

New Jersey. Attorney General's Task
Force on Sovereign Immunity.

Report

1972.

Copy 3.

974.90
R424
1972b

974.90

Copy 3.

~~974.90~~ R24 N.J. Attorney General's
1972 *b* Task Force on Sovereign
Immunity.
Report

New Jersey State Library
Department of Education
Trenton, New Jersey 08625



PRINTED IN U.S.A.



REPORT
OF THE
ATTORNEY GENERAL'S
TASK FORCE
ON
SOVEREIGN IMMUNITY

GEORGE F. KUGLER, JR.
Attorney General
STATE OF NEW JERSEY

May, 1972

PROPERTY OF
NEW JERSEY STATE LIBRARY

JUN 7 1972

185 W. State Street
Trenton, N. J.



New Jersey

REPORT
OF THE
ATTORNEY GENERAL'S
TASK FORCE
ON
SOVEREIGN IMMUNITY.

GEORGE F. KUGLER, JR.
Attorney General
STATE OF NEW JERSEY

994.70
A424

May, 1972



REPORT
OF THE
ATTORNEY GENERAL'S
TASK FORCE
ON
SOVEREIGN IMMUNITY

MEMBERS OF TASK FORCE

DEPUTY ATTORNEYS GENERAL:

EDWARD C. LAIRD, *Director*, Special Assistant to the Attorney General.

JOSEPH A. HAYDEN, JR., Division of Criminal Justice, Organized Crime and Special Prosecutions Section.

ARTHUR DUFFY, Counsel to Division of Purchase and Property.

JOSEPH CHARLES, Division of Law.

GEORGE F. KUGLER, JR.
Attorney General

SECRETARIAL STAFF

MRS. LOIS BEASTON

MRS. ANNA MARIA BRUSCHINI

TRENTON, NEW JERSEY

MAY, 1972

TABLE OF CONTENTS

	PAGE
Chapter 1. Attorney General's Letter of Transmittal to the Legislature	1
Chapter 2. Attorney General's Recommendations	7
Chapter 3. The New Jersey Experience	21
I. Introduction	21
II. Procedure	21
III. Substantive Law	30
A. State	30
B. State Employees	34
C. Local Units of Government	38
1. Governmental—Proprietary Test	39
2. The Active Wrongdoing Test	41
3. The Test of Ordinary Negligence	42
4. Ministerial-Discretionary Test	43
D. Local Employees	45
IV. The Role of the Attorney General	47
V. Financial Coverage of the State of New Jersey	49
VI. Financial Response and Possible Impact Upon Local Governmental Entities	59
Chapter 4. The California Experience	77
I. Introduction: Background to the Adoption of California Tort Claims Act of 1963	77
II. The California Tort Claims Act of 1963: Procedural Aspects	82
A. Claims Procedures	83
1. The Mechanics	83
2. The Rationale	89
B. The State Board of Control	90
C. Role of the Public Attorney	93
1. The Attorney General's Office	93
2. The Department of Public Works	96
3. The City Attorney's Office of San Francisco	97

	PAGE
4. The City Attorney's Office of Los Angeles	98
D. Defense of Public Employees	99
III. The Tort Claims Act of 1963: Substantive Aspects	100
A. General Provisions	100
B. Entity and Employee Immunities	104
C. Dangerous Conditions on Public Property	106
D. Law Enforcement and Correctional Activities	112
E. Fire Protection	114
F. Medical, Hospital and Public Health Activities	115
G. Administration of the Tax Laws and the Use of Pesticides	117
H. Indemnification	118
IV. Funding Judgments Against a Public Entity	118
A. The State	118
B. Local Public Entities	120
V. Claims Experience and Administrative Impact	122
1. The State	122
a. Attorney General's Office	122
b. Department of Public Works	127
2. Local Entities	127
a. San Francisco	127
b. Los Angeles	130
3. The Courts	130
VI. Conclusion	131
Chapter 5. The New York Experience	133
I. Introduction and History	133
II. Court of Claims Procedure	135
III. The Role of the State Attorney General	136
IV. Substantive Provisions: General	139
A. Torts of Militia Members and Military and Navy Employees	140
B. Medical and Public Health Activities	141

	PAGE
C. Recreational Areas	141
D. Dangerous Conditions and Highway Claims	142
E. Police and Correctional Activities	143
V. Employee Immunity and Indemnifica- tion	144
VI. Funding of Claims and Judgment	147
VII. Claims Experience—New York Court of Claims	149
VIII. The New York Court of Claims—An Evaluation	154
Chapter 6. The Federal Experience	159
I. The Federal Tort Claims Act	159
A. Introduction	159
B. Procedure of the FTCA	160
C. The Role of the Department of Justice Attorneys	164
D. Federal Employees	164
E. Substantive Law	165
F. FTCA—Funding of Judgments and Claims Experience	167
II. Government Contracts and the U.S. Court of Claims	168
A. U.S. Contracts—Administrative Remedies	168
B. The United States Court of Claims	173
Chapter 7. Summary of the Law of the Several States	179
(A) Torts	179
(B) Contracts	195
Chapter 8. Proposed Title 59—Claims Against Public Entities	203
Chapter 9. Proposed Amendment to Attorney General's Powers; Duty to Represent State Employees	248

CHAPTER 1



STATE OF NEW JERSEY
GEORGE F. KUGLER, JR.
ATTORNEY GENERAL

To *The Honorable* RAYMOND H. BATEMAN, *President of the New Jersey State Senate and the Honorable Members thereof and the Honorable* THOMAS H. KEAN, *Speaker of the New Jersey State Assembly and the Honorable Members thereof:*

Gentlemen:

Pursuant to N.J.S.A. 52:17b-4.1, there is respectfully submitted herewith the Report of the Attorney General's Task Force on Governmental Immunity. After the enactment of this statute in 1967 a committee was appointed by the former Attorney General and work was begun toward the goal of producing a report on governmental immunity. After taking office in 1970, however, and particularly after the New Jersey Supreme Court decisions of *P,T&L Construction Co. v. Commissioner, Department of Transportation, State of New Jersey*, 55 N. J. 341 (1970) and *Willis v. Department of Conservation and Economic Development*, 55 N. J. 534 (1970), it became obvious to me that a more intensive examination of the subject was required. Consequently I established a task force comprised of Deputy Attorneys General Joseph A. Hayden, Jr., Arthur Duffy, and Joseph Charles under the direction of Deputy Attorney General Edward C. Laird of my staff.

The principal responsibility of this task force was not only to study existing statutory provisions and case law relating to the governmental immunity of the State of New Jersey and its political subdivisions, but also to investigate and examine the experience of other States and local units of government throughout the country who have been exposed to liability by virtue of legislation or judicial decisions. The results of that investigation and examination are contained in this report, along with a series of proposals and recommendations for an

equitable and economical abolition of the State's traditional sovereign immunity from suit, both in contract and tort.

Members of the task force traveled to the States of California and New York and to the offices of the Federal Government in Washington, D. C., for the purpose of gathering first-hand information from the government officials in those jurisdictions who have had direct responsibility for implementing programs instituted to deal with the abolition of sovereign immunity. California was chosen because it perhaps most extensively and most thoroughly examined the problems attendant the abrogation of its traditional immunity from suit prior to enacting a comprehensive tort claim statute in 1963. In addition, California provided an example of a State with *nine* years experience in processing claims against all public entities through the regular court system with jury trials. The New York experience was examined because New York has had over 40 years of liability for tort and contract actions and because it has chosen a specialized court within its judicial branch to hear all claims against the State. For that reason, and because of the expressed interest in the possible establishment of a Court of Claims in the State of New Jersey, this report relates and analyzes the New York experience in some detail. The Federal Government's approach to liability was evaluated because of its 25 years under the Federal Tort Claims Act and particularly because of its extensive experience with contract matters and in handling both the administrative and judicial phase of settling contract disputes.

Among the individuals consulted in California were:

- A. Mr. Willard Shank, Assistant Attorney General in charge of the Torts Section of the Attorney General's Office in the State of California. Mr. Shank participated in the Law Revision Commission's meetings between the years 1961-1963 and participated in drafting the proposals which resulted in the California Tort Claims Act of 1963. He has been a member of the Tort Section for over ten years and has been the head of that Section since the passage of the 1963 Act.
- B. Mr. Robert Carlson, the Chief Deputy Director of the Department of Public Works—California's Highway Department and the Department which handles approximately 50 per cent of the tort claims filed against the State

- of California. Mr. Carlson played a significant role in the Law Revision Commission meetings between 1961-1963.
- C. Mr. Gordon Bacca, a legal Assistant to Mr. Carlson. Mr. Bacca provided substantial information relating to the operation of the Department of Public Works.
 - D. Mr. Ralph Kleps, the Administrative Director of the California Court system.
 - E. Mr. John Smock, an Attorney with Mr. Kleps' staff who is currently in charge of judicial legislation and who was one of the three full-time Attorneys on the staff of the Law Revision Commission during the two-year period when they were drafting the proposals ultimately enacted in 1963.
 - F. Professor Arvo Van Alstyne, who was the Research Consultant of the California Law Revision Commission and who has prepared extensive materials explaining in depth the various provisions of the 1963 Act.
 - G. Mr. Charles Dixon, the Director of General Services of the State of California who is currently the head of the State Board of Control—the administrative Board through which all claims against the State of California must be processed.
 - H. Mr. Thomas O'Connor and his staff—City Attorney of the City of San Francisco.
 - I. Mr. George Franscell, City Attorney of the City of Los Angeles.

The following persons were contacted and consulted extensively in New York.

- A. Mr. John J. McNamara, Jr.,—Chief Law Assistant to the New York Court of Claims who is probably most versed about the legal and operational aspects of that Court, having been with it since before 1953.
- B. Mr. John J. Clark, the Clerk of the New York Court of Claims.
- C. Mr. Donald C. Glenn, Assistant Attorney General of the State of New York who is in charge of the 80 man trial

section which handles all litigation for the State of New York before the New York Court of Claims.

- D. Mrs. Grace K. Banoff, the Principal Attorney and Chief Assistant to Mr. Donald Glenn.
- E. Mr. Saul C. Corwin, the Commissioner for Legal Affairs of the New York Department of Transportation.
- F. Mr. Theodore Spatz, the Counsel to the New York State Comptroller.

The officials contacted and consulted in Washington were:

- A. Mr. Frank Peartree, Clerk of the United States Court of Claims, who has gained a great deal of experience and expertise over a long period of time with the U. S. Court of Claims. Mr. Peartree provided an excellent explanation of the actual workings of the Court of Claims, and in particular its processing of contract matters of the United States Government.
- B. Mr. Thomas Lydon, the Chief of the Court of Claims Section of the Civil Division of the United States Department of Justice.
- C. Mr. John G. Loffand, the Chief of the Tort Claims Branch of the Civil Division of the United States Department of Justice.

The efforts of the task force, however, were not completely extra-jurisdictional. In an effort to effectively anticipate the projected impact of abolishing the State's sovereign immunity, each Department of State government was examined and their recommendations and concerns relating to sovereign immunity were solicited. This was accomplished through the Deputy Attorneys General assigned to all State agencies who specifically elicited responses from Department and Division heads concerning their existing claims experience and anticipated problems. Also a sampling of claims experience from selected local jurisdictions as well as from independent authorities, such as the New Jersey Turnpike Authority, the New Jersey Highway Authority and the Delaware River Port Authority was solicited and obtained. In addition, Willard Heckel, former Dean of the Rutgers Law School in Newark and a member of the former Attorney General's Committee on Sovereign Immunity, was interviewed in relation to the various legal problems he foresaw

as a result of his contact and experience with both teaching the law of municipal corporations and with serving as a former Committee member.

In an effort to solicit advice concerning the problems with which the judiciary would be most concerned, members of the task force met with and consulted Chief Justice Joseph Weintraub of the New Jersey Supreme Court and Associate Justice John J. Francis, as well as Edward McConnell, the Director of the Administrative Office of the Courts. Their views as well as the views of the other persons consulted in preparing this report are collectively reflected throughout both the text and the proposals contained herein.

By emphasizing practical experience as well as substantive law and theory we have endeavored to present a comprehensive and realistic report. It is my sincere hope that this report will provide you with a substantial basis on which to make the major policy decisions involved in the consideration of abolishing the State's traditional sovereign immunity from suit in matters arising out of contract and in actions sounding in tort. With this as our goal, this report is

Respectfully submitted,

GEORGE F. KUGLER, JR.,
*Attorney General of the
State of New Jersey.*

CHAPTER 2

ATTORNEY GENERAL'S RECOMMENDATIONS

SUMMARY

While there are many significant proposals contained throughout this report and particularly in the draft legislation, it is the central thesis of this report that the liability of the State of New Jersey in contract and tort be adjudicated through the regular court system without a jury trial and pursuant to a comprehensive statutory scheme.

Specifically the principal recommendations are as follows:

1. *The State of New Jersey should legislatively provide selective abolition of its sovereign immunity in contract and tort.*

It is time for the reasonable abolition of sovereign immunity in the State of New Jersey. Throughout other jurisdictions there has been an increasing and steady movement away from immunity. The growing recognition that the basic unfairness of the State's refusal to permit itself to be sued when its actions result in injury to innocent third parties has become an impelling force for change. An examination of governmental immunity in the State of New Jersey establishes the principle that while all the local units of government must face the test of liability in the courts, the State of New Jersey will not do so. Even on the State level the Legislature has embarked upon a "case by case" method of abolishing immunity by the usage of the phrase "may sue and be sued." Thus, some State agencies are still immune from suit while others have either the fortune or misfortune of having been granted the ability to sue and be sued and therefore are liable for tortious conduct to the same extent as any local governmental entity.

At a time when the responsiveness of all levels of government is being continuously challenged, it is difficult to continue to support such an arbitrary and unjust doctrine. It seems even more difficult to believe that the State of New Jersey is willing to provide a crime compensation fund for payments to victims of

crime—a victimization over which the State has little effective control—and at the same time continue to refuse to permit itself to be sued when its own conduct and that of its employees has harmed equally innocent third persons. In this regard it should be noted that two other states who have passed crime compensation legislation—New York and California—did so after they had long since abandoned the archaic doctrine of sovereign immunity.

Examination of those two jurisdictions in particular has confirmed the belief that the State need not fear unlimited and uncontrolled liability from a selective and intelligent waiver of its immunity from suit. It is, therefore, strongly recommended that the State abolish its traditional shield of sovereign immunity.

2. The present legislative procedure for adjudicating all claims against the State should be abolished.

The New Jersey Legislature is currently confronted with the same inappropriate and burdensome task of deciding individual claims against the State which ultimately resulted in the Congress of the United States passing the Federal Tort Claims Act in 1946. In addition to considerations of fair play and justice for the innocent victims of tortious conduct, the Congress found itself compelled to waive immunity to relieve itself from passing upon a myriad of private bills, from acting as a fact-finding agency as well as a judicial forum, and from the burden of attempting to expedite payment of meritorious claims.

Governor Cahill and former Governor Hughes have both articulately expressed the manifest injustice and obvious inequities inherent in the current legislative claims procedure. It is clearly time for the Legislature of the State of New Jersey to relieve itself from the burdens imposed by the adjudication of claims presented to it, and it is clearly time for the Legislature to admit that it is not and was never intended to be constituted or equipped to perform what is essentially a judicial role—fact-finding and ruling on the merits of a claim. Other legislatures have abandoned this task without great difficulty. In New York, for example, a constitutional amendment in 1874 proscribed the legislature from auditing or allowing any private claim or account against the State. This amendment was prompted by criticisms similar to those already leveled at the procedure in New Jersey today, namely: (1) the legislature should not act

as a judicial body; (2) claims were actually decided in committee and the entire body of the legislature never knew what they were voting for; (3) the legislature did not have adequate time to make proper investigations of claims; (4) a separate agency would give greater uniformity of decisions. In fact, in light of the other staggering burdens imposed upon legislative members, it would seem that functions peculiarly unsuited for their deliberations should no longer occupy their valuable time.

While it is urged that the Legislature should remove itself from the normal claim processing procedure, it is nonetheless believed that it should retain sufficient authority to rule upon claims which may fall within a category commonly referred to as "moral obligations." Such obligations usually arise in situations where the law does not provide for a remedy, but where the hardship involved cries out for relief. The legislatures of the States of New York and California have used this approach effectively and fairly, and it is suggested that the New Jersey Legislature should also retain this very limited claims review function.

3. *The State of New Jersey should immediately enact a contract liability statute.*

The overwhelming majority of States throughout the country as well as the Federal Government have been and are subjecting themselves to liability for contract claims. In fact, the officials interviewed in some jurisdictions were amazed to find that a State could voluntarily enter into a contract and then be free to completely disclaim its obligations under the very contract it had agreed to. Indeed it is even arguable that such immunity may in fact be an unconstitutional impairment by a State of the obligation of contract. It seems clear that it is unconscionable for a State to be permitted to repudiate a contract which it has voluntarily entered and which binds the other parties. In any event, it is strongly urged that the State of New Jersey should be liable for contract claims against it.

While this proposal is primarily intended to treat the State similarly with private individuals in matters arising out of contract, it is nonetheless recommended that the State should not be subjected to liability on the basis of a contract implied at law, for a breach of implied warranty or for consequential damages since the nature and extent of such liability in damages would expose the State to unforeseen risks.

4. *New Jersey should enact a comprehensive tort claims statute containing specific immunities which applies to all public entities throughout the State.*

It is recommended that the Legislature enact a uniform and comprehensive tort claims act providing the statutory framework for adjudicating the liability of *all public entities* throughout the State of New Jersey. This recommendation follows the basic statutory approach contained in the California Tort Claims Act of 1963. The proposed Act would *reestablish the immunity* of all public entities in the State of New Jersey *subject to liabilities* set out in reasonable detail in the statute. In addition, certain specific immunities are provided for the exercise of governmental functions. The California Law Revision Commission's recommendations contain the following comment in support of the above proposal:

“A statute imposing liability with specified exceptions will provide the governing bodies of public entities with little basis upon which to budget for the payment of claims in judgments for damages, for public unforeseen situations, any one of which could give rise to costly litigation in any possible damages judgment. Such a statute would invite actions brought in hopes of imposing liability on theories not yet tested in the Court and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of insurance under such a statute would no doubt be greater than under a statute which provided for immunity except to the extent provided by enactment, since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under a statute imposing liability with specified exceptions.

“Accordingly, the legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by an enactment. This will provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability. Should further study in future years demonstrate that additional liability of public entities is justified, such liability

may then be imposed by the Legislature but in carefully drafted limits.”

See *California Law Revision Commission, Recommendations Relating to Sovereign Immunity*, 811 (1963).

Moreover, an examination of the rather haphazard approach to government liability extant in the State of New Jersey today provides convincing evidence that only a *comprehensive* and *uniform* statute which applies to all governmental entities—whether local or State—including public authorities, will provide for the development of an intelligent and uniform body of governmental tort law in the State of New Jersey.

In an effort to assist in the development of such a body of tort law, the following specific substantive provisions are included in the proposed New Jersey Tort Claims Act:

- A. A broad provision immunizing a public entity for high-level discretionary activities based upon the underlying thesis that “it is not a tort for government to govern” and allowing a very limited review of the allocation by government of resources already obtained.
- B. Immunity for issuance, denial, suspension or revocation of permit, license, etc.
- C. Immunity for failure to inspect, or negligent inspection of, property.
- D. The discretionary decision to enforce or not to enforce the laws.
- E. Generally no liability for the failure to provide adequate supervision of public recreational facilities.
- F. No liability for the actual fraud, actual malice or willful misconduct of public employees.
- G. A broad immunity for injuries resulting from a plan or design of public property when it has been officially approved by an authorized governmental body.
- H. A broad immunity for injuries occurring on unimproved property and generally when government lands are provided in their natural state for recreation and enjoyment (on the thesis that in light of the limited funds available for the acquisition and improvement of such property, it

is reasonable to expect persons using that property to assume the risk of injuries arising therefrom as part of the price to be paid for the benefits received).

I. Prisoners may sue under the Act for injuries resulting from the negligence of public entities or their employees but not during their period of institutional confinement. Also there is no recovery against public employees or a public entity for injuries to prisoners caused by other prisoners.

J. Generally, immunity for the failure to provide or the inadequate provision of personnel, facilities or equipment in most areas of governmental responsibility—such as police, fire, hospital care, etc.

5. *Suits against all public entities in tort or contract should be processed through the regular court system—without a jury trial.*

A. *New Jersey does not need a Court of Claims.*

Examination of the Court of Claims in the State of New York clearly establishes that whatever the merits of that Court in the State of New York may be there are many reasons why it would not be advisable for the State of New Jersey to establish such a Court. First, the present operating budget of the New York Court of Claims is close to \$3,000,000, exclusive of building costs and maintenance of buildings. This figure would, of course, be substantially more if the State had to incur the initial expense involved with the establishment of a new and independent Court. Secondly, the administrative benefits provided by the New York State Court of Claims result from the fact that the regular court system in New York is administered on a county-wide basis without centralized administration. Thus, because the New York Court of Claims is administered centrally through Albany, it provides a benefit peculiar to the New York system of court administration. This benefit, however, would not be realized in the State of New Jersey since there is a centrally located and centrally administered Office of the Courts. In addition, the New York State Court of Claims sits in only eight of the 62 counties in the State of New York; a similar distribution of courts throughout the State of New Jersey would prove less advantageous to the litigant than the present court system which is situated in each of New Jersey's 21 counties.

Moreover, it should be noted that approximately 70% of the calendar of the New York State Court of Claims is devoted to condemnation matters and only a small percentage of the business of that Court involves contract claims with the State. It is readily apparent that since condemnation matters are presently handled through the regular court system in New Jersey, the establishment of a separate and independent court to hear tort and contract claims against the State (claims which occupy only about 30% of the calendar of the New York Court of Claims) would be an unnecessary extravagance.

It has also been argued that a Court of Claims is necessary in order to develop and utilize a special judicial expertise when adjudicating claims against the State. This argument does not seem persuasive for many reasons: first, all claims against local governmental entities are presently being handled in the regular court system without any apparent absence of the requisite judicial expertise; second, whatever skill might be developed by judges sitting on a special court could also be obtained by the effective use of special calendars within our existing court system. Perhaps most persuasive, however, has been the experience of the State of California. Prior to 1963 the California Law Revision Commission concluded that a special Court of Claims similar to that of New York was neither necessary nor desirable in California:

“In all States, including those with special Courts of Claims, it appears that tort claims against *local* governmental entities are adjudicated in the normal trial Courts in the same general way as comparable litigation against private persons, although some form of local administrative processing and rejection is often prescribed. This experience elsewhere, as verified by existing California practice, suggests that there is no obvious or pressing need at this time for setting up a special Court of Claims structure in this State. Careful studies have disclosed no basis for believing that, with minor procedural modification, the judiciary would not be fully capable of handling the burden of whatever litigation an expansion of governmental tort liability might generate. If an unexpected volume of litigation, or the emergence of unique kinds of legal problems in governmental tort cases, ultimately are shown to require a court of claims apart from the regular trial courts, the

advisability of such a development should then be evaluated and decided upon in the light of actual experience.”

See *California Law Revision Commission, A Study Relating to Sovereign Immunity*, 315-316 (1963).

It is significant that after *nine* years of experience in California the officials contacted there were virtually unanimous in their belief that the appropriate forum for the adjudication of claims against the State—the regular court system—had been chosen. Moreover, there appears to be nothing inherently unique about tort claims against the State which justifies an independent Court.

B. *New Jersey does not need a specialized administrative tribunal to hear claims against the State.*

While many jurisdictions still use administrative proceedings in settling claims against the State, it nonetheless appears to be the current trend to avoid the use of administrative boards where possible on the State level. For example, an examination of all the States indicates that while some states use administrative boards to settle *contract* matters, the majority of jurisdictions utilize their regular Court system. In addition, the majority of States which have recently moved away from *tort* immunity have chosen to utilize their Court system for the purpose of adjudication. While it may be stated that California utilizes an administrative board to process its claims, examination of that board disclosed that it is used as a “rubber stamping” agency and fails to play a significant role in the settling and adjudication of State claims.

In addition, the use of an administrative board in no way seems to alleviate the problems of calendar control and congestion which are oftentimes problems in our Court system. For example, New Jersey’s Workmen’s Compensation Court, as noted by Governor Cahill in his first annual message, has a backlog of approximately 47,000 cases awaiting disposition. Thus the use of an administrative tribunal is clearly not a cure-all for the calendar congestion.

It is also argued that an administrative tribunal will provide a special expertise otherwise unavailable to the Court system. No evidence has been discovered to support the argument; indeed, as experience with suits against local governmental units indicates, there is nothing inherently unique about tort and con-

tract claims against governmental entities which justifies the creation of an administrative board of experts. In fact, the prestige associated with the New Jersey Court system permits that system to attract the best qualified men and thus higher caliber appointees than those who might otherwise be attracted to an administrative board. Moreover, the establishment of a new board creates its own bureaucracy and problems of administration and requires, among other things, an initial outlay of funds merely to get started. There is no apparent reason why the New Jersey Court system cannot provide the caliber of men and the degree of expertise through the intelligent use of calendar control to resolve the disputes in which the State of New Jersey may be involved.

C. Both tort and contract cases against public entities should be tried by a judge without a jury.

While there are cogent arguments on both sides of the jury trial debate, it is suggested that a jury trial should not be provided in contract and tort suits against public entities. This proposal is based primarily on the belief that court congestion will be alleviated to some extent; that the amount of time consumed in trial will be diminished; that the costs of the administration of justice will be less; that the probable awards will be more uniform; and that experience in other jurisdictions indicates that a nonjury trial is the most popular means of disposing of claims against the public entities.

6. The State of New Jersey and all local public entities should indemnify all public employees for civil liability arising within the scope of their employment and not caused by actual fraud, actual malice or willful misconduct.

An examination of the law of other jurisdictions throughout the country and an analysis of the present New Jersey law compels the conclusion that New Jersey should no longer permit—at the State level—the unfair situation where a public employee acting within the scope of his employment may be subjected to civil liability but his employer, the State of New Jersey, is completely immune. Even if the State concludes that it wishes to retain its immunity, it is strongly urged that all public employees be indemnified for their acts and omissions within the scope of their employment. The standard for indemnity contained in the proposed New Jersey Tort Claims statute would provide the

public employee with the absolutely essential measure of security from liability in the performance of his duties while at the same time providing for a necessary element of accountability for his performance. While he may be sued, he must nonetheless be indemnified for acts within the scope of his duties unless his actions constituted actual fraud, actual malice or willful misconduct.

7. The Attorney General of the State of New Jersey should provide for the defense of all State employees sued for negligence within the scope of their employment.

The common practice throughout the other jurisdictions examined is that the Attorney General of the respective states represents state employees in the civil actions brought against them. It is the current practice of the New Jersey Attorney General to provide such representation, and it is essential that he should continue to do so and be provided with a more specific statutory authority under which to act.

8. No judgment should be granted against a public entity or public employee on the basis of strict liability, implied warranty or products liability.

This recommendation is intended to protect public entities from novel causes of action and from liability of a generally unforeseen and difficult to project nature.

9. No awards should be made against a public entity for punitive damages, for damages compensable through collateral sources or for damages based upon pain and suffering, except in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$1,000.

A major premise underlining the proposals for recovery contained in this report is that while an individual should be reimbursed for his *full net economic loss*, he should not be permitted in a suit against a public entity to collect for damages above and beyond those which are necessary to effectively restore him to the economic position he occupied prior to his injury or claim. Therefore, the proposed tort claims statute specifically prohibits awards for punitive damages, for damages compensated through collateral sources such as insurance policies and for pain and suffering except in aggravated circumstances.

The prohibition of recovery for pain and suffering reflects the policy judgment that in view of the economic burdens presently placed upon public entities the claimant should not be reimbursed for non-objective types of damages, except in cases involving loss of a bodily function, permanent disfigurement or dismemberment where the medical expenses are in excess of \$1,000.

Consistent with the thesis of these proposals to compensate for net economic loss, the Act provides that the Court may, in its discretion, award a successful claimant all reasonable costs of suit, including witness fees not exceeding a total of \$100, and reasonable attorney's fees, provided, however, that there shall be no such recovery where damages are awarded for pain and suffering.

In addition, in order to insure that the public entity reaps the benefit of prohibiting recovery for damages compensable from collateral sources, the Act also provides that no carrier shall be permitted to subrogate to the rights of its insured against a public entity.

10. *There should be no monetary limits upon recovery against a public entity.*

There are several jurisdictions which provide monetary limits of recovery; in effect they establish a ceiling above which no claimant may recover. This approach has been rejected because it is believed that the establishment of monetary limits is an arbitrary and unjust way to limit recovery against a public entity. By precluding various types of damage recovery and by foreclosing double recovery through collateral sources, it is suggested that sufficient protection for the public treasury is being provided on a rational and reasonable basis. In fact, it has been estimated by an official in California that at least 50 per cent of the total damage awards in that State are for pain and suffering—an estimate which clearly supports the approach contained in this report. If there is concern with the potential large one-shot judgment, then it is suggested that an appropriate insurance policy providing for catastrophe coverage be obtained.

11. *In actions under the proposed Act in which a public entity or public employee is a party, the doctrine of comparative negligence shall be applied to determine the compensation to be paid by any party to any other party.*

This recommendation modifies one of the most outmoded and unjust laws of this State—that of the law of contributory negligence—and substitutes in its place the law of comparative negligence when assessing the liability of all parties to a suit arising under the New Jersey Tort Claims Act. This proposal adopts the so-called “pure form” of comparative negligence. In other words, the damages to which an injured party is entitled under the Act shall be diminished in proportion to the amount of negligence attributable to him. This approach is presently the law in the State of Mississippi (Miss. Code Ann. § 1454) and it is and has been the law applied under the Federal Merchant Marine Act (45 U.S.C. § 688) and the Federal Employers’ Liability Act (45 U.S.C. § 53).

In addition, this recommendation responds to a growing call throughout the country for a change in the old rule of contributory negligence and the adoption of a system of comparative negligence. Many other jurisdictions, including Wisconsin, Arkansas, Georgia, Maine, Florida, Iowa, Nebraska, South Dakota, and Hawaii, have already adopted some form of comparative negligence. While it is recommended that the “pure form” of comparative negligence be adopted in all actions in the State of New Jersey, the specific recommendation contained in this report and proposed in the New Jersey Tort Claims Act is that this form of comparative negligence will apply in all actions in which a public entity or a public employee is a party. It is consistent with the general approach of the proposed Act which is intended to encourage settlements and to reasonably and fairly encourage the compensation of injured persons.

12. *In any case where a public entity or public employee acting in the scope of his employment is determined to be a joint tortfeasor, any settlement or judgment by a tortfeasor shall be reduced pro tanto from the injured party’s judgment against any other tortfeasor.*

This provision changes the existing law which provides that when a joint tortfeasor settles with a claimant there will be a *pro rata* reduction of the judgment against the remaining tortfeasors. In other words, the plaintiff does not now recover the full amount of his judgment if he settles with a joint tortfeasor below his *pro rata* share of the judgment (to the extent of the difference).

The recommendation contained in the proposed Tort Claims Act would rectify this inequity and permit a plaintiff to recover from any non-settling tortfeasor the difference between the total amount of his judgment and the amount of any settlement he may have reached. In addition to more fairly and fully compensating an injured plaintiff, this provision will undoubtedly encourage settlements by all parties.

13. *A. The State of New Jersey should establish a fund for the purpose of paying tort judgments and settlements against the State.*

Both the State of California and the State of New York are self-insured in the sense that they appropriate funds a year in advance for the specific purpose of paying tort judgments anticipated to be rendered in the upcoming year. Representatives of both states indicated that they believed that the least costly and most productive way to fund judgments was by this method of appropriation to a specifically established fund. They also added that if possible it would be advisable to cover automobile claims out of such a fund and to relinquish the automobile policy presently possessed by the State of New Jersey.

B. The State of New Jersey should examine the possibility of relinquishing its auto liability policy and the State should, through its Department of Insurance, examine the existing and potential problems facing governmental units in their efforts to obtain and retain adequate insurance coverage for the liability imposed upon them by law.

Recent hearings before the Legislature in California demonstrated that municipal liability insurance difficulties are becoming increasingly more acute in that State. This may be due in part to the functional ineffectiveness of governmental units themselves as well as to the failure perhaps of the insurance industry to fully comprehend and respond to the public's interest in the financial support of local units of government. In addition the failure of local governmental units to select and maintain a uniform and comprehensive insurance policy has undoubtedly contributed to their problems of increasing costs. It is often indicated that rather than one or two policies, local units of government seem to be placing insurance coverage with many different brokers and with many different companies for a variety of specific types of liability. In any event, the current California situation with respect to insurance problems of gov-

ernmental entities is indicative of a problem which may, indeed, foreshadow similar difficulties in the State of New Jersey. It should encourage a careful examination at this time of the insurance experience of all units of government in an effort to determine the most effective and economical way for governmental units to respond to civil liability.

CHAPTER 3

THE NEW JERSEY EXPERIENCE

I. Introduction

Prior to 1970, the State of New Jersey had traditionally enjoyed sovereign immunity in the area of contract and tort liability. In 1970, however, the New Jersey Supreme Court decided to abolish the common law sovereign immunity of the State of New Jersey in contract actions [*P,T&L Construction Co. v. Commissioner of Transportation, State of New Jersey*, 55 N.J. 341 (1970)] and in tort actions [*Willis v. Department of Conservation and Economic Development*, 55 N.J. 534 (1970)]. While the court did not discuss the retroactivity of the *P,T&L* decision, it did impose an effective date of January 1, 1971 in the *Willis* decision so that the State could effectively prepare for the impact of the judicial abrogation of its sovereign immunity in tort. The *Willis* case was decided on April 20, 1970 and on June 15, 1970 the Legislature enacted *N.J.S.A. 52:4A-1* which was intended to bar any action against the State of New Jersey accruing prior to July 1, 1971. This Act was later amended to extend the moratorium period until April 1, 1972, P.L. 1970, c. 98 (as amended).

The New Jersey Supreme Court, however, has most recently declined to apply that "moratorium" statute to contract matters involving the State and has ruled that unless the legislature designates a different tribunal all claims based upon expressed contracts shall be adjudicated through the regular court system. *P,T&L Construction Co., supra*. The legislature then extended the moratorium period as to torts until July 1, 1972. In order to effectively examine the potential impact of the abolition of that immunity it is of course necessary to fully understand and appreciate the existing claims experience in this State.

II. Procedure

The State of New Jersey has for many years been processing claims against the State of New Jersey through a Claims Bureau established in the Department of Law and Public Safety under the Attorney General as well as through a Subcommittee on Claims of the Joint Legislative Appropriations Committee.

The Bureau of Claims was transferred from the Department of Transportation to the Department of Law and Public Safety in 1951 by Executive Order of Governor Alfred E. Driscoll. At that time the major function of the claims Bureau was the handling of workmen's compensation claims, but it has since grown into the Bureau in the Attorney General's office which initially investigates and screens tort claims against the State of New Jersey. If the Bureau of Claims concludes that a claim is proper and just and should be paid and if that conclusion meets with the approval of the agency against whom the claim is made, then it is the practice of the Bureau of Claims to appear before the Subcommittee of Claims in the Legislature and to recommend that payment be included in the Supplemental Appropriations Act. By virtue of Laws 1966, c. 33 § 10 (and subsequent annual appropriation acts), the State Treasurer is mandated to pay claims not exceeding \$250, upon the warrant of the Director of the Division of Budget and Accounting, provided such claim is recommended for payment by the Attorney General and approved by the Legislative Budget and Finance Director. In this case there is no need for a claimant to appear before the Subcommittee. This 1966 amendment which raised the amount from \$100 to \$250 was intended to expedite the settling of small claims and thus to alleviate the burden upon both the Legislature and the claimant of processing them through the claims committee.

Tort claims against the State which exceed \$250 are normally processed through the Bureau of Claims and are then reviewed by the Director of the Legislative Budget and Finance Office. *N.J.S.A.* 52:11-33(b) imposes a duty upon the Director to:

“examine other requests for appropriations and receive and investigate the truth, fairness and correctness of all claims against the State for payment of which appropriations are to be requested.”

The Director reviews the merits of the claim and makes his recommendations to the Legislative Subcommittee on Claims. The Subcommittee then bases its recommendation to the Legislature on the Director's report and any hearings which the Subcommittee itself holds. The Legislature, in turn, in plenary session, accepts or rejects the Subcommittee's recommendation. The Legislature normally accepts the recommendation of its Subcommittee and passes what are in effect “private bills” for the specific purpose of paying the claim. See e.g., Chapter 64

of the Laws of 1967, at pp. 304-307; Chapter 408 of the Laws of 1968, at pp. 1389-1393; Chapter 15 of the Laws of 1969, pp. 354-358. The Governor then, pursuant to Article V, Section 1, ¶ 15 of the State Constitution, performs his own review of the bill containing the appropriation for payment of the claim and either signs or vetoes the bill.

Contract claims against the State are processed through the same procedure explained above, except that instead of being processed through the Bureau of Claims they are processed through the contracting agency or department of State Government. If the claimant is unsatisfied with the final determination of his claim in the department or agency, he then normally files his claim with the Director of the Legislative Budget and Finance Office. Ordinarily a settlement with the agency does not require submission to that Office because appropriations are usually available in the agency's budget.

In recent years there has been growing disenchantment with the procedural methods utilized by the Legislative Subcommittee. In particular Governor Hughes, in rejecting certain contested claims contained in Chapter 115, Laws 1969, made the following statement:

"I have previously urged you, in my message of January 14, 1969 * * * to undertake a reformation of existing claims procedures. In that message I suggested that a minimal augmentation of the present procedures—in lieu of a sweeping change in the entire system—should include the following items:

(1) equitable ground rules should be established in advance and be made readily available to the party;

(2) at least a majority of the members of a Subcommittee on Claims should actually *hear* the claims presented to the Subcommittee;

(3) Subcommittee conclusions should contain complete findings of fact in regard to fault or indebtedness on the part of the State and the extent of compensable losses occasioned thereby, or some similar recitation of the basis upon which a claim is denied or reduced;

(4) claimants, State agencies involved, and all members of the Legislature should be served with copies of the report of the Claims Subcommittee; and

(5) each contested claim approved by the Subcommittee in the Joint Appropriations Committee should be presented to the full Legislature as a separate supplemental appropriations bill, so that the vote of each Legislator may be recorded with respect to each claim.

As I have said in the past, these reforms are the essential minimum to insure an adequate and equitable consideration of contested claims by the Legislature and by the Governor. At present, information presented to the Legislature prior to consideration of claims is so cursory that a number of Legislators have informed me that they did not even realize that any of the claims included were contested.

I am not unaware of the heavy burden that thorough adjudication of these claims has placed on the Legislature, particularly on the members of the Claims Subcommittee, but I do feel that change in the procedure is necessary, in fact, essential.”

On June 29, 1970, Governor Cahill made the following statement while objecting to the payment of certain claims presented to him by Senate Bill No. 801:

“The situation with respect to these claims is no different than that presented to the former Governor. These claims were not heard de novo by the Subcommittee after the disapproval in June, 1969. Essentially, the Subcommittee relied on the records that have been made before the prior Subcommittee, which records are subject to the infirmities enumerated by the former Governor. Thus, I am in no different or better position to conclude that these claims should be approved * * *.

Therefore, the need for revamping the claims procedure has not abated by virtue of the ruling of the Supreme Court and I urge the Legislature to provide a procedure for these and other claimants which guarantees fair adjudication to both the claimants and the State.”

The following chart provides some indication of the nature and number of claims made against the State during a ten year period from 1963 to 1972 and the number of claims allowed:

NATURE OF CLAIM

NO. OF CLAIMS MADE

	'63	'64	'65	'66	'67	'68	'69	'70	'71	'72
A-T Wrongful convictions or unlawful sentences	1	1	1	2	1	..	1	3	3	3
B-T Damage attributed to inmates and escaped convicts	7	9	8	12	11	1	1	4	5	4
C-C State leased property covered with insurance policy	..	..	..	1	..	..	1	..	..	..
D-T Negligence in road maintenance or construction	4	5	3	3	..	3	4	6	7	5
E-T Negligence of State employee which caused damage	..	4	2	15	8	4	3	8	7	7
F-C Loss because Contract with State was completed at extra expense to claimant	3	1	1	6	7	2	6	2	1	3
G-T Compensation for Injury in public buildings	3	1	1	6	..	5	2	6	2	4
H-C Workmen's Compensation—type injury to inmates (no coverage)	1	..	..	1	..	6	10	14	5	13
I-T Payment for debt incurred by the State not yet paid	3	..	..	2	1	1	1	1	..	..

NATURE OF CLAIM	NO. OF CLAIMS ALLOWED									
	'63	'64	'65	'66	'67	'68	'69	'70	'71	'72
A-T Wrongful convictions or unlawful sentences .....	..	..	1	..	..	..	..	..	..	..
B-T Damage attributed to inmates and escaped convicts	1	2	3	8	9	..	1	1	1	..
C-C State leased property covered with insurance policy .....	..	..	..	..	..	..	..	..	..	..
26 D-T Negligence in road maintenance or construction	2	1	..	1	..	2	2	1	5	..
E-T Negligence of State employee which caused damage .....	..	2	..	10	6	1	2	2	3	..
F-C Loss because Contract with State was completed at extra expense to claimant	1	1	1	4	4	2	4	2	1	..
G-T Compensation for Injury in public buildings .....	..	..	..	3	..	..	..	2	..	..
H-C Workmen's Compensation—type injury to inmates (no coverage)	1	..	..	1	..	4	8	11	4	..
I-T Payment for debt incurred by the State not yet paid	3	..	..	2	..	1	1	1	..	..

NATURE OF CLAIM

NO. OF CLAIMS MADE

[You are Viewing an Archived Copy from the New Jersey State Library](#)

	'63	'64	'65	'66	'67	'68	'69	'70	'71	'72
J-T Refund of license fee because of purchaser's death .....	..	..	..	1	..	..	1	..	..	..
K-T Refund for overpayment of taxes	1	..	1	..	1	1	1	..	..	2
L-T Refund for legal fees incurred by representative of New Jersey Commission .....	..	..	..	..	1	2	..	..	1	..
M-T Refund requested for injury caused by condemnation proceedings .....	..	2	1	..	1	2	1	..	..	..
27 N-C Payment of municipal taxes for parks ..	7	1	1	..	1	1	3	3	3	3
O-T Negligence of bridge operation or maintenance .....	..	1	..	..	1	..	..	..	3	3
P-T Compensation for unjust suspension	1	..	..	..	..	..	..	..	..	..
Q-C Breach of contract by State	1	..	..	..	..	3	3	4	1	2
R-T Loss or damage to personal property .....	..	..	..	..	..	1	2	7	9	25
Total	<u>32</u>	<u>25</u>	<u>19</u>	<u>49</u>	<u>33</u>	<u>32</u>	<u>40</u>	<u>58</u>	<u>47</u>	<u>74</u>

NATURE OF CLAIM

	'63	'64	'65	'66	'67	'68	'69	'70	'71	'72
J-T Refund of license fee because of purchaser's death				1			1			
K-T Refund for overpayment of taxes	1		1			1				
L-T Refund for legal fees incurred by representative of New Jersey Commission						2			1	
M-T Refund requested for injury caused by condemnation proceedings						1				
N-C Payment of municipal taxes for parks	6	1	1		1	1		1	3	
O-T Negligence of bridge operation or maintenance		1			1				3	
P-T Compensation for unjust suspension	1									
Q-C Breach of contract by State						2	2	3	1	
R-T Loss or damage to personal property						1		3	9	
Total	16	8	7	30	21	18	22	27	31	

Legend—First letter, indicates item in outline

T following the item letter indicates claims involving Tort or Negligence.

C following the item letter indicates claims involving Contracts.

An analysis of the claims experience indicates that during the past decade the principal sources of claims against the State are: claims for damage attributable to inmates and escaped convicts (60); claims for negligence in road maintenance or construction (40); claims for negligent acts by State employees (58); and claims for workmen's compensation type injuries of inmates (50). Moreover, analysis also reveals that of the claims filed or made with the Subcommittee on Claims in 1972 over two-thirds are institution oriented—involving prisoners or inmates.

The following chart provided by the Bureau of Claims in the Attorney General's Office indicates the number of *claims* filed against the State as well as the number of *suits* ultimately filed against the State and/or its employees from the year 1959 to the year 1970.

<i>Year</i>	<i>Claims Against State</i>	<i>Suits Against State and/or State Employees</i>
1959	89	3
1960	79	6
1961	92	4
1962	102	3
1963	115	4
1964	128	10
1965	136	12
1966	154	18
1967	132	7
1968	144	28
1969	179	29
1970	296	65

An analysis of this chart and the one preceding it indicates that of the number of claims initially filed with the Bureau of Claims a smaller number are filed with the Legislature and an even smaller number are ultimately allowed. For example, in 1970 two hundred and ninety-six claims were filed with the Bureau of Claims, fifty-eight claims were filed with the Subcommittee on Claims and only twenty-seven claims were finally allowed by the Legislature.

It appears that the existing claims procedure, as well as the doctrine of sovereign immunity, has the benefit of obstructing

the successful processing of claims against the State of New Jersey. That this procedure and this doctrine are inherently unfair and inequitable can hardly be disputed; indeed the infirmities inherent in the existing legislative claims procedure as well as the criticisms of the present and former Governors have prompted the New Jersey Supreme Court to reiterate its earlier position that "there should be an established forum in which all such claims may be presented as of right and upon known principles." In holding that the judiciary would now supply such a forum (for contract claims against the State) the Court stated that "nothing less can satisfy the fundamental demand for equality at the hands of government." *P,T&L Construction Co., supra*. (Slip Opinion at 9-9, 1972)

III. *Substantive Law*

A. *STATE*

The general thesis of the immunity of the sovereign traces back to the 1788 English case of *Russell v. The Men of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 359 (K.B. 1788). That decision was predicated primarily on a lack of precedent to sustain the action, fear of a multitude of such actions and the absence of funds in the Treasury to be used in payment of judgments arising out of tort claims. It was pointed out in that decision "that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng. Rep. at p. 362. Although it has been pointed out that the application of the sovereign immunity doctrine established in *Russell* to the States of the United States "is one of the mysteries of legal evolution," it was nonetheless the rule traditionally applied by New Jersey Courts until the recent decisions in *Willis* and *P,T&L*. See e.g. *Freeholders of Sussex v. Strader*, 18 N.J.L. 108 (Sup. Ct. 1840); *Lodor v. Baker*, 39 N.J.L. 49 (1877); *Grove v. Van Duyn*, 44 N.J.L. 654 (E.&A. 1882); *Valentine v. Englewood*, 76 N.J.L. 509 (E.&A. 1908); *Strobel Steel and Co. v. State Highway Commissioner*, 120 N.J.L. 298 (E.&A. 1938); *McAndrew v. Mularchuk*, 33 N.J. 172, 190-191 (1960).

In *Lodor v. Baker, supra*, the Supreme Court said: "[The State] enjoys this immunity as one of the essential attributes of sovereignty, it being an established principle of jurisprudence in all civilized nations, that the sovereign cannot be sued in its own courts without its consent."

While immunity has been the general rule throughout the State of New Jersey, it has nonetheless been judicially abrogated to a great extent for local jurisdictions and in fact the State itself has been subjected to suit in many varied and sometimes ill-defined types of actions. For example, the state may be sued to compel condemnation (with just compensation) of private lands it has effectively "taken" for the public use—inverse condemnation"—*Haycock v. Janmarone*, 99 N.J.L 183 (E.&A. 1923); the State may be sued at the instance of someone seeking to compel by way of prerogative writ the performance by State officers of their ministerial duties; the State may be sued by anyone seeking to restrain the State from taking unconstitutional action, *Wilson v. State Water Supp. Com.*, 84 N.J. Eq. 150 (E.&A. 1915); *Jersey City v. Zink*, 133 N.J.L. 437 (E.&A. 1945); the State may be sued for the payment of local real estate taxes on property which it has condemned for public use, *East Orange v. Palmer*, 47 N.J. 307, 329 (1966).

In addition, the State of New Jersey has waived its sovereign immunity from suit by legislatively providing that various State agencies "may sue or be sued" and it has effectively waived any sovereign immunity for a long list of local government entities by containing the same provision in the legislation establishing their existence. The pertinent statutes are listed below:

- N.J.S.A. 4:24-22—Soil Conservation Districts.
- N.J.S.A. 4:24-37—State Soil Conservation Committee.
- N.J.S.A. 4:25-6—Public Market Commission.
- N.J.S.A. 9:11-2—County Parental Schools.
- N.J.S.A. 12:11A-6—South Jersey Port Commission.
- N.J.S.A. 13:1B-15, 17—Department of Conservation and Economic Development.
- N.J.S.A. 13:1B-15.114—New Jersey Historic Trust.
- N.J.S.A. 13:1B-15.122—New Jersey Natural Lands Trust.
- N.J.S.A. 13:15-6—Sandy Hook Reservation Authority.
- N.J.S.A. 13:17-6—Hackensack Meadowlands Reclamation and Development Authority.
- N.J.S.A. 18:22-111—Trustees of a County College.
- N.J.S.A. 18:22A-7—Financial Assistance for Higher Education Authority.
- N.J.S.A. 18:22B-5—Educational Facilities Authority.
- N.J.S.A. 18A:6-49—State Federation of Boards of Education.

N.J.S.A. 18A:11-2—Boards of Education.

N.J.S.A. 18A:61A-4—Board of Trustees of the New Jersey School of the Arts.

N.J.S.A. 18A:64A-12—Board of Trustees of County Colleges.

N.J.S.A. 18A:64C-8—Board of Trustees of the New Jersey Medical and Dental College.

N.J.S.A. 18A:64E-6—Board of Trustees of the Schools for Industrial Education.

N.J.S.A. 18A:72-7—Higher Education Assistance Authority.

N.J.S.A. 18A:72A-5—Educational Facilities Authority.

N.J.S.A. 24:10-85—Medical Milk Commission.

N.J.S.A. 26:9-21—Mosquito Commission.

N.J.S.A. 27:12B-5—New Jersey Highway Authority.

N.J.S.A. 27:12C-11—New Jersey Expressway Authority.

N.J.S.A. 27:19-33—County Bridge Commissions.

N.J.S.A. 27:23-5—New Jersey Turnpike Authority.

N.J.S.A. 30:9-16—Hospitals for the indigent sick and disabled established by the municipalities.

N.J.S.A. 32:8-3—Delaware River Joint Toll Bridge Commission.

N.J.S.A. 32:11D-87—Delaware River Basin Commission.

N.J.S.A. 32:12-4—County Interstate Bridge and Tunnel Commission.

N.J.S.A. 32:13A-4—Gloucester County Travel Commission.

N.J.S.A. 32:17-4—Palisades Interstate Park Commission.

N.J.S.A. 32:22A-15—New York-New Jersey Transportation Agency.

N.J.S.A. 32:23-10—Waterfront Commission Act.

N.J.S.A. 32:29-15—Mid-Atlantic States Air Pollution Control Commission.

N.J.S.A. 38:23B-3—Veterans Loan Act Authority.

N.J.S.A. 40:3-5—Linking Fund Commissions in Counties, Municipalities and School Districts.

N.J.S.A. 40:4-4-20—County Welfare Boards.

N.J.S.A. 40:11A-6—County and Municipal Parking Authorities.

N.J.S.A. 40:13-37.2—Municipal Pensions Fund Commissions.

N.J.S.A. 40:14A-7—County and Municipal Sewage Authorities.

N.J.S.A. 40:14B-20—Municipal Authority.

N.J.S.A. 40:18-3—Every County.

N.J.S.A. 40:33-13.9—Board of Trustees of County Libraries.

N.J.S.A. 40:36A-19—County Sewage Authorities.

- N.J.S.A. 40:37-95.5—County Park Commissions.
N.J.S.A. 40:37-99—County Park Commissions.
N.J.S.A. 40:37-116—A person who shall have been granted an award against a County Park Commission can sue and collect payment.
N.J.S.A. 40:37-198—County Park Commissions.
N.J.S.A. 40:37-218—County Park Commissions.
N.J.S.A. 40:37A-55—County Improvement Authority.
N.J.S.A. 40:37B-12—County Recreation Authorities in First Class Counties.
N.J.S.A. 40:43-1—Every Municipality.
N.J.S.A. 40:48B-2.1—Consolidated and Joint Service Projects.
N.J.S.A. 40:54-11—Municipal Library Boards of Trustees.
N.J.S.A. 40:54A-5—Municipal Cultural Centers and Museums.
N.J.S.A. 40:54B-7—Planned Unit Development Authorities.
N.J.S.A. 40:55B-7—Industrial Commissions.
N.J.S.A. 40:55C-12—Municipal Redevelopment and Regional Redevelopment Agencies.
N.J.S.A. 40:61-32—Municipal Public Park and Playgrounds Commissions.
N.J.S.A. 40:62-105.2—Public Utilities Municipally Owned.
N.J.S.A. 40:66A-7—Municipal Incinerator Authorities.
N.J.S.A. 40:66A-38—Solid Waste Management Authorities.
N.J.S.A. 40:63-40—Beach Erosion Control Districts.
N.J.S.A. 40:68A-7—Port Authority.
N.J.S.A. 40:68A-40—Municipal Port Authority.
N.J.S.A. 40:69A-29—Municipalities governed under the Optional Municipal Charters Act.
N.J.S.A. 40:90-2—Garbage Districts.
N.J.S.A. 40:91-1—Lighting Districts.
N.J.S.A. 40:106-1/1—City Referendum Charter Commissions in Second-Class Cities of Less than 20,000.
N.J.S.A. 40:151-2—Fire Districts.
N.J.S.A. 40:154-2/4—Sewerage Districts.
N.J.S.A. 40:155-1—Township Street Lighting Districts.
N.J.S.A. 40:190-8—Industrial Commissions.
N.J.S.A. 44:7-7—County Welfare Boards.
N.J.S.A. 52:18A-59—Authorities created by the Officers and Employees Act, Executive and Administrative Departments.
N.J.S.A. 52:27C-22—Public Housing and Development Authority.

- N.J.S.A. 54:8A-46—Interstate Tax Suit Agreement.
N.J.S.A. 55:14A-7—Local Housing Authorities.
N.J.S.A. 55:14H-7—State Housing Authorities.
N.J.S.A. 55:14J-34—New Jersey Housing Finance Authority.
N.J.S.A. 55:15-8—Housing Corporation.
N.J.S.A. 58:5-7—North and South Jersey Water Supply Com-
missions.
N.J.S.A. 58:12-18—Sewage Districts.
N.J.S.A. 58:14-2—Passaic Valley Sewage Authority.
N.J.S.A. 58:15A-19—Bergen-Hackensack Sanitary Sewer
Authority.

In 1956 the Supreme Court of New Jersey held that the grant of the power to sue and be sued constituted a consent by the Legislature to suits, including actions in tort, against any State or local agency so authorized. *Taylor v. New Jersey Highway Authority*, 22 N.J. 454, 468-471 (1956). Since the Legislature continued to authorize various agencies to sue and be sued after the effective date of that decision, it can be assumed that the Legislature concurred with the court's judgment that when an agency is established and granted the power to sue and be sued it has also lost all vestiges of the traditional defense of sovereign immunity which would otherwise be enjoyed by the State. Consequently, all of the above agencies—each of which performed some type of governmental function—have been stripped of the cloak of sovereign immunity and are subject to suit in the courts of the State of New Jersey. Once this fact is recognized it becomes apparent from the above list of State agencies and political subdivisions that may sue and be sued that the State of New Jersey has followed a rather haphazard and arbitrary approach in waiving its traditional sovereign immunity.

B. STATE EMPLOYEES

Although the State has been traditionally immune from suit in most instances, it is significant that this immunity has not been extended automatically to officers and employees of the State. In 1959 the New Jersey Supreme Court made it very clear that State officers and employees are subject to liability for torts committed in the performance of their "ministerial" activities and are only immune from suit for torts committed in the performance of "discretionary or quasi-judicial" activities, provided that malice or bad faith is not shown. *Bedrock Foundations, Inc. v. George H. Brewster & Son, Inc.*, 31 N.J.

124, 141 (1959). The reasons behind this rule were forcefully stated by Judge Leonard Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950):

“It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hardput to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.” 177 F.2d at p. 581.

The Courts of New Jersey, as indicated in the *Bedrock* decision *supra*, have attempted to strike the appropriate balance by utilizing the discretionary-ministerial distinction. For example in *Kisielewski v. State of New Jersey*, 68 N.J. Super. 258 (App. Div. 1961) the Appellate Division held that while the defense of sovereign immunity was available to the State, it was not available to certain named State employees of the State Home for Girls unless the facts so warrant it. These employees were sued by an inmate of that institution for burns suffered while working in the institution's kitchen. The court concluded that if the facts demonstrated they were acting in their ministerial capacity they would be subject to liability under commonly accepted, common law principles. If, however, the facts demonstrated that they were exercising discretion, they would be immune under traditional common law principles.

The more recent case of *Czyzewski v. Schwartz*, 110 N.J. Super. 255 (App. Div. 1970) reaffirmed the principle that an individual State employee may be liable for negligent acts committed within the scope of his employment, although his employer—the State—would not be liable on the basis of the doctrine of sovereign immunity. In *Czyzewski* the Law Division had dismissed the plaintiff's action against a state trooper whose hand signaling from the side of the highway was alleged to have been a contributing cause to a two car rear-end collision. The trial court dismissed the case on the ground that the trooper was merely the alter-ego of the State and as such was immune from suit under the sovereign immunity doctrine. The Appellate Division reversed this judgment and applied the commonly accepted "ministerial-discretionary" test. Two of the three judges in the Appellate Division concluded there was no immunity since "the trooper's signal in this case did not involve the exercise of discretion beyond a ministerial function." 110 N.J. Super. at 261. In a pointed dissent, Judge Matthews found fault with the doctrine that the State employee could be held personally liable in situations where the State was immune. He argued that the activity of the trooper as an individual was indistinguishable from his activity as a state police officer and therefore he should be immune from suit in the same manner as his employer—the State of New Jersey. Most recently the Appellate Division of the Superior Court has concluded that individual officers and employees of the State prison system are liable for negligence in the performance of their duties. *Harris v. State of New Jersey*, ___ N.J. Super. ___ (1972). While this decision continues to recognize the "discretionary-ministerial" test, it is perhaps significant to note that at least as far as the jailor is concerned the Court formulated the following standard against which his liability will be measured: "A duty to employ the care of a reasonable and prudent person in the protection of prisoners against reasonably foreseeable risks generally." (Slip Opinion at p. 8.)

Thus, while a State employee may be liable, he does generally enjoy the benefit of certain common law immunities which have been established by the Courts and which have been applied to him as a result of the nature of the governmental function which he performs. c.f. *Valentine v. Englewood*, *supra*; *Johnson v. Marsh*, 82 N.J.L. 4 (Sup. Ct. 1912); *Grove v. VanDuyne*, *supra*; *Florio v. Jersey City*, 101 N.J.L. 535 (E.&A. 1925).

In addition there are certain statutes in the State of New Jersey which provide particular employees with statutory immunity or indemnification:

1. *N.J.S.A.* 38A:4-9 provides that members of the organized militia ordered into the actual service of the State by proper authority shall not be liable civilly or criminally for any acts done by them while engaged in the performance of their duties.

2. *N.J.S.A.* 18A:60-4 provides that the State shall save harmless any teacher or other person employed in a teaching capacity by the State Board of Education, or by the Commissioner in the Marie H. Katzenbach School for the Deaf, or in any other educational institution under the control of the State board, for any act or omission arising out of and in the course of the performance of the duties of such office, position or employment.

3. *N.J.S.A.* 26:2G-20 provides that no person may be held liable for damages or otherwise prejudiced in any manner by reason of furnishing information or data in connection with the registry of drug information required under the "Controlled Dangerous Substances Registry Act of 1970".

4. *N.J.S.* 2A:15-25 protects any law enforcement officer from liability for wiretapping if he acted on the basis of a good faith reliance on a Court order authorizing the wiretap.

5. *N.J.S.* 2A:126-6 provides "If, in the dispersing, seizing or arresting of any persons so unlawfully, routously, riotously and tumultuously assembled, or in endeavoring to disperse, seize or arrest such persons, any of them are killed, hurt or wounded, by reason of resisting the persons endeavoring to disperse, seize or arrest them, then every such magistrate, sheriff, undersheriff, police officer or constable, and any person assisting them, or any of them, shall be held guiltless and be absolutely indemnified and discharged."

6. *N.J.S.* 2A:2-9 provides "Whenever it shall be necessary or proper to make the superior court of New Jersey a party to any action or proceeding in any court, the superior court of New Jersey may be sued and designated therein by naming the Clerk of the superior court. In any such action or proceeding, the clerk shall not be individually liable for any costs or fees, nor subject to a personal judgment."

N.J.S.A. 30:4-16 provides "No action at law shall lie against any officer or employee or member of the state board or members

of the several boards of managers, for admitting, receiving, keeping, detaining or transferring or discharging as provided by this title or directed by any order made in accordance with this title, any person coming to an institution or non-institutional agency on his own application, or on the application of his friends or relatives, or by order of a judge or court of this state, but such application or order, or certified copy thereof, shall be sufficient warrant and authority for the admission, keeping, detention, transfer, discharge or reasonable care, treatment, management and control of any patient or inmate received or committed according to the terms of this title.”

It is apparent that the pattern of immunity established by statute is completely lacking in uniformity and fails to take into consideration many other State employees subjected to the type of liability against which the above statutes have been directed.

C. LOCAL UNITS OF GOVERNMENT

In addition to being legislatively authorized “to sue and be sued” local units of government in the State of New Jersey have not recently shared in the broad common law sovereign immunity granted to the State. As a result, local units of government throughout the State have been subject to suit on various theories within the regular court system and as such have been subjected to the rules of procedure and jury trial provisions commonly applied to private litigants. Since these local units of government perform functions quite similar to those performed by the State and since they have traditionally been subject to liability, it is not surprising that the major body of case law on the tort liability of governmental units in the State of New Jersey has resulted from the judiciary’s case by case adjudication of the liability of these local government entities.

An analysis of the New Jersey cases discloses a pattern of adoption and abandonment of various standards of liability, all of which were intended to fairly adjudge the liability of government units, but none of which seem to have completely resolved the sometimes peculiar difficulties involved in assessing the liability of these units while engaged in their many functions. Nonetheless it is necessary to examine the various tests of liability which have been established and which have either been completely or partially abandoned because local entity liability in the State of New Jersey today is based upon remnants of all of the various standards which the courts have applied. Such an

understanding is essential to evaluating the potential impact of a Statewide tort claims act upon the existing liability of local units of government.

(1) *Governmental—Proprietary Test*

Traditionally, the immunity of counties and municipalities has been confined to those activities which the entity undertakes as the agent of the State—government functions—as distinguished from those which it pursues in a corporate or proprietary capacity. *Cloyes v. Delaware Township*, 23 N.J. 324, 327 (1957). Among the factors said to denote a governmental function are: the fact that the activity was historically engaged in by a local government, that it continues to be so furnished by local government, that it could not be performed as well by a private corporation, that it was not undertaken for profit or revenue, and perhaps most importantly, that it is among the imperative public duties imposed upon an entity as an agent of the State. *Fahey v. City of Jersey City*, 52 N.J. 103, 108-109 (1968). Essentially the courts of New Jersey have been attempting to determine when the local entity was performing a governmental function as opposed to a private or proprietary function. In that quest the courts characterized the following activities as proprietary: operation of a sewage disposal plant, *Cloyes v. Delaware Township*, *supra*; operation of a sewer system, *Henry Clay v. Jersey City*, 74 N.J. Super. 490 (Ch. Div. 1961), *aff'd* 84 N.J. Super. 9 (App. Div. 1964); operation of a municipal swimming pool, *Weeks v. Newark*, 62 N.J. Super. 166 (App. Div. 1960), *aff'd* 34 N.J. 250 (1960); distributing water for a utility rate, *Fay v. Trenton*, 126 N.J.L. 52 (E.&A. 1940). In another line of cases the judiciary has recognized that certain kinds of governmental action should never give rise to liability in tort. *Amelchenko v. Freehold Borough*, 42 N.J. 541 (1964) (no liability for reasonable failure to remove snow from municipal parking lot); *Hoy v. Capelli*, 48 N.J. 81 (1966) (no liability for decision to remove traffic light); *Visidor Corp. v. Cliffside Park*, 48 N.J. 214 (1966) (no liability for invalid designation of one way street); *Fahey v. City of Jersey City*, *supra* (no liability for failure to provide adequate supervision of public playgrounds); *Miehl v. Darpino*, 53 N.J. 49 (1968) (no liability for method of snow removal).

In *Amelchenko* suit was brought by an individual who had fallen and injured himself while walking over uneven ice-crusting snow in a municipal parking lot. It was alleged that the municipi-

pality had negligently failed to remove the snow from the lot within a reasonable time. The New Jersey Supreme Court affirmed the trial court's dismissal of the action on the grounds that the purchasing and deployment of snow removal equipment and assignment of personnel are peculiarly matters of discretion and judgment of local government officials and should not be subject to review by the courts in a tort action. The court, through Justice Francis, stated:

“When a street department is established, obviously the governing body determines the number of employees to be assigned to it and the amount of snow removal equipment to be purchased and made available for ordinary municipal needs. That determination is a matter of judgment committed under our system of government to the local authority and it should not be interfered with by the courts in a tort damage suit.

Moreover, establishment of a general method of handling snowstorms is a matter of planning. The decision adopting a procedure regulating when, where and in what order of the priority the equipment and personnel are to be used in dealing with them is legislative or governmental in nature. Such decisions cannot be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions. The extent and quality of governmental service to be furnished is a basic governmental policy decision. Public officials must be free to determine these questions without fear of liability either for themselves or for the public entity they represent. It cannot be a tort for government to govern.” 42 N.J. at 549-550.

Similarly in *Michl v. Darpino, supra*, it was held that a municipality would not be liable for having piled snow in such a manner that a pedestrian, faced with an emergency situation, cannot get over a snowbank to safety. In *Fitzgerald v. Palmer*, 47 N.J. 106 (1966) the New Jersey Supreme Court declined to express an opinion as to the liability of the State, partly because the thesis of liability—that the State should have erected wire fences along a highway overpass to prevent objects from being thrown from it—was a doubtful one. The court reasoned that “* * * the question of how much money should be raised and how to deploy what is available, in the endless effort against

crime * * *” was a political decision entrusted to the judgment of the legislative and executive branches. And significantly in *Fahey v. City of Jersey City, supra*, two consolidated cases were heard in which it was alleged that the defendant municipalities had been negligent in the construction, maintenance and supervision of their playgrounds. In both cases, children fell from playground apparatus and suffered injuries. In denying liability, this court said:

“Plaintiff’s allegations of negligence boil down to a claim that the municipalities should have provided professional supervision for the playground area in question. In the circumstances of these cases, liability must be denied because the employment of supervisors involves the type of governmental policy determination which must remain free from the threat of tort liability.”

While it is apparent that the proprietary-governmental test is not subject to precise delineation, the above cases do indicate a sensitivity of the judiciary to the problems inherent in the making of governmental policy decisions.

(2) *The Active Wrongdoing Test*

In their continuing efforts to erode the traditional common law governmental immunity the Courts of New Jersey developed an additional test which provided that municipalities could be sued in the exercise of their *governmental* functions if it was established that the activities causing the injury constituted active wrongdoing. This test was to be contrasted against the test utilized for *proprietary functions* which allowed suit against municipalities based upon ordinary principles of negligence. The meaning of the active wrongdoing test and the difficulty in applying it is indicated in the following excerpt:

“The meaning of active wrongdoing has always engendered confusion. Certainly the concept is used to indicate action as opposed to inaction. As noted, [*Freeholders of Sussex v. Strader*, 18 N.J.L. 108 (Sup. Ct. 1840)] the *Strader* doctrine incorporated the principle that no liability could attach for nonfeasance. Thus the courts had always to find some action in the causation chain. In *Hammond v. County of Monmouth*, 117 N.J.L. 11 (Sup. Ct. 1936), the court explained that a failure to properly construct

adequate safeguards around a culvert constituted active wrongdoing. The *Hammond* case can be viewed in either of two ways: (1) a "failure" to do something, or (2) a negligent construction in that it was not constructed completely so as to be safe. The court, choosing to recognize an action framed to rely on the negligent completion aspect, found active wrongdoing present. More precisely, in *Hammond*, the court viewed the action as involving more than passive negligence, defining it as positive misfeasance. Positive misfeasance thus became synonymous with active wrongdoing.

"Although *Hammond* involved performance of a lawful act (building culverts) in an unlawful manner (so as to create a public nuisance), active wrongdoing has also been found when the original action was done in a lawful manner but a *subsequent failure to act* allowed the original action to deteriorate into a nuisance [*Hayden v. Curley*, 34 N.J. 420 (1960)], where a failure to repair a sidewalk broken by roots of a tree planted by the municipality was held to constitute active wrongdoing]." Rutgers Camden Law Journal 69, 83-84 (1969).

Apparent inadequacies in the active-wrongdoing test have contributed to its demise as a viable standard for determining governmental tort liability. In *Jackson v. Hankinson, and Board of Education of New Shrewsbury*, 51 N.J. 230, 234 (1968) the New Jersey Supreme Court indicated that the vitality of the active-wrongdoing test had been severely depleted. In that case suit was instituted against the Board of Education and an independent bus operator for the loss of eyesight sustained by a pupil when he was struck by something hurled by a fellow pupil while on a school bus. The court concluded that "active wrongdoing" was not necessary to obtain relief; it would only be necessary to show that the board negligently failed to exercise "reasonable supervisory care" for the children and that the failure to exercise such care was the proximate cause of the injury.

(3) *The Test of Ordinary Negligence*

In *B.W. King, Inc., v. West New York*, 49 N.J. 318 (1967) the New Jersey Supreme Court announced its dissatisfaction with the governmental-proprietary test of liability and asserted its

intention to apply ordinary principles of negligence law where possible to the question of whether a local government unit should be liable in tort. In the *King* case an action was instituted for recovery of damages to plaintiff's respective property resulting from fire which had originated on piers to which the defendant municipality had taken title in foreclosure actions. In reversing and remanding the matter for a new trial, the court disregarded the proprietary-governmental distinction and held that the municipality had the same duties and liabilities in connection with the prevention of the spread of fire originating on its lands as had private land owners. While announcing the ordinary negligence test, however, the court was quick to add that there would be certain activities of government which would continue to be immune and that would never be subjected to judicial review. In addition, the court announced that certain other municipal actions would only be subjected to a limited judicial review. These actions were referred to as involving "low level" policy decisions where the element of "competing demand" and governmental resources was present. In such instances the governmental decision would not be disagreed with unless it was "palpably unreasonable". *Bergen v. Koppenal*, 52 N.J. 478 (1968). It is clear, therefore, that although the standard of ordinary negligence may theoretically be applied, the operations of government necessitate a somewhat unique application of the principles of traditional tort liability in order to appropriately and properly fix responsibility upon a governmental entity.

(4) Ministerial—Discretionary Test

As part of the general picture of governmental liability as it relates to both governmental units and government employees the discretionary-ministerial test has provided the courts with an immunity concept which allows them to express their basic concepts of governmental tort liability through a somewhat easily stated but impossibly defined standard of liability. It is commonly stated that public employees shall not be liable for their discretionary acts and consequently under the principles of *respondeat superior* the governmental entity by whom they are employed will also enjoy immunity from liability. On the other hand public employees are liable for the ministerial acts which they commit and under principles of *respondeat superior* the governmental entity shares responsibility for the public em-

ployee's negligence. In effect, the test is stated so that one may not be liable for deciding to do an act, but he may be liable for the way in which he carries out his decision. This statement, however, is too simplistic and the examination of the case law indicates that the courts have great difficulty in discerning between what may be discretionary and what may be ministerial since almost all acts include the exercise of some degree of discretion. Nonetheless it is a test which is being utilized throughout the country and in the State of New Jersey and it is beginning to provide a substantial body of case law on which to base decisions of governmental tort liability. See *Amelchenko v. Borough of Freehold*, *supra*, (snow removal is a governmental discretionary activity); *Visidor Corp. v. Borough of Cliffside Park*, 48 N.J. 219 (1968); *cert. den.* 386 U.S. 972 (1969) (installation of a one-way street sign by improper ordinance procedures held to be no basis of a damage action); *Hoy v. Capelli*, *supra*, (decision to install or not to install traffic control devices are peculiarly governmental decisions and involve the exercise of discretion); *Bergen v. Koppental*, *supra*, (police officer's failure to notify governmental entity of defective traffic light would be tested by the "palpably unreasonable" standard to be applied against such low-level discretionary activity).

All of the aforementioned tests have been developed and used for varying reasons. They all continue, in fact if not in theory, to retain some vitality in the law of governmental tort liability in the State of New Jersey.

The difficulties in applying any test to the State have been summarized by Chief Justice Weintraub in *Fitzgerald v. Palmer*, *supra* at 109:

"A private entrepreneur may readily be held for negligent omissions within the chosen ambit of his activity. But the area within which government has the power to act for the public good is almost without limit, and the State has no duty to do everything that might be done. Rather there is a political discretion as to what ought to be done, as to priorities, and as to how much should be raised by taxes or borrowed to that end. If government does act, then, when it acts in a manner short of ordinary prudence, liability could be judged as in the case of a private party. So if a road were constructed of a design imperiling the user, the issue of fault would present no novel problem. But whether a

road should have four or six or eight lanes, or there should be dividers, or circles or jughandles for turns, or traffic lights, or traffic policemen, or a speed limit of 50 or 60 miles per hour—such matters involve discretion and revenue and are committed to the judgment of the legislative and executive branches. As to such matters, the question is whether a judge or jury could review the policy or political decisions involved without in effect taking over the responsibility and power of those other branches.” [47 N.J. at 109]

The problems and the various tests noted above cannot, of course, be considered apart from the liability of governmental officers and employees, since the employees often share the immunities and liabilities of their government employer.

D. LOCAL EMPLOYEES

Local government officers and employees, like their State counterparts, may be held liable in damages for torts committed in the performance of their official duties. It has long been well settled that public officers and employees can be personally accountable for torts committed in the performance of their official duties. *Florio v. Jersey City*, 101 N.J.L. 535, 542 (E.&A. 1925) (where the driver of a municipal fire apparatus was held liable for negligently driving into the plaintiff). Until 1960 the *Florio* case also stood for the proposition that a municipality was not vicariously liable for the negligent acts of its employees—the standard today applicable to the State of New Jersey. In 1960, however, the Supreme Court of New Jersey decided *McAndrew v. Mularchuk, supra*, and stated that the doctrine of *respondeat superior* would be applied to local units of government and that they would be responsible in the same way as ordinary private employers. Thus the local governmental employers, unlike the State at the present time, are subject to vicarious liability under the general principles of *respondeat superior*.

In addition to case law there are several statutory provisions which specifically affect the liability of local government entities and employees in the State of New Jersey. For example, although at common law counties and municipalities had no liability for failure to prevent personal and property damages as a result of riots, *N.J.S.A.* 2A:48-1, as amended in 1968, imposes liability on counties and municipalities under certain prescribed

You are Viewing an Archived Copy from the New Jersey State Library conditions. Also, *N.J.S.A.* 30:9-16 imposes liability upon municipalities for actions growing out of the creation and maintenance of municipal hospitals for the indigent sick and disabled.

N.J.S.A. 18A:12-20 provides that where a civil action is brought against a member of a board of education, or a criminal action resulting in the final disposition in favor of such person, the board of education shall bear the cost of defense and expenses together with the cost of appeal, if any. *N.J.S.A.* 18A:16-6 provides that any teacher or student-teacher shall be saved harmless by the appropriate board of education for any act or omission arising out of the course of their duties. *N.J.S.A.* 26:11-12 provides a statutory immunity for members, officers, and agents of county boards of health for actions done in good faith and for ordinary discretion on behalf of the board. *N.J.S.A.* 40:47-29 provides an immunity for firemen, and fire companies (whether municipal, paid, volunteer or independent) when going to or returning from fires in neighboring municipalities.

Certain statutes, two in particular, provide for what the New Jersey Supreme Court has termed "islands of immunity". *N.J.S.A.* 40:9-2 provides that a county or municipality is absolutely immune for personal injuries resulting from the use of any public grounds, buildings or structures. *N.J.S.* 18A:20-35 provides a similar immunity for school districts. Both of these statutes have been limited by the courts to governmental activities only. In addition *N.J.S.A.* 40:60-25.5 specifically exempts municipalities from liability in the operation of a public parking area (but not for negligence of its employees).

While the statutory provisions clearly indicate a lack of uniformity in treatment and while the case law is often varied and sometimes difficult to categorize, it may be stated in conclusion that the following principles are now being applied by the Courts of New Jersey:

(a) certain activities of government and its employees shall be absolutely immune. For example, "the State will not be held liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial cast, nor generally with respect to decisions calling for the exercise of official judgment or discretion." *Willis v. Dept. of Conservation and Economic Development*, *supra* at 540.

(b) certain lower-level decisions will be subjected to judicial review but only to a very limited judicial review based upon the

You are Viewing an Archived Copy from the New Jersey State Library
standard of whether the act was "palpably unreasonable".
Bergen v. Koppenal, supra.

(c) ordinary principles of negligence will be applied to those actions which do not fall within (a) and (b) above. In other words, the search will include a determination of the existence or absence of a duty, whether the duty was breached, *i.e.* whether the activity was performed in a reasonable manner consistent with a reasonably foreseeable risk, and whether there was a proximate cause relationship between the breach and the injury asserted.

IV. THE ROLE OF THE ATTORNEY GENERAL

As the chief law officer of the State of New Jersey the Attorney General receives his powers from the New Jersey Constitution, the common law and from the statutory law of this State contained in N.J.S.A. 52:17A and B. In particular, N.J.S.A. 52:17A-4 imposes the following duties upon the Attorney General:

- (1) The exclusive duty to attend and control all litigation and controversies in which the state's rights and interests are involved;
- (2) The responsibility to act as the sole legal advisor, attorney or counsel for all officers of state government;
- (3) The duty to represent all such officers in all proceedings or actions of any kind which may be brought for or against them in any court of the state;
- (4) The duty to attend generally to all legal matters in which the rights or interests of the state or any of its officers are involved.

Three other statutes impose upon the Attorney General a specific duty of representation of certain state employees.

- (1) N.J.S.A. 38A:4-10 provides that:

When an action or proceeding of any nature shall be commenced in any Court against any member of the organized militia for any act done in his official capacity in the discharge of his duty, or for an alleged omission to do an act which it was his duty to perform, or against

any member of the organized militia acting under proper authority for any act done in pursuance thereof, or by any warrant issued pursuant to law, * * * the defendant or defendants * * * shall be represented and defended by the Attorney General of the state at the expense of the state.

(2) N.J.S.A. 53:1-22 provides as follows:

The Attorney General may personally or by any assistant defend all criminal actions and proceedings in which the department (Division of State Police) or any member thereof is concerned as a party, which requires the services of attorney or counsel, in order to protect the interests of the state as may be necessary for the purposes of the department (Division) or the members thereof, or the Attorney General may appoint an attorney for the purposes of such defense and certify the expense thereof to the Department of State Police for payment, which shall be paid by the Department upon the warrant of the Comptroller, by the State Treasurer.

(3) Both N.J.S.A. 18A:60-4 (relating to civil actions against teachers in state educational institutions) and N.J.S.A. 18A:60-5 (relating to criminal actions against such persons) provide that the State shall defray the cost of defense in the civil action and in the criminal action if the final disposition is in favor of the employee but neither statute refers to the Attorney General nor does it indicate whether the State itself has the duty to provide the defense.

The above expressions of authority in the Attorney General have induced some confusion about the actual authority of the Attorney General to represent state employees. In addition, since state employees are potentially liable for their negligent acts within the scope of their employment even though their employer is immune, there has been an understandable concern over whether they will receive representation by the State's chief legal officer—the Attorney General.

While there are obvious arguments on the face of the statutes cited above—suggesting a lack of authority in the Attorney General—such as (1) the use of the word *officer* indicates a legislative intent to foreclose the Attorney General from representing state *employees* and (2) the specification of additional statutes authorizing him to represent certain employees indicates a leg-

islative conclusion that he does not otherwise possess authority to do so, it is nonetheless the conclusion of this task force that the Attorney General has inherent power to represent state officers and employees and that the mere specification of powers does not indicate a legislative intent to preclude him from acting to represent state employees when he considers it to be in the best interest of the State of New Jersey. See *O'Regan v. Schermerhorn*, 25 N.J. Misc. 1, (Sup. Ct. 1946). This was the conclusion reached and implemented by the Attorney General of the State of New York under a similar grant of statutory authority and it has been the actual practice of the Attorney General of the State of New Jersey. While it is justified on the basis of common law, statute and constitutional authority in this State, the Attorney General's Office in New York recommended that comprehensive statutory authority be provided on which the Attorney General can rely when representing state employees.

As indicated earlier in this report, the Attorney General performs at this time one further function in connection with the handling of claims against the state and its employees. Through the Bureau of Claims in his department, the Attorney General approves and recommends the settlement of claims not exceeding \$250.00. This authority was specifically granted to him by Public Law 1966, Chapter 33, Section 10 and has been repeatedly granted to him in each annual appropriations act.

V. FINANCIAL COVERAGE OF THE STATE OF NEW JERSEY

While it is true that the State of New Jersey has been protected by the doctrine of sovereign immunity, it is nonetheless a fact that the State has obtained substantial amounts of liability insurance coverage. An examination of the policies presently in force in the State indicates a somewhat piecemeal approach to the coverage of the State, its employees and its activities. The chart contained in this section provides a complete picture of the liability coverage of the State of New Jersey as of January 1, 1971. Such coverage has not yet traditionally been held to amount to an express waiver by the state of its defense of sovereign immunity—although all insurance carried by the State contains an endorsement assuring that the insurance carrier will not raise the defense of sovereign immunity in an action brought against the named insured unless specifically so authorized by the State.

STATE OF NEW JERSEY—LIABILITY INSURANCE POLICIES (as of 7/1/71)

<i>Department</i>	<i>Name of Insured</i>	<i>Type of Coverage</i>
Various State Agencies ..	State of New Jersey	Elevator Liability
Dept. of Institutions and Agencies	State of New Jersey, Dept. of Institutions and Agencies (Commissaries at 19 Institutions)	Workmen's Compensation
	State of New Jersey, Dept. of Institutions and Agencies	Workmen's Compensation
50 Dept. of Institutions and Agencies	State of New Jersey, Dept. of Institutions and Agencies (Commissaries—Sundry Institutions)	Comprehensive General Liab. (Except automobile)
Various State Agencies ..	State of New Jersey	Boat Liability (Total any 1 accident)
Various State Agencies ..	State of New Jersey, Dept. of Environmental Protection, Police Training, Dept. of Civil Service, Municipal and County Boards of Education	Comprehensive General Liability
	Operations of Wardens, Deputy Wardens and Volunteers in connection with their duties for the State of New Jersey, Dept. of Environmental Protection, Police Training Commission, instructors, Board Members, Dept. of Civil Service Examiners	

<i>Department</i>	<i>B.I.</i>	<i>P.D.</i>	<i>Annual Premium</i>	<i>Subscription Date</i>	<i>Expiration Date</i>
Various State Agencies ..	\$100,000/ 300,000	.....	\$22,007 (3 yr. premium)	1/23/68	1/23/71
Dept. of Institutions and Agencies	Statutory		2,572	2/ 4/71	2/ 4/72
	Statutory		1,966	2/ 4/71	2/ 4/72
51 Dept. of Institutions and Agencies	\$100,000/ 300,000	\$25,000/ 50,000	12,453 (3 yr. premium)	6/26/69	6/26/72
Various State Agencies ..	\$50,000/ 150,000	\$50,000	4,285	4/26/70	4/26/71
Various State Agencies ..	\$100,000/ 300,000	\$50,000	8,634 (3 yr. premium)	9/10/69	9/10/72

STATE OF NEW JERSEY—LIABILITY INSURANCE POLICIES (as of 7/1/71)—Continued

<i>Department</i>	<i>Name of Insured</i>	<i>Type of Coverage</i>
Various State Agencies . . .	State of New Jersey (Sundry Institutions)	Swimming Pool Liability
Various State Agencies . . .	Individual nurses employed by the various State Colleges, Dept. of Transportation and Treasury	Professional Liability
52 Fish and Game	State of New Jersey, Volunteer Deputy Game Wardens "Insured Persons" All Registered Volunteer Deputy Game War- dens	Special Risk Accident Policy Accidental Death Acc. Dismemberment Acc. Medical Acc. Dental 52 Wks. Wkly. Benefit
Fish and Game	State of New Jersey, Bow and Arrow In- structors "Insured Persons" All registered Bow and Arrow Instructors	Special Risk Accident Policy Accidental Death Acc. Dismemberment Acc. Medical Acc. Dental
Navigation	State of New Jersey—Volunteer Marine Patrolmen "Insured Persons" All Regis- tered Volunteer Marine Patrolmen	Special Risk Accident Policy Accidental Death Acc. Dismemberment Acc. Medical Acc. Dental 52 Wks. Wkly. Benefit

<i>Department</i>	<i>Limits</i>		<i>Annual Premium</i>	<i>Inception Date</i>	<i>Expiration Date</i>
	<i>B.I.</i>	<i>P.D.</i>			
Various State Agencies . . .	\$100,000/ 300,000	\$10,000/ 25,000 (3 yr. premium)	\$6,613	5/22/69	5/22/72
Various State Agencies . . .	\$100,000 300,000		640	4/ 1/70	4/ 1/71
Fish and Game	\$5,000 5,000 1,000 100 25		1,054	6/ 1/70	6/ 1/71
Fish and Game	\$500 500 500 100		345	6/ 1/70	6/ 1/71
Navigation	\$5,000 5,000 1,000 100 25		1,237	6/ 1/70	6/ 1/71

STATE OF NEW JERSEY—LIABILITY INSURANCE POLICIES (as of 7/1/71)—Continued

<i>Department</i>	<i>Name of Insured</i>	<i>Type of Coverage</i>
Fish and Game	State of New Jersey, Hunter Safety Instructors	Special Risk Accident Policy Accidental Death Acc. Dismemberment Acc. Medical Acc. Dental
	State of New Jersey and Governor and Mrs. William T. Cahill	O.L.T. Liability Insurance Medical Payments
Shell Fisheries	State of New Jersey, Dept. of Conservation & Econ. Dev.	Boat Liability (P & I)
Water Policy & Supply . .	State of New Jersey—Borough of Manville	Owners and Contractors Protective Liability
Education	State of New Jersey—Residential Manpower Trng., Newark Manpower Trng., Skills Center	Workmen's Compensation Comprehensive General Liab.
New Jersey Educational Facilities Authority . . .	New Jersey Educational Facilities Authority	O.L.T.
Higher Education	Raritan Valley Hospital Assoc., Raritan Valley Aux., State of New Jersey, Lessee	Comprehensive General Liab. Aggregate Auto

79

You are Viewing an Archived Copy from the New Jersey State Library

55

<i>Department</i>	<i>B.I.</i>	<i>Limits</i>	<i>P.D.</i>	<i>Annual Premium</i>	<i>Inception Date</i>	<i>Expiration Date</i>
Fish and Game	\$500			\$735	6/ 1/70	6/ 1/71
	500					
	500					
	100					
	\$100,000		\$25,000/	158	3/14/68	3/14/71
	300,000		25,000	(3 yr. premium)		
	\$1,000/					
	10,000					
Shell Fisheries	\$50,000			756	7/26/70	7/26/71
Water Policy & Supply ..	\$100,000/		\$50,000/	50	1/29/70	1/29/71
	300,000		50,000			
Education	Statutory			\$15,120	6/ 8/70	6/ 8/71
	\$10,000/		\$100,000	190	6/15/70	6/15/71
	300,000		100,000			
New Jersey Educational Facilities Authority ...	\$250,000/		\$500,000	354	10/28/70	10/28/71
	1,000,000					
Higher Education	\$250,000/		\$50,000	45,463	12/20/70	12/20/71
	500,000					
	500,000		50,000			
	\$250,000/		\$50,000			
	500,000		50,000			

STATE OF NEW JERSEY—LIABILITY INSURANCE POLICIES (as of 7/1/71)—Continued

<i>Department</i>	<i>Name of Insured</i>	<i>Type of Coverage</i>
Higher Education	New Jersey College of Medicine and Dentistry and the Martland Medical Center	O.L.T. and Malpractice Liab. O.L.T. Malpractice
Law & Public Safety	Police Training Commission, State of New Jersey, Dep. of Law and Public Safety	Workmen's Compensation
Law & Public Safety	State of New Jersey, Dept. of Law and Public Safety, Division of Professional Boards	Workmen's Compensation
Law & Public Safety	State of New Jersey, Dept. of Law and Public Safety, Division of State Police	Aircraft Liability
Palisades Interstate Park Commission	Palisades Interstate Park Com.	Workmen's Compensation
State	State of New Jersey, Dept. of State, Uniform Commercial Code Bureau	Errors & Omissions Liab. Each Occurrence Aggregate \$500 Deductible each claim
Various State Agencies . .	State of New Jersey	Boiler and Machinery Limit—per accident
Various State Agencies . .	State of New Jersey	Master Motor Vehicle Liab. General Liability

Department	<i>B.I.</i>	<i>Limits</i> <i>P.D.</i>	<i>Annual</i> <i>Premium</i>	<i>Inception</i> <i>Date</i>	<i>Expiration</i> <i>Date</i>
Higher Education	\$100,000/ 300,000 300,000	\$100,000/ 100,000	\$21,991	10/20/70	10/20/71
	\$100,000/ 300,000		100,469	10/20/70	10/20/71
Law & Public Safety	Statutory		289	7/ 1/70	7/ 1/71
Law & Public Safety	Statutory		1,409	7/ 1/70	7/ 1/71
Law & Public Safety	\$5,000,000		12,251	9/19/70	9/19/71
Palisades Interstate Park Commission	Statutory		28,063	8/ 1/70	8/ 1/71
State	\$25,000 75,000		3,500	1/ 2/71	1/ 2/72
Various State Agencies . .	\$1,000,000		35,693	3/30/71	3/30/72
Various State Agencies . .	\$150,000/ 500,000	\$50,000	441,000	7/ 1/70	7/ 1/71
			30,000		

The comprehensive automobile liability policy purchased by the State of New Jersey covers not only the State but also its employees while acting in the performance of their duties and within the scope of their employment. The policy only covers the employee, however, to the extent that other insurance is not collectible when the employee is driving a car not owned by the State of New Jersey. The policy covers 7,514 vehicles including 4,130 passenger vehicles and 3,384 commercial vehicles. These figures also include all Department of Defense vehicles. As indicated by the chart, the limits of the policy are \$150,000/500,000 for bodily injury and \$50,000 for property damage. The premium for 1971 was \$441,000-up on a retrospective plan from an original premium of \$388,542.00—with a maximum of \$460,000.00. The policy expired July 1, 1971 and was renewed at a premium of \$495,000.

The claims experience under this policy from 7/1/68-7/1/69 was 1,067 claims totalling \$321,938.00. From 7/1/69-7/1/70 there were 995 claims totaling \$357,234.00. A further breakdown of the claims experience indicates that:

(1) 7/1/68-7/1/69—985 claims paid totaling \$254,500, 56 of which were over \$500 and of those, 29 were over \$1,000.

(2) 7/1/69-7/1/70—736 claims were paid, 20 of which were over \$500 and 20 over \$1,000.

(3) 7/1/70-7/1/71—600 claims for bodily injury and property damage; paid out losses totaling \$497,985.

There is one other major source of insurance coverage which might be considered "hidden insurance" and that is the insurance required by the Division of Purchase and Property of all contractors and bidders with the state. Although the State pays for the premium by virtue of the price of the contract, each contract nonetheless provides for "comprehensive general liability unrestricted by endorsement in the limits of \$100/300,000—bodily injury; \$50/100,000—property damage and automobile public liability and property damage in the limits of \$100/300,000 for bodily injury and \$50,000 for property damage."

It becomes readily apparent that the State of New Jersey expends considerable amounts of money in the purchase of insurance for both comprehensive liability and property damage. When the cost of such insurance is added to the amount appropriated annually by the legislature for claims—in fiscal year 1969-70 an amount of \$232,332.00, Chapter 116 P. L. at page 293—

a reasonable estimate of the cost to the State of New Jersey of its present claims approach could perhaps be made. Administrative cost would also have to be considered as would contract claims settled by the various state agencies and paid out of existing appropriations. There is obviously great difficulty at arriving as such an estimate.

VI. FINANCIAL RESPONSE AND POSSIBLE IMPACT UPON LOCAL GOVERNMENTAL ENTITIES

In an effort to try to determine the existing cost incurred by local units of government as a result of their current liability for tort actions, a questionnaire was prepared and submitted to a broad cross-section of counties and local units of government throughout the State of New Jersey. Unfortunately, because of time and the difficulty of collecting information, a definitive and effective response to the questionnaire was not possible. The responses that were received are contained on the attached chart. Since it was anticipated that such a response would probably be minimal, the assistance of the Department of Insurance was solicited in an effort to concentrate on subdivisions selected on various bases to assure that the response would provide a fairly accurate cross-section throughout the State of New Jersey.

There were several reasons for the preparation and submission of the questionnaire and for the solicitation of the assistance of the Department of Insurance. There is growing concern in other states that the cost of insurance for governmental units is becoming prohibitive. Local units of government in the State of California, for example, have recently testified that there is a severely limited market for purchasing such insurance and that what markets do exist are costing the municipalities far and above what their claims experience justifies. Consequently, efforts were directed at determining whether a similar problem is arising throughout the State of New Jersey. Clearly, this information (contained in charts A and B) is relevant to the State's determination of a means of funding any liability which it imposes upon itself and the information would further provide some basis on which to judge the financial impact of a Statewide comprehensive liability statute.

The response of the counties, municipalities and school districts to the questionnaires which were circulated is shown in these charts. As shown, of the 21 counties surveyed, 7 responded; of

CHART A

<i>County</i>	<i>No. of Employees</i>	<i>Judicially Adjudged Liability</i>	<i>Are Employees Insured</i>	<i>Are Employees Given Legal Defense</i>	<i>Claims Procedure</i>	<i>Motor Vehicle Policy Premium, Carrier</i>
Bergen	3,499	1%	Yes	Yes, through insurance	All claims reported to insurance company, General Accident Assurance Corp.	B.I. \$1,250,000/1,500,000 P.D. \$1,050,000 Premium: \$55,000
Union	1,445	....	Yes	Yes	Claim is reported to Clerk of Board of Freeholders who forwards it to insurance agency	Carrier: Fireman's Fund American Ins. Co.
Camden	1,800	None	Yes	Yes	Claims are reported to county council and insurance broker	Premium: \$45,000
Morris .....	....	....	Yes	Yes, when deemed necessary	<i>Insurance Carriers:</i> Fireman's Fund Amer. Hartford Ins. Co. Fidelity & Deposit Lloyds of London	General Liability and Limits on Auto
Mercer	1,200	Most losses are adjusted few judgments	Yes, but are not insured personally in every instance	Yes, although 3 instances have arisen wherein ins. carrier ques. whether it should defend	Claims are initially by letters, from claimant or his attorney these claims are forwarded to insurance agent	Bodily Injury (B.I.) Property Damage (P.D.) B.I. \$250/500,00 P.D. 100,000 Premium: \$34,253 Security Insurance Co. of Hartford
Somerset	646	Most losses are adjusted	Yes	Yes, if work connected	Claims are initiated through treasurer's office who completes forms and forwards them to insurance company	(100/300/50) Premium: \$11,617
Hunterdon .....	....	Not available	Yes	Yes	<i>Insurance Carrier:</i> Selected Risks Ins. Co.	100/300/25 Premium: \$3,937.00

County	You are Viewing an Archived Copy from the New Jersey State Library			Special Insurance Contract Provisions
	General Liability	Excess Liability	Other	
Bergen	B.I. \$1,500,000/1,500,000 P.D. 1,110,000 Premium: \$76,000		Malpractice Premium: \$42,000	Waiver of Governmental immunity
Union	Carrier: St. Paul FSM Insurance Company		J. E. Rummelle of Union County covers Malpractice Carrier St. Paul FSM Ins. Co. Hospital	General Liability covers all employees acting within scope of duties. Also includes: personal injury, false arrest, slander, libel, malicious prosecution
Camden	\$1,000,000 limit Premium: \$82,000		Malpractice premium: \$37,000	
Morris	Auto—\$50,000 primary 1½ million excess	1970 Budget: \$306,000 for all policies	1, Fire and Inland marine contracts 2, Bonds—various limits	
Mercer	B.I. 250/500,000 P.D. 100,000 Premium: \$43,500 Security Insurance Co. of Hartford	Blanket Excess Liability B.I., P.D. (Single Limit 3,000,000) Premium: \$13,350 Fireman's Fund American	Airport Liability B.I.—P.D. (Single Limit \$500,000) Premium: 7,200 U.S. Aviation Ins. Group	
Somerset	Special Multi-Peril (fire—\$5,000,000) liab.—300/300/50 Premium: \$20,592.02	Umbrella Liab. (2,000,000) Excess Ins. \$10,000 deductible Premium \$3,500 New Hampshire Ins. Co.	Bonds (Blanket, forgery valuable papers) Fidelity Deposit Co.	
Hunterdon	100/300/100 Premium: \$7,329			

You are Viewing an Archived Copy from the New Jersey State Library

62

<i>Municipality</i>	<i>No. of Employees</i>	<i>Judicially Adjudged Liability %</i>	<i>Are Employees Insured</i>	<i>Are Employees Given Legal Defense</i>	<i>Claims Procedure</i>	<i>Motor Vehicle Policy, Premium, Carrier</i>
Newark	12,000	60	Yes	Yes	70% Suit 30% Letter If claim is initiated by letter, it is referred to operating department for comment. Reply to claimant conforms to comment.	Hartford A & I Premium: \$148,000
Trenton	1,700	Unknown	Yes	Yes, through insurance carrier	Forwarded to insurance carrier	Maryland Casualty Co.
Atlantic City .....	....	....	Yes	Yes	Claims are sent to solicitor's office, who forwards them to insurance adjuster	It now costs over \$600,000 for comprehensive, workmen's compensation and fire American Cas. Inc. Co.
Nutley	223	....	Yes	Yes	Claims letters are forwarded to insurance company	Total annual premium \$230,000 for all insurance
Livingston	150-200	....	Yes	Yes	Either insurance company or township attorney	
Millborne	190	10	....	....	All claims forwarded to insurance broker	B.I. 300,000/500,000 P.D. 25,000 \$22,750
Cherry Hill	280	20	Yes	Yes	Information given to claims clerk for forwarding to insurance broker	B.I. 250,000/500,000 P.D. 100,000 Premium: \$23,000

You are Viewing an Archived Copy from the New Jersey State Library

<i>Municipality</i>	<i>General Comprehensive</i>	<i>Excess Liability</i>	<i>Other</i>
Newark	Ambassador Premium: \$64,500		
Trenton	Maryland Casualty Co.		1. Riot insurance not obtainable 2. Home Insurance Comp. for all other insurance
Atlantic City	See M.V. Policy Column		No malpractice
Nutley	See M.V. Policy Column	Workmen's Comp. Recreation Accident Employee Group Bonds for certain employees to public officers	1. No malpractice 2. Unable to give specific information on No. and amount of claims because insurance company does not disclose
Livingston		Motor vehicle comprehensive liability Premiums: \$11,225	Only three claims and \$350 liability in last five years Queen Insurance Co. Globe Ins. Co.
Millborne	Newark Insurance Company See M.V. Policy Column		Personal injury commandeered automobile Blanket contractual liability Incidental malpractice liability
Cherry Hill	B.I. 250,000/500,000 P.D. 100,000 Premium: \$20,000	1,000,000 B.I. & P.D. Insurance Company of North America	<i>Special Provisions in Ks:</i> Liability includes: (1) Waiver of immunity (2) Personal injury (3) Products (4) Blanket contracted (5) Elected or appointed officials as insured Liquor law liability excluded

49

<i>Municipality</i>	<i>No. of Employees</i>	<i>Judicially Adjudged Liability %</i>	<i>Are Employees Insured</i>	<i>Are Employees Given Legal Defense</i>	<i>Claims Procedure Used</i>	<i>Motor Vehicle Policy, Premium, Carrier</i>
Hamilton Twp. ...	515	Negligible	Yes	Yes	Forwarded to carrier	B.I. 300/500,000 P.D. 25,000 Premium: \$25,000
Sayreville	245	....	Yes	....		B.I. 100/300,000 P.D. 50 \$35,823.44
Ewing Twp.	140	Very minute, if any	Yes	Yes		Nationwide (Fleet) Ins. Co. \$21,566
Union City	350	0	No	Yes	Referred to law department which supervises investigation, settlement, negotiation and defense	Motor vehicles
Tenafly	97	5	Yes	Yes	Claims referred to insurance agent	B.I. 500/1,000 P.D. 500 \$10,000
Essex Fells	30	....	Yes	....		B.I. 250/500 \$2,028

65

<i>Municipality</i>	<i>General Comprehensive</i>	<i>Excess Liability</i>	<i>Other</i>
Hamilton Twp.	Fire and general liability Premium: \$25,000 Home Insurance Co.		Workmen's Comp. \$102,005 Floater Equipment 6,000 Money and Securities 1,000 Boiler and Machinery 3,000 Bonds for Employees 3,000
Sayreville	Comprehensive Gen. L. Aetna Insurance Co.		Aetna Workmen's Comp. \$33,890 P.I.P. 6,286.80 Continental Insurance Co.
Ewing Twp.	Hanleysville \$12,000		Workmen's Comp. \$71,964 Malpractice \$ 20 (Nurses only)
Union City	Has found insurance prohibitively higher	Emergency notes employed to pay settlements; otherwise amount needed is carried in following year's budget	1. Insurance carried for personal injury or real property owned 2. No comprehensive or malpractice
Tenafly	B.I. 250/500,000 P.D. 5,000 Continental Ins. Co.	Limits: \$1,000,000 \$1,500	1. Has malpractice insurance 2. Cannot get mob or riot insurance
Essex Fells		Carrier: 1. Fred S. James & Son 2. Ins. Co. of North America	1. Fire coverage \$2,086.94 2. Workmen's Comp. 5,325.00 3. Has malpractice coverage

You are Viewing an Archived Copy from the New Jersey State Library

66

<i>Board of Education</i>	<i>No of Employees</i>	<i>% Judicially Adjudged Liability</i>	<i>Are Employees Insured</i>	<i>Are Employees Given Legal Defense</i>	<i>Claims Procedure Used</i>	<i>Motor Vehicle, Carrier Policy, Premium,</i>
Camden	300	None	Required by Statute	Required by Statute	Claims are reported to Sec'y of Bd., who forwards them to agent, who sends them off to Ins. Carrier	B.I. 300/500 P.D. 25,000 \$6,000 Premium
Bloomfield	625	?			Sec't of Bd. to Ins. agent; to carrier	500/1,000/\$100,000 Premium: \$3,356 Newark Ins. Co.
Bayonne	?	?			"	
Essex Falls .....	....	None			"	Motor Vehicle 5 100/300 Premium: \$3,271
Millburn	401	....			School principal reports claims to ins. carrier	B.I. 100/100 \$1,615 P.D. \$50,000 \$571
Egg Harbor	40	None			Insurance Agent	
Verona	227	None			Insurance Agent	
West New York	447	None	Required by Statute	Required by Statute		300/500/100,000 2,715 Premium
Livingston .....	....	....		

<i>Board of Education</i>	<i>General Comprehensive</i>	<i>Excess Liability</i>	<i>Other</i>
Camden	Malpractice & Comprehensive 300/500/25,000 Premium: \$20,000		Carriers: General Accident Continental Insurance
Bloomfield	Comprehensive and Malpract. \$1,000,000 Single Limit Premium: \$8,335		1. Claims usually involve student accidents and are initiated by parents 2. Under ins. policy immunity defense is waivable in meritorious cases
Bayonne	Premium: \$18,956		30 claims are received per month
Essex Falls	Comprehensive Liability		
Millburn	Single Limit \$1,000,000 Continental Ins. Co.	Excess Blanket: 2,000,000 limit Premium: \$725	There are no contract claims
Egg Harbor			Multi-Period Policy: \$1,100,000 limit a. motor veh. b. malpractice c. comprehensive
Verona			Insurance: 1. Building and Equipment. 2. General Liability Carriers: Aetna Cas., Amer. Ins.
West New York	1,000,000 B.I. 50,000 P.D. \$2,514		Continental Insurance Co. Providence Washington Inc.
Livingston			Newark Insurance Comp. Insurance: Motor Vehicle Malpractice Comprehensive Premium \$6,052

You are Viewing an Archived Copy from the New Jersey State Library

68

<i>Board of Education</i>	<i>No of Employees</i>	<i>% Judicially Adjudged Liability</i>	<i>Are Employees Insured</i>	<i>Are Employees Given Legal Defense</i>	<i>Claims Procedure Used</i>	<i>Motor Vehicle, Carrier Policy, Premium.</i>
Lodi	260	90%			Refer claims to Bus. Admin. or Board Attorney or Insurance Manager	\$2,928
Teaneck .....	....	Negligible				100/300/400 \$1,109
Cherry Hill .....	....	Settled out of Court			School Supervisors; to Business Admin.; to Ins. Carrier which is Ins. Co. of North Amer.	250/500/\$50,000
Philliphburg	240	None				500/1,000/\$100,000 \$1,300
Margate City	89	....			Processed by Board of Ed. then to local ins. agent	300/1,000/\$100,000 \$364 Glenn Falls Ins.
Neptune	586	25%	Required by Statute	Required by Statute	Handled by insurance agent upon referral from school	Premium: \$10,058 Ins. Co. of N. Amer.
ifazlet	444	100%			Carriers: Hartford U. S. Fire All State Pension Life	300/500/10,000 \$7,128

You are Viewing an Archived Copy from the New Jersey State Library

<i>Board of Education</i>	<i>General Comprehensive</i>	<i>Excess Liability</i>	<i>Other</i>
Lodi	7,680	Workmen's Comp: \$17,600	<ol style="list-style-type: none"> 1. Continental Insurance Comp. Carriers the insurance package, except that the New Jersey Manufacturer Carries the Workmen's Compensation. 2. 100/300 are the limits
Teaneck	100/300/100 Royal Globe Ins. Group	Umbrella Liability \$2,000,000 limit \$1,140 St. Paul Fire and Marine	Insurer interposes defense of sovereign immunity unless reguarded not to by the board
Cherry Hill	\$500,000 single limit	Catastrophe Liability \$1,000,000 in excess of limits	
Phillipsburg	B.I. \$1,000,000 P.D. 25,000 =\$2,770		Carrier: Veh. Securet. Insurance Co. of Hartford General Liability Newark Insurance Co.
Margate City ...	500/500 \$4,865 North River Ins. Co.	Boiler & Machinery \$200,000 limit \$698 premium North River Ins. Co.	
Neptune	Includes fire and liability \$30,337.14	Excess Liab. \$1,475 Bonds 555 Workmen's Comp. . 18,475	Major Accidents: <ol style="list-style-type: none"> 1. Bleachers collapsed 2. Bus rolled over—approximately \$50,000 were paid in claims: largest were for \$11,000 and \$15,000
Hazlet	1000/1000/5000—\$3,600 Fire and Extended Coverage \$24,000		<ol style="list-style-type: none"> 1. Student Accident \$2.50-5.50/student Workmen's Compensation \$14,000 Many claims are collected on absence of supervision rationale

<i>Board of Education</i>	<i>No of Employees</i>	<i>% Judicially Adjudged Liability</i>	<i>Arc Employees Insured</i>	<i>Arc Employees Given Legal Defense</i>	<i>Claims Procedure Used</i>	<i>Motor Vehicle, Carrier Policy, Premium,</i>
Nutley	400	0%			Newark Ins. Corp.	500/1000/100,000 \$3,497
Colts Neck .....	....	....			Continental Ins. Co. of N.Y. Gen: Ins. Co. of Seattle	Single Limit: \$1,000,000
Lawrence Township	378	0%			Travelers Ins. Co. North River Ins. Co. Ins. Corp. of North Amer. U. S. Aviation Ins. Group	100/300/50,000 \$1,128
Ridgewood .....	....	None			Principal to insurance agent	
South Orange & Maplewood	670	90%			By insurance agent	
Hackettstown	179	....			Handled by ins. agent	
Belleville	500	....			Handled by ins. agent	1,000/1,000/\$50,000
Long Branch	422	Unknown			Forwarded to School Attorney & Ins. Agent	100/300/50,000 \$4,124
Perth Amboy	550	....			"	300/500/50,000 \$3,600
Tenafly	300	....			"

<i>Board of Education</i>	<i>General Comprehensive</i>	<i>Excess Liability</i>	<i>Other</i>
Nutley	1,000,000 Limit \$4,184		Policies permit the waiver of tort immunity defense
Colts Neck	Single Limit: \$1,000,000		
Lawrence Township	1,000,000 single limit \$2,700	1. Aircraft Non-Owner 1,000,000 Sing. Limit: \$450 2. Umbrella Liability 2,000,000 excess \$775	1.5 slips and falls in last 5 years, amt'g to \$1,732
Ridgewood			Insurance: Personal injury 500/1,000 Public Liability \$500/1,000 Property Damage \$100,000 Motor Vehicle 500/1,000/100 Comprehensive 1,000,000 excess
South Orange & Maplewood			1. A \$38,000 defamation judge was entered against the 8d. a teacher for something contained in a year-book
Hackettstown		Carriers: Reliance Ins. Co. Planet Ins. Co. Hartford Steam Boiler Liberty	Insurance Coverage: Auto and Comprehensive 1,000/1,000 4,977 Premium
Belleville			Insurance Company of North America
Long Branch	Malpractice, Catastrophe, Comprehensive \$1,577		
Perth Amboy	General & Person Liab. \$4,262 Continental Ins. Corp.		Five falls in last 5 years; \$3,500 in claims were paid
Tenaflly	Liability Limit: \$3,000,000 \$11,450		

the 78 municipalities, 13 responded; of the 80 school districts, 26 responded. Given this response, and given the fact that many of the returned questionnaires did not contain all of the information requested, it is not possible to make the kinds of financial and claims projections which the questionnaires were designed to permit.

What these charts do point up, however, is that governmental employees are generally insured by their employer, that most claims are not litigated in the Courts, that most public entities carry some amount of liability insurance coverage and that most claims are handled by insurance carriers.

Unfortunately, within the time available for the following survey it was possible to aggregate only a small volume of the type of insurance experience solicited. Nonetheless, the information obtained (which is contained in the attached chart B) provides the following totals:

	<i>Earned Premiums</i>	<i>Incurred Losses</i>
Automobile Liability	\$640,786	\$409,491
General Liability	1,117,103	506,702

CHART B

LIABILITY INSURANCE CARRIED BY NEW JERSEY POLITICAL SUBDIVISIONS

Sample Based on Telephone Survey Feb. 24 & 25, 1971

<i>Political Subdivision</i>	<i>Years of Experience</i>	<i>Earned Premiums</i>	<i>Incurred Losses</i>
<i>Municipalities</i>			
Automobile Liability			
Newark	1970	\$148,000	\$111,335
South Orange	1967-1971	25,549	25,024
East Orange	1970-1971	78,000	4,297 ¹
Clark (Township)	1970	9,021	1,025
Egg Harbor, Morristown, Hanover, Ewing, Little Falls, Hoboken, Wash- ington, School District of Union Beach, Buena and Egg Harbor	Various ³	203,408	112,686

<i>Political Subdivision</i>	<i>Years of Experience</i>	<i>Earned Premiums</i>	<i>Incurring Losses</i>
<i>Counties</i>			
Automobile Liability			
Essex	1970	49,841	14,828
Hudson	1966-1970	204,967	144,593
Total Auto		\$640,786	\$409,491
<i>Municipalities</i>			
General Liability			
Secaucus	1966-1969	\$13,070	\$486
	1970-1971	8,830	63
South Orange	1964-1970	65,848	103,406
Parsippany	1970	14,894	10,856
East Orange	1970-1971	[50,000]
Middletown	1966-1970	133,152	48,057
Asbury Park	1969-1970	189,392 ²	45,782
East Rutherford	1968-1971	6,747	2,131
Red Bank	1970	11,484	2,300
Eatontown	1968-1971	13,969	3,476
Brielle	1968-1971	13,871	1,021
Irvington	1970	49,672	14,863
Roselle Park	1968-1971	9,649	897
Paramus	1968-1971	21,989	6,852
Longside	1967-1970	1,933	5,192
Camden	1967-1970	169,121	48,347
Seaside Heights	1967-1970	73,251	47,861
Seaside Park	1967-1970	22,818	13,835
Mansfield	1967-1970	2,637	.....
Medford Lakes	1967-1970	11,027	3,093
<i>Counties</i>			
Hudson	1966-1970	283,840	148,184
Total General Liability		\$1,117,103	\$506,702

NOTES:

¹ Since this policy is still in force, the premiums are not completely earned and additional accidents may occur—not included in the total.

² This policy is written under the Retrospective Rating Plan—the premium reflects a \$43,000 refund, and additional reductions may result in the final adjustment under the Plan.

³ Latest 5 years, 4 years, etc., for the different entities.

These losses incurred in experience of course are subject to change with respect to that portion of the incurred losses that represent loss reserves as opposed to losses actually paid out. The general experience, however, is that losses develop upward in the aggregate and that consequently the loss ratio could be expected to increase. By calculating the loss ratio it is readily apparent that there is approximately a 65% loss ratio in automobile liability and approximately a 48% ratio in general liability. While these ratios are of course only indicators of the total picture of the State and while they do not reflect modifications of premiums due as a result of various rating plans—such as a retrospective plan—they nonetheless indicate that a very poor loss ratio exists in automobile liability situations, while the general and comprehensive liability ratio appears to be very good and perhaps indicates that the cost of insurance for comprehensive liability exceeds what the claims and incurred losses justify. In any event, since there is growing concern about the cost of liability insurance and since the examination in California indicated a propensity toward self-insurance, a thorough examination of this problem would be in the best interest of all local units of government throughout the State. The Utah Study Report done in 1964 commented “only about forty-seven cents out of every dollar paid out in liability insurance premiums by governmental entities in Utah is actually paid to claimants as compensation.” *Utah Report* at pages 52-53. While the experience gained from the above limited surveys certainly cannot stand for any broad propositions, it is recommended that a more thorough survey be conducted to determine the actual experience and cost involved with the purchase of liability insurance for local units of government; and it is also recommended that consideration be given by those units of government to a more uniform and comprehensive approach to liability coverage rather than the piece-meal approach which is indicated by the responses received from the surveys.

While the basic value of the surveys conducted for this report is informational, it is nonetheless apparent that in the light of the existing breadth of tort liability imposed upon local units of government and in light of the rather extensive liability coverage which these units of government apparently possess, any comprehensive and carefully drawn Tort Claims Act which applies to *all* public entities throughout the State, should have a minimal impact upon both the liability of and the financial cost

to the public entities throughout the State of New Jersey. This is particularly true since the New Jersey Courts have defined such liability more comprehensively than most other courts in the nation—and particularly more so than had the California courts prior to their 1963 legislative enactment.

CHAPTER 4

THE CALIFORNIA EXPERIENCE

I. *Introduction: Background to the Adoption of California Tort Claims Act of 1963.*

Reasoning that the rule of governmental immunity for tort is an "anachronism without rational basis" which has existed only by the "force of inertia," the California Supreme Court rendered a decision, on January 27, 1961, which dictated that the doctrine of sovereign immunity would no longer protect the State and other public entities from civil liability for torts committed in performance of their governmental functions. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961). In order to fully appreciate the precise impact of the *Muskopf* decision, the response of the California Legislature to that decision, and the experiences of state and local governments under the statutory scheme subsequently adopted in 1963 by the Legislature, it will be helpful to briefly review the status of the law prior to *Muskopf*.

This review of pre-*Muskopf* law will necessarily focus on the area of tort law, since "the traditional immunity of governmental entities for their torts was never extended to public contracts." See Van Alstyne, *California Government Tort Liability*, § 1.5, at 8 (1964); *Chapman v. State*, 104 Cal. 690, 38 P. 457 (1894); *Souza and McCue Construct. Co. v. Superior Court of San Benito County*, 20 Cal. Rptr. 634 (1962). As far back as 1894, the California Supreme Court ruled, in *Chapman, supra*, that the doctrine of sovereign immunity was not a defense in a contract action against the state (38 P. at 458):

"The principle that a State is bound by the same rules as an individual in measuring its liability on a contract is well expressed by Allen J., in his concurring opinion in the case of *People v. Stephens*, 71 N. Y. 549, in which he said: The State in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other.

There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business, and the conduct of business enterprises and contracts with individuals, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjudged upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor."

Prior to 1961 the general rule of sovereign immunity had been subjected to numerous exceptions created both by the legislature and the judiciary. For example, section 17001 of the California Vehicle Code imposed liability upon any "public agency" (but not employee) for death, personal injury or property damage caused by the *negligent operation* of one of its officers or employees within the scope of employment. Section 903 of the California Education Code provided that the governing board of any school district was liable for any judgment against the district on account of an injury or property damage arising out of the negligence of the school district, or its officers and employees. Another source of liability for governmental units before 1961 was Section 2 of the Public Liability Act of 1923, § 53051 Cal. Govt. Code, which imposed liability, under certain circumstances, upon a "local agency" for a dangerous or defective condition on public property. Liability was also imposed upon cities and counties for damage to property within its boundaries by mobs or riots. Govt. C. § 50140. (This provision has since been repealed, however.) *See generally, California Law Revision Commission, A Study Relating to Sovereign Immunity*, 36-108 (1963). [Hereinafter "*Commission Study*."]

The judicial branch also carved out exceptions to the rule of sovereign immunity long before *Muskopf*. For instance, in 1947 the California Supreme Court declared that the State, as well as a municipality, was liable for torts committed when it was acting in its proprietary capacity. *People v. Superior Court*, 29 Cal. 2d 754, 178 P. 2d 1 (1947). Similarly, prior to *Muskopf* a person injured as a result of the activity of a public entity could recover by an action in tort if he could muster facts to prove that the governmental activity causing the injury constituted a "nuisance." The California courts also had long recognized the doctrine of "inverse condemnation" as a remedy

against certain forms of tortious conduct causing property damage. That doctrine allowing compensation to a property owner for "damage" to his private property is rooted in the language of Article I, § 14 of the California Constitution which requires that just compensation be paid for property "taken or damaged" for public use. The present provision had its genesis in the California Constitution of 1879. The inverse condemnation doctrine allowing compensation for injury to property caused by public works is subject to a number of significant limitations, the principal of which are: (1) by definition it applies only to torts causing property damage and not personal injuries or wrongful death; and (2) the ordinary negligence or carelessness of public employees does not constitute a taking or damaging of property for public use. *See generally, Commission Study, supra*, at 102-108; 219-236.

The status of the law in California respecting sovereign immunity prior to *Muskopf* was summarized in the report of the Senate Fact Finding Committee to the Legislature, *Government Tort Liability, Seventh Progress Report to the Legislature, Part One*, at XIII - XIV (1963), as follows:

State of California

"Pre-Muskopf Law. Under pre-*Muskopf* law, the State was considered immune from tort liability. However, liability existed in a number of areas, the most significant of which were the following:

(1) Dangerous conditions of property used for a 'proprietary' purpose.

(2) Negligence in carrying on 'proprietary' activities (such as, for example, power systems, harbors and docks, railroads, public entertainments and spectacles, and demonstrations designed to attract enlistments in the National Guard).

(3) Negligent and intentional torts of employees engaged in 'proprietary' activities.

(4) Negligent operation of motor vehicles.

(5) Nuisance (including personal injury as well as property damage).

(6) Inverse condemnation.

(7) Malpractice by State medical personnel. (Government Code Section 2002.5.)

(8) Innocent person erroneously convicted and imprisoned. (Penal Code Sections 4900-4906.)

In addition, the University of California does not claim sovereign immunity as a defense in tort actions.

On the other hand, state employees are fully liable for negligent and intentional torts to the same extent as private persons, except for acts or omissions involving the exercise of discretionary authority.”

Cities and Counties

“*Pre-Muskopf Law.* Under pre-*Muskopf* law, cities and counties were liable for:

- (1) Dangerous conditions of property (by statute).
- (2) Negligence in carrying on ‘proprietary’ activities.
- (3) Negligent and intentional torts of employees engaged in ‘proprietary’ activities.
- (4) Negligent operation of motor vehicles (by statute).
- (5) Nuisance.
- (6) Inverse condemnation.
- (7) Negligence of weed abatement crews (by statute).
- (8) Absolute liability for property damage from mob or riot (by statute).

Employees are liable for negligent and intentional torts to the same extent as a private person, except for discretionary immunity.”

School Districts

“*Pre-Muskopf law.* Under pre-*Muskopf* law, school districts were liable for:

- (1) Their own negligence (by statute).
- (2) Negligent torts of employees but not intentional torts (by statute).

- (3) Dangerous conditions of property (by statute).
- (4) Negligent operation of motor vehicles (by statute).
- (5) Nuisance and inverse condemnation.

School district employees are liable for both negligent and intentional torts, except for discretionary immunity."

From the foregoing it is evident that the piecemeal approach taken by the courts and the Legislature prior to *Muskopf* operated to create numerous inequities and a lack of uniformity, since a plaintiff's right to compensation for injuries caused by tortious conduct would vary with the political entity involved and would depend more on the nature of the activity involved rather than on the conduct of the political entity.

In *Muskopf, supra*, the California Supreme Court held, in the majority opinion by Chief Justice Traynor, that a local hospital was responsible for injuries sustained by a paying patient because of the negligence of the hospital employees. The opinion characterized the rule of sovereign immunity for governmental functions as "mistaken and unjust," 55 Cal. 2d at 213, 11 Cal. Rptr. at 90, 359 P. 2d at 458, and observed that the numerous legislative and judicial exceptions to the rule "operate so illegally as to cause serious inequality." 55 Cal. 2d at 216, 11 Cal. Rptr. at 92, 359 P. 2d at 460.

The same day as *Muskopf* was decided, the California Supreme Court rendered a decision in *Lipman v. Brisbane Elementary School District*, 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P. 2d 465 (1961) which also had a potentially far-reaching impact on public entities. There, a damage action was brought by a school superintendent against the district, three of its trustees and the county superintendent of schools, and the district attorney. The three trustees were charged with engaging in a course of conduct for the purpose of discrediting plaintiff and forcing her out of her scholastic position, but the Court ruled that the doctrine of discretionary immunity would protect the trustees for their acts within the scope of employment. The opinion also indicated that the immunity of an agency from liability for the discretionary conduct of its officials was not coextensive with that of its officials, and hence an entity might be liable in instances where an official would be immune. Although under the facts presented to it the Court ultimately determined that there

was no entity liability, the following factors were listed as critical (359 P. 2d 465) :

“Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.”

The *Muskopf* decision became final on February 27, 1961. The initial legislative response to both *Muskopf* and *Lipman* was a moratorium measure, Chapter 1404 of the Statutes of 1961, suspending the effect of those decisions until the ninety-first day after the final adjournment of the 1963 Regular Session of the Legislature. The moratorium statute was adopted in June of 1961 and became effective as of September 15, 1961. This measure, however, was subsequently interpreted to be entirely procedural, and causes of action recognized under *Muskopf* were held to be merely suspended and not destroyed. *Corning Hospital Dist. v. Superior Court*, 57 C. 2d 488, 20 Cal. Rptr. 621, 270 P. 2d 325 (1962).

During the period between the *Muskopf* opinion in 1961 and the termination of the moratorium in 1963, the California Law Revision Commission authored a report containing procedural and substantive proposals regarding sovereign immunity. The majority of these proposals were adopted in legislation which became effective on September 20, 1963.

II. *The California Tort Claims Act of 1963: Procedural Aspects*

The principal source of substantive tort law and the procedural mechanisms for processing claims against public entities in California is the piece of legislation known as the California Tort Claims Act of 1963. Cal. Gov't Code § 810 *et seq.* [Hereinafter referred to as the “Act”; statutory citations will be to the California Government Code unless otherwise indicated.] Basically, the approach of the legislation was to reinstate the doctrine of sovereign immunity, except as expressly provided by subsequent portions of the Act which spell out the liabilities

You are Viewing an Archived Copy from the New Jersey State Library of governmental units and their employees. The Act's liabilities and immunities apply uniformly to *all* independent public entities since by definition the term public entity "includes the State, Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." § 811.2. The obvious intent behind this legislation was to eliminate the substantive differences among public entities that existed in the law before *Muskopf. Van Alstyne, California Government Tort Liability, supra*, § 515.

A. Claims Procedures

1. The Mechanics

The Act envisions that all disputed tort and contract claims against a public entity will be subjected to some form of administrative review through a claims presentation procedure before a suit may be brought against the public entity through the regular court system. Although, as previously indicated, sovereign immunity had been held not to apply to contract suits, by its broad terms the Act's claims presentation requirement applies to contract claims against public entities. See §§ 905 and 905.2.

Section 910 of the Act requires that a claim notification shall include the essential information about the claim: name of the claimant; date, place, and circumstance of the occurrence or transaction giving rise to the claim; a general description of the injury or loss occurred; the name of the public employee causing the injury or loss, if known; and the amount claimed as of the date of computation. Not later than the *100th day after the accrual* of the cause of action in tort, the appropriate administrative body, either the State Board of Control (the body designated to process claims against the State) or the specifically designated local body, must be presented with a notice of claim. § 911.2. A claim relating to any other cause of action shall be presented *within one year* after the accrual of the cause of action. § 911.2.

Noncompliance with the claims presentation requirement either as to *content* of the claim or *timeliness* of the filing can be a complete bar to suit against a public entity (§ 945.4) or a public employee (§ 950.2), but the doctrines of "substantial compliance," "waiver" and "estoppel" are available in some

instances to circumvent the harsh rule. See *Van Alstyne, California Government Tort Liability, supra*, §§ 8.15-8.17. Additionally, there are a number of provisions in the Act permitting the filing of a late claim within a reasonable time (up to a year). The principal provision permits the appropriate administrative body to accept late claims if the failure to present the timely claim was through mistake, inadvertance or excusable neglect and the public entity was not prejudiced through the delay. A denial of an application for filing a late claim may be reviewed *de novo* by the Superior Court. § 912(b)(1). If a court grants the petitioner relief from the claims procedure, he has thirty days to commence action on the claim. § 946.6.

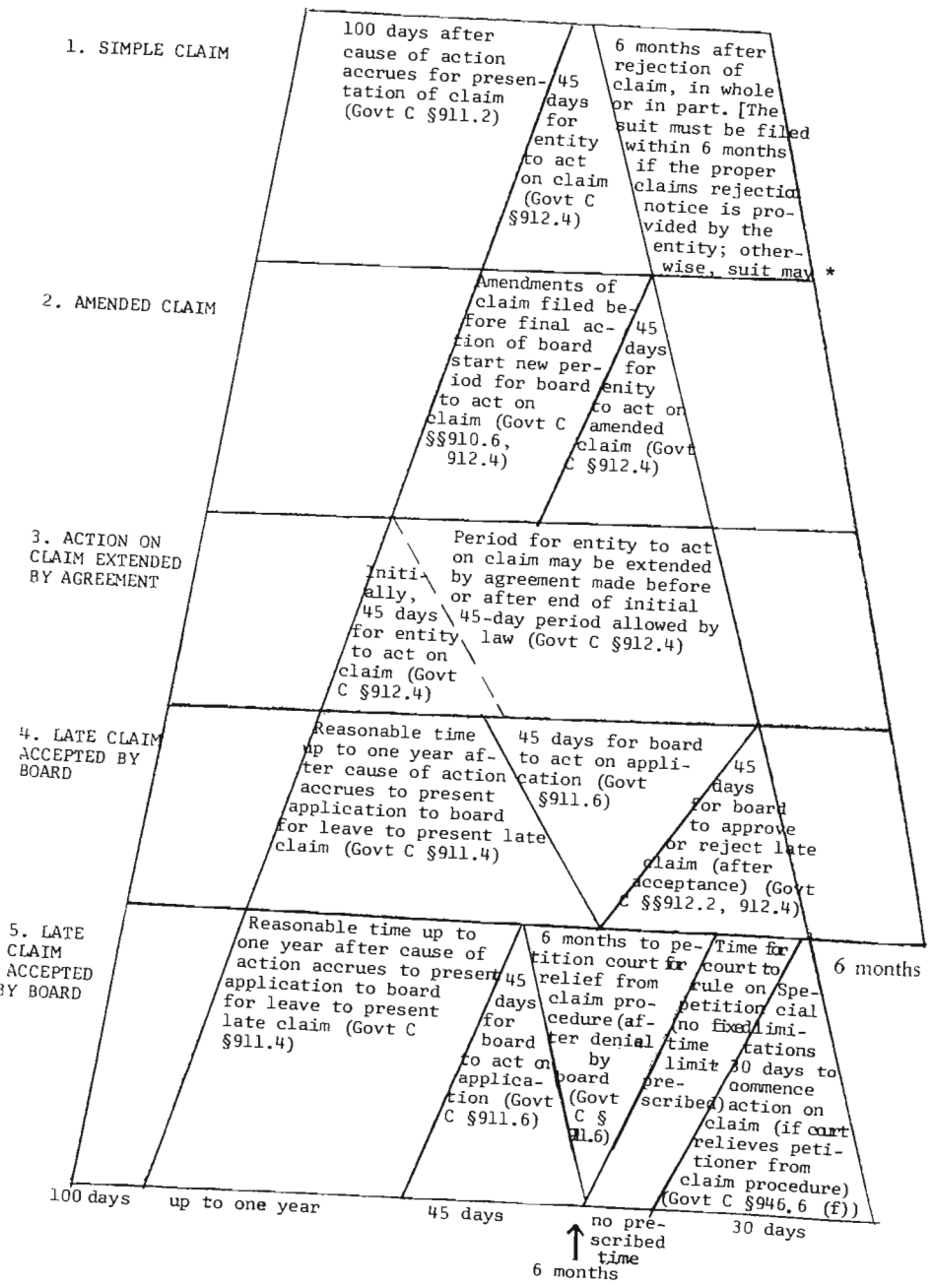
The attorneys interviewed representing the State and local entities in California reported that the courts are exceedingly lenient toward late claims—too lenient in their opinions—and claimants making timely petitions for the review of late claim applications are almost always successful. When Professor Van Alstyne was contacted he indicated that his major reservation about the 1963 Act was the potential for injustice if the claims procedure was rigidly enforced, and he suggested that perhaps a claimant should be entitled to file a late claim as a matter of right, *unless* the State can show prejudice because of the delay. Jon Smock, an attorney representing the Administrative Office of the Courts of California, expressed a similar view.

The administrative body involved has 45 days to act on the claim. A claimant may amend the claim before the expiration of the presentation period (either 100 days or one year) in section 911.2 or before final action thereon is taken by the administrative body, whichever is longer, § 910.6. Any amendment triggers a new 45-day period in which the public entity may act, but a claim can only be amended if it relates to the same transaction or occurrence which gave rise to the original claim. Both the governing boards of local public entities and the State Board of Control have the power to reject, accept or compromise any claim presented, §§ 912.6 (a) and 912.8; if no action is taken within the 45-day period the claim is deemed denied as a matter of law. Public entities are also empowered to reconsider rejected claims for the purpose of settlement, § 913.2, even if litigation is already pending. §§ 948-949.

As enacted the Act mandated that a suit must be commenced within six months after a claim is formally rejected by the administrative body involved or deemed to be rejected as a matter of law because of the Board's failure to act on the claim or to secure a continuance from the claimant. § 945.6. The statute of limitations provision was recently revised, however, and a public entity is presently required to accompany any notice of claims rejection with a notification warning the claimant that he has only six months to file and further advising him of his right to consult an attorney. If the public entity fails to provide notification of the right to sue, then the claimant involved may then file suit against a public entity *within two years* of the accrual of the cause of action. § 945.6.

The procedural channels for processing tort claims are graphically depicted in the following chart of Professor Van Alstyne (*California Government Tort Liability*, (Supplement) at inside cover) :

PROCEDURAL CHANNELS FOR 100-DAY CLAIMS



* be filed within two years of the accrual of the action. (Govt C §§913 and 945.6)]

Once suit is commenced, section 947 of the Act permits a public entity joined as a defendant to require the plaintiff to post an "undertaking" as security for the allowable costs which may be awarded against an unsuccessful plaintiff. The provision provides:

"(a) At any time after the filing of the complaint in any action against a public entity, the public entity may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars (\$100) for each plaintiff or in the case of multiple plaintiffs in the amount of two hundred dollars (\$200), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed.

(b) * * * This section does not apply to an action commenced in a small claims court."

The purpose of this type of provision is to grant a public entity a mechanism to discourage groundless and unjustified law suits. At the same time the act commendably makes the posting of an undertaking discretionary with the entity involved; presumably the discretion is prudently exercised so as not to harass or unduly burden a claimant with a meritorious cause of action.

The City Attorney's Office of San Francisco made a suggestion respecting the procedural conditions necessary to commence suit. There, a major source of concern in the area of tort litigation is the number of groundless suits filed against the police for false arrest and/or police brutality claims in which the plaintiffs seek exceedingly high punitive damages. The damages requested normally run into five or six figures in these type suits. Since a public entity is expressly barred by statute from indemnifying any public employee for a judgment for punitive damages against him, punitive damage suits ordinarily have an unnerving effect on the police officer involved and undermine the morale of the department. Apparently because the experience of the San Francisco Attorney's Office indicated that the aforementioned undertaking provision was insufficient to deter frivolous suits seeking punitive damages, it was suggested that a

person bringing a suit against a police officer seeking punitive damages be *required* to post a bond or undertaking as a condition of suit if *punitive damages* are sought. The bond or undertaking would be used as security for any court costs and/or the amount of a reasonable attorney's fee of a defendant (if he retains a private attorney to represent him regarding the punitive damage claim) which may be awarded against an unsuccessful plaintiff.

The suggestion of the San Francisco Attorney's Office undoubtedly would have the *positive* effect of causing a plaintiff's attorney to seriously reflect upon the merits of his case and the chance of recovery before filing a suit praying for punitive damages. The critical question, however, is whether such a procedure would unduly burden or inhibit plaintiffs having meritorious claims against the police. Unfortunately, there is little empirical data available to answer such a question but information was supplied indicating that only one claim had resulted in recovery against a police officer for punitive damages.

As indicated earlier, the Act contemplates that contract claims also be subjected to administrative review before suit in a similar fashion to tort claims. There are, however, a number of exceptions to this general rule. First, a State agency (subject to authorization by the State Board of Control) or a local public entity is empowered by the Act to include special provisions in their written contracts governing the time and manner of presentation, consideration and payment of claims arising thereunder. Such a claims procedure could "exclusively govern the claims to which it relates." See §§ 930 and 930.2.

Another exception to the normal claims procedure respecting the processing of contract claims is contained in § 14378 of the Government Code. The provision states that "every contract" involving the Department of Public Works and certain other State agencies *shall provide* that monetary claims totaling \$25,000 or less *may*, at the option of the contractor or the department, be subject to a determination of rights by a hearing officer appointed for that purpose from the staff of the Office of Administrative Procedure. In addition, the following section *mandates* that the "decision of the hearing officer shall be final if supported by law and by substantial evidence." § 14379. Although § 14378 was seemingly intended to provide an alternative dispute settling mechanism to the courts, the officials contacted

report that this administrative adjudicatory device has never been used.

2. *The Rationale*

Consideration was given by the Law Revision Commission to a proposal to confer jurisdiction on a special court of claims to adjudicate claims against governmental entities which had been administratively rejected. Significantly, this proposal was rejected by the Law Revision Commission in favor of adjudication through the regular court system (with a right to jury trial) after compliance with a claims presentation procedure. With respect to a special court of claims, the Commission's reasoning is persuasive (Commission Study, at 315-316):

“Second, consideration should be given the question whether jurisdiction to adjudicate tort claims which have been administratively rejected should be vested in the regular courts or should be conferred exclusively upon a special court of claims. The principal arguments in favor of a special court are substantially the same as those which might be advanced in favor of an administrative board of claims vested with substantially the same functions—to wit, relieving the courts from the burden of governmental tort litigation, providing assurance that tort claims against governmental entities will be decided from a uniform point of view divorced from local prejudices and attitudes, and developing a degree of expertise in adjudicating such claims which may be expected to come through specialization. Only three states (Illinois, Michigan and New York) appear to have such courts of claims at the present time, and in each instance the court's jurisdiction is restricted to claims against the State. As to this class of claims, the need for a new court seems dubious, for the present California State Board of Control appears to be functioning without difficulty. In all states, including those with special courts of claims, it appears that tort claims against *local* governmental entities are adjudicated in the normal trial courts in the same general way as comparable litigation against private persons, although some form of local administrative processing and rejection is often prescribed. This experience elsewhere, as verified by existing California

practice, suggests that there is no obvious or pressing need at this time for setting up a special court of claims structure in this State. Careful studies have disclosed no basis for believing that, with minor procedural modification, the judiciary would not be fully capable of handling the burden of whatever litigation an expansion of governmental tort liability might generate. If an unexpected volume of litigation, or the emergence of unique kinds of legal problems in governmental tort cases, ultimately are shown to require a court of claims apart from the regular trial courts, the advisability of such a development should then be evaluated and decided upon in the light of actual experience.”

Actual experience since 1963 has shown that the California judicial system was in fact capable of handling the additional burden of adjudicating claims against the State, and there is presently no movement afoot to change the adjudicatory procedure. With one notable exception, all of the California officials contacted endorsed the Legislature’s decision to process claims against the State through the regular court system. The one critic of the present California scheme was of the view that the State would fare better both in terms of judgments rendered against it and the amounts of verdicts in a specialized court of claims such as New York has. The attorney interviewed from the California Administrative Office of the Courts, Jon Smock, stated that his office is unalterably opposed to any type of a specialized court. Smock persuasively argued that there is nothing inherent in a tort or contract suit against a governmental entity requiring a specialized court; that the regular court system has greater flexibility with respect to the allocation of judicial time than would a specialized court; that on the whole “generalist” judges—those dealing with varied types of cases—have proven to be better judges than “specialist” judges, who tend to develop a bias for one side or the other; and that the regular court system would attract a higher caliber of candidates for a judgeship than would a specialized court.

B. *The State Board of Control*

As previously mentioned, the State Board of Control is the administrative body with which claims against the State for money or damages must be filed. The Board is an executive agency created within the Department of General Services, a

department which is located in the executive branch of government. The actual Board of Control consists of the Director of General Services and the State Controller, both acting *ex officio*, and a third member appointed by the Governor to serve at his pleasure.

In 1911, the State Board of Control was created to supervise State departments, hospitals, prisons, reformatories, boards, commissions and bureaus. In 1912, the Department of Finance was created by the Legislature, and the Board of Control served as its governing body. This arrangement prevailed until 1927 when the Legislature created a new Board of Control. At present, aside from its claims processing function, the Board has been vested with the responsibility of adopting rules and regulations controlling travel expenses and allowances; governing the use of State vehicles; and hearing protests to the purchase of supplies or equipment. The Board is also empowered to establish headquarters for State officials; approve various fiscal matters generally committed to its jurisdiction; and determine general administrative costs.

Two other functions of the Board merit mention. First, the Board administers California's Aid to Victims of Violent Crime statute. An annual appropriation is made in advance to cover these payments, and the Legislature has delegated authority to the Board to make the final determination as to compensation. Second, the Board also processes equitable or moral claims against the State. These claims are of the type where no legal liability exists, but where there is a moral right to compensation from the State. For this type of claim, the Board reviews the evidence and makes a recommendation to the Legislature. The Legislature is then at liberty to reject, accept or alter the recommendation.

The Board of Control has a full-time staff of ten people. Approximately 6.4 of its manpower is devoted to its law claims processing duties. The Board's administrative budget for the fiscal year 1970-71 is \$128,278, but it was unable to provide any further breakdown as to the approximate cost of processing claims against the State.

The purpose behind the requirement that claims be presented with the State Board of Control is twofold: (1) the State is provided with an opportunity to settle just claims before a suit is brought; and (2) the State is provided with an opportunity

to make an early investigation of the facts on which a claim is based, thereby enabling it to properly defend itself against unjust claims and to correct conditions or practices which gave rise to a claim. California Law Revision Commission, *Recommendation Relating to Sovereign Immunity*, 1008 (1963). [Hereinafter referred to as "Commission's Recommendations"]. Before the Act, courts, relying on the validity of these objectives, "sustained former claims presentation requirements [for claims against public entities where sovereign immunity did not apply] as reasonable and thus constitutional." *Van Alstyne, supra*, at § 8.6, at 362. This concept of administrative processing of claims prior to suit was so entrenched in the California practice, that little serious consideration seems to have been given to eliminate it.

It is noteworthy that all of the officials of California State government interviewed (with the exception of those employed by the State Board of Control) were of the view that the administrative processing of claims against the State mandated by the Act is of minimal value. At the hearings held by the State Board of Control, the Board normally follows the recommendations of the State as to which claims to accept, reject or compromise. The consensus was that those claims which were settled before the Board of Control would have been settled before trial anyway, and the prescription in the Act requiring the attorney for the State to deal with another bureaucratic agency was unduly wasteful.

On the other hand, the State and local officials contacted were unanimously of the view that the claims presentation requirements in the Act are worthwhile, since they operate to give the State early notice of a claim at a stage when prompt investigation might uncover factual data favorable to the State. In sum, the "off the record" recommendation of the experienced State and local officials interviewed is that administrative review by an agency such as the State Board of Control could be eliminated, but that a claims notification procedure should be maintained. Rather than filing a notification of a claim with the appropriate administrative body, a claimant, under this modified system, would file its claim notification directly with whatever instrumentality is designated to defend the entity and public employee involved. A claimant would also be required to send a copy of his claim to the public entity directly involved in the litigation.

C. *Role of the Public Attorney*

1. *The Attorney General's Office*

The torts section of the Attorney General's Office represents the State and State employees in approximately 50% of the tort suits in which the State is a party. The other 50% of the tort actions against the State are handled by the legal staff of the Department of Public Works, an agency which is responsible for the State's highways and its bay toll crossings. Neither the Attorney General's Office nor the Department of Public Works represent the State in suits or claims involving State motor vehicles, since the State purchases liability insurance for its vehicles and turns all claims of this type over to its carrier.

The torts section has a full-time legal staff of nine attorneys and seven investigators located in offices in Sacramento, San Francisco and Los Angeles. Ordinarily, the initial contact this section will have with a tort claim will be occasioned by the filing of an "incident report" by a State agency having knowledge of an occurrence that might give rise to a tort claim. Upon receipt of the incident report an investigator will review the report and determine the need for an immediate follow up investigation, and if this is needed an investigator will be dispatched to the scene from one of the three local offices. It occasionally happens, however, that the first notification the Attorney General's Office receives about a tort incident is through a claim notification which had been filed with the State Board of Control. (This situation occurs quite frequently when a person is injured in one of the numerous State recreational facilities and does not report his injury to the authorities there.) If a claim notification is filed before an incident report, the State agency involved will immediately be requested to file an incident report and ordinary procedures will then be followed.

Upon referral of a tort claim from the State Board of Control, an attorney with the tort section will review the file and attempt to settle the claim. Pursuant to § 935.6 of the Act, the Board has delegated the power to adjust and settle tort claims not exceeding \$1,000 to the Attorney General's Office and hence a tort claim not in excess of that figure can be settled by an attorney from the tort section. Claims in excess of \$1,000 may be settled or adjusted at a hearing before the Board during which the Board will normally abide by the Attorney General's recommendation as to settlement and a settlement figure. (The

Board has never imposed a settlement upon the State against the wishes of the State's attorney.) Tort settlements not in excess of \$1,000 or awards by the State Board of Control are paid by a warrant drawn by the Controller from a general tort fund appropriated annually to the Attorney General's Office. § 965.

Once a claim has been rejected by the Board and suit has been filed, the State may compromise or settle a tort claim without obtaining approval of the Board. § 948. Pursuant to an agreement worked out with the Director of Finance, the torts section has the authority, subject to the approval of the agency directly involved in the litigation, to settle a tort claim in an amount not in excess of \$4,000. When a settlement is arrived at in excess of \$4,000, it must receive the written approval of the Director of Finance aside from the approval of the agency involved in the litigation. Such a settlement as well as a judgment against the State are paid by a warrant drawn by the Controller from the general tort fund.

This general tort fund is comprised of appropriations made in advance of each fiscal year on the basis of a projection by the torts section as to its administrative budget and its potential liabilities for suits to be tried or settled in the upcoming fiscal year. Through the assistance of Assistant Attorney General Willard Shank, figures were obtained respecting the *administrative* budget of the tort section for the past eight years. This budget represents solely the cost to the Attorney General's Office of its representation of the State and its employees and does not represent the cost of judgments or settlements reached. (For an analysis of the claims experience respecting costs of Tort Judgments see Sec. 5 *infra*.)

	<i>FY</i>			<i>FY</i>
	9/64-7/65	<i>FY</i> 65-66	<i>FY</i> 66-67	67-68 <i>est.</i>
Salaries and Wages	\$92,550	\$211,019	\$218,911	\$188,911
Operating Costs . . .	29,301	29,830	33,815	34,000
Equipment	12,627	613	0	0
<i>Totals</i>	<u>\$134,478</u>	<u>\$241,462</u>	<u>\$252,726</u>	<u>\$222,911</u>

Approximate Total FY 68-69 FY 69-70 FY 70-71 FY 71-72

Cost in salaries, operating costs and expenses	\$264,000	\$280,000	\$341,000	\$376,000
--	-----------	-----------	-----------	-----------

An explanation of some of the above figures may be helpful. In the fiscal year 1963-64, the State was covered by comprehensive liability insurance, and hence there was no administrative budget since all tort actions were automatically referred to the insurance carrier. The disparity between the amount budgeted for salaries in 1964-65 as opposed to 1965-66 (\$92,550 and \$211,019) is explained by the fact that 1964-65 was the first year that the State was representing itself and a large staff was not necessary because the suits being handled had not reached the trial stage. The approximate \$30,000 decrease in the amount budgeted for salaries between 1966-67 and 1967-68 (\$218,911 and \$188,911) evinces the effect of a newly elected Governor's austerity program.

An analysis of the administrative budget of the torts section for the first six years (1964-65 through 1969-70) shows a total cost to the State of approximately \$1,395,577. This figure averages out to a cost of \$232,596 per year for the past six years. However, if the administrative budgets for the last four fiscal years (1968-69 through 1971-72) are computed the total cost is approximately \$1,261,000, the average cost per year being \$315,250.

The Attorney General's Office also represents the State in all contract suits in which the Department of Public Works is not involved. Initially, a contract dispute will be handled by a "house" counsel retained by a specific agency, and any preliminary settlement negotiations will ordinarily be conducted by the house counsel. But once suit is instituted, the Attorney General's Office takes over the case. The settlement procedures in contract cases are substantially similar to those in torts, it being necessary to obtain the approval of the State agency involved and the Director of Finance for contract settlements in excess of an amount agreed upon between the Director of Finance and the Attorney General. § 948. The major difference between contract and tort settlements (or judgments) is that a contract settlement or judgment is paid out of the annual budget of the particular agency. If insufficient funds exist to satisfy

a settlement or judgment, the Legislature appropriates funds to satisfy the settlement.

2. *The Department of Public Works*

As previously noted, the Department of Public Works is the department responsible for all the State's bay toll crossings and the nearly 18,000 miles of State highways. It reports that between 17 and 20 attorneys on its legal staff handle the Department's tort and "inverse condemnation" cases which arise principally from maintenance of the State highways. Ten full-time investigators are also on the Department's staff. The Department is fortunate in having a built-in reporting system for most tort incidents affecting it, because accidents or property damage on or about state highways are usually the subject of immediate police reports by the county or state highway patrols.

The State Board of Control has delegated to the Director of the Department of Public Works the authority to settle personal injury and property damage claims under \$1,000 which are not covered by insurance. See 2 Cal. Adm. C. § 632.11 and § 935.6. Tort claims settled either at the Board of Control stage or during the pendency of suit need the approval of the Director of the Department of Public Works, but not of the Director of Finance. The money for payment of tort claims or judgments comes directly from money appropriated on an annual basis to the Department of Public Works.

The legal staff of the Department of Public Works is also responsible for handling contract disputes involving the department. Contracts not in excess of \$25,000 involving the Department of Public Works are subjected to section 14378 of the Government Code *permitting* either the contractor or the department to have a determination of rights by a hearing officer from the staff of the Office of Administrative Procedure. The determination of the hearing officer is binding if supported by law and substantial evidence. § 14379. Unlike with agencies represented by the Attorney General's Office at trial, contracts involving the Department normally contain an elaborate claims adjudication procedure which attempts to adjust or settle a contract dispute within the Department. Under the mechanism specified in a Department of Public Works contract, a claimant must initially notify the Department of his claim (within a specified period) and attempt to negotiate a settlement with a repre-

[You are Viewing an Archived Copy from the New Jersey State Library](#)
sentative of the department; if the claim is denied at the lower level then the claimant must appeal to a Board of Review within the Department. This Board of Review must consist of an attorney and an engineer from the Department's staff. If the Board of Review denies the claim, then the contractor may commence suit. The funds to satisfy a judgment or settlement arrived at after or during a law suit processed through the regular court system, or by the decision of an administrative officer, are taken directly from the budget of the Department. No approval is needed from the Director of Finance for contract settlements.

3. *The City Attorney's Office of San Francisco*

Claims against the City of San Francisco are filed either with the Comptroller of that City or with its Board of Supervisors. They are automatically referred to the City Attorney's Office; normally tort claims are denied without any administrative review because of the inability of the city to adequately investigate a claim within the statutory 45-day period given the entity to process a claim. With respect to settlement, the San Francisco procedure is that the City Attorney can settle all claims (with the exception of those involving profit-making public utilities which are handled separately) against the City which do not exceed \$500.00, subject to the approval of the municipal agency involved in the litigation. Any claim exceeding \$500.00 can only be settled after passage of a published ordinance by the Board of Supervisors. Moreover, once litigation has started an ordinance is needed to effectuate settlement no matter how much the amount involved. The money to satisfy judgments or settlements is paid through warrants drawn by the City Comptroller after the settlement requirements are complied with.

From the above description of the San Francisco settlement procedures, it is apparent that the City Attorney's ability to bring about prompt settlements is severely curtailed by the somewhat archaic restrictions in the Charter which require approval by the Board of Supervisors for settlements entered into after a suit is instituted or in excess of \$500.00. It seems that the lesson to be learned from the San Francisco procedure is that, whether or not a comprehensive torts statute is adopted in New Jersey, local entities should scrutinize their charters to determine if there are any bars to a City Attorney's ability to enter into an immediate settlement (subject to the approval of the agency involved) for a realistic amount.

The City Attorney of San Francisco reports that there is no "section" as such in the office which specializes in handling the tort claims against the City. The Office has a staff of 39 attorneys, and individual attorneys are assigned to review tort claims against the City and represent municipal employees in connection with their other duties in advising or assisting a particular municipal institution or agency. The only available statistic as to manpower deployment suggests that tort suits against the police occupy the total workload of approximately 2½ men out of the entire staff. There is only one full-time investigator for the tort claims, and hence the City Attorney is ordinarily required to rely upon the personnel of the particular agency or institution involved in the tort claim for his investigatory work. Although the abrogation of the sovereign immunity doctrine has brought about some increase in the number of claims and attendant litigation in which the City is involved, this has not necessitated an increase in the legal staff of the San Francisco Office. Rather, any increase in tort claims has been handled by a shifting of workload assignments within the office.

4. *The City Attorney's Office of Los Angeles*

The settlement procedures permitted in Los Angeles are considerably more flexible than those in San Francisco. There, according to information provided by the Chief Attorney in the litigation section, the City Attorney is unilaterally empowered to bring about the settlement of a claim or suit not in excess of \$5,000. When a settlement figure exceeds \$5,000, the City Attorney's Office must then obtain the approval of both the Mayor and City Council.

The City Attorney's Office in Los Angeles is generally regarded as having developed the most comprehensive approach for processing and investigating tort claims. That office has a separate litigation section consisting of 16 attorneys, 13 of which are exclusively assigned to tort litigation. Nine full-time civilian investigators are assigned to conduct ordinary tort investigations, and six police officers are assigned full-time to the City Attorney's staff exclusively to investigate suits against the Los Angeles Police. No figures are available at this time respecting the administrative budget of this office.

The key to the Los Angeles approach is the size of their legal and investigatory staff and their ability to utilize the members of that City's police department not associated with the City

Attorney's Office as a built-in reporting system. That is, all police officers are instructed to make out investigation reports and to forward them to the City Attorney's Office within two days of any incident coming to their attention which is a potential claim. Additionally, if the police become aware of an incident of any magnitude, they are instructed to contact a centralized bureau maintained under the control of the City Attorney's Office which is in operation 7 days a week, 24 hours a day and which can immediately dispatch an investigator to the scene of an accident. Once suit is instituted against the City, the case is immediately assigned to a Deputy City Attorney who then becomes responsible for that individual case at least until a judgment is rendered.

D. *Defense of Public Employees*

Upon request a public entity is charged with providing for the defense of an employee or former employee in a civil action brought against him, in his official or individual capacity or both, on account of an act or omission during his public employment, § 995. This mandate includes a cross-action, counterclaim or cross-complaint.

There are three grounds for an entity's refusal to provide an employee or former employee with a defense: first, conduct not within the scope of employment, for example, when the employee was off duty; second, if the injury complained of was caused by an act or omission occasioned by the actual fraud, corruption or actual malice of the employee; third, the possibility of a conflict of interest, for example, in a situation where it would be in the employer's interest to prove conduct not in scope of employment or malice so as to avoid the employee indemnification provisions. See § 825 *et seq.* But a public entity is liable to the employee for the cost of his defense—reasonable attorney's fees, costs and expenses—if it wrongfully refuses to tender a defense. § 996.4. Section 996 states that a public entity may provide for an employee's defense through its own attorney, by employing outside counsel or by purchasing insurance requiring the insurer to provide the defense.

Respecting criminal proceedings, the Act provides that although a public entity is not required to provide for the defense of one of its employees in a criminal proceeding, it has the discretion to do so if (1) the act complained of occurred during

the course of employment; (2) the entity determines it is in its own interest to provide a defense; and (3) the entity determines that the employee or former employee acted in good faith without actual malice. A similar provision in the act vests a public entity with the discretion as to providing for the defense of its employee at an administrative proceeding brought against him. § 995.6.

Despite the theoretical right under the statute of a public entity to refuse to defend its employee or former employee, those attorneys contacted from both state and local government in California indicated that in actual practice a public entity rarely if ever refuses to defend its employee or former employee. In fact, when the California practice in these areas was probed during various personal interviews, both local and State officials appeared hard-pressed to recall more than a couple of instances where a defense was refused a public employee or former employee. Only the City Attorney's Office of Los Angeles indicated an inclination to assert its right under the Act. Seemingly, the dynamics of the employment relation are such in California, that an entity feels that, except in the most flagrant situations, the damage to employee morale would far outweigh any gain to be realized from a failure to defend.

III. *The Tort Claims Act of 1963: Substantive Aspects*

A. *General Provisions*

Aside from setting forth the procedural mechanism for processing the various types of claims against the State, the Act is also the principal source of tort liability and immunity.

The basic statutory approach of the legislation is to reinstitute sovereign immunity in § 815 (a) by declaring that "except as otherwise provided by statute," a "public entity" is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or another person. The policy considerations which prompted the Legislature to adopt an approach reimposing sovereign immunity subject to certain stated exceptions, rather than an approach abolishing sovereign immunity subject to certain express immunities are expressed in the proposals of the California Law Revision Commission (*Commission's Recommendations, supra*, at 811):

Determination of basic statutory approach.

The initial question to be decided in formulating a legislative plan to govern the tort liability of public entities is whether they should be liable only as made liable by specific enactment or whether they should be made liable for all damages and injuries caused by their activities except as such liability is limited or conditioned by statute.

A statute imposing liability with specified exceptions would provide the governing bodies of public entities with little basis upon which to budget for the payment of claims and judgments for damages, for public unforeseen situations, any one of which could give rise to costly litigation and a possible damage judgment. Such a statute would invite actions brought in hopes of imposing liability on theories not yet tested in the courts and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of insurance under such a statute would no doubt be greater than under a statute which provided for immunity except to the extent provided by enactment, since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under a statute imposing liability with specified exceptions.

Accordingly, the legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by an enactment. This will provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability. Should further study in future years demonstrate that additional liability of public entities is justified, such liability may then be imposed by the Legislature within carefully drafted limits.

Section 815 (b) reflects another underlying policy determination. It provides that the liability of a public entity "is subject to any immunity of the public entity provided by statute." This language was intended to ensure that the immunity provisions in the Act or any other statute would prevail over its

liability provisions. Paragraph "b" of section 815 also provides that a public entity may utilize any defense available to a private person (e.g., contributory negligence or assumption of risk).

The primary source of entity liability is § 815.2 (a) of the Act. It establishes the principle of vicarious liability by imposing liability upon the public entity for "injury proximately caused by an *act* or *omission* of an employee of the public entity within the scope of his employment . . . (emphasis added.)" The broad grant of liability is somewhat limited by the rule established in paragraph "b" that "except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." This section effectively nullifies the suggestion in *Lipman v. Brisbane Elementary School District*, 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P. 2d 265 (1961), discussed in Part I of this section, *supra*, that an entity's discretionary immunity is not coextensive with that of its employee's and hence liability may exist under some circumstances even though the employee is immune.

The principal statutory provisions which "otherwise provide" for entity liability despite the existence of public employee immunity are:

Dangerous condition of public property—Govt C §§ 830-835.4, 840.2.

Destruction of diseased plants and animals—Ag C §§ 153.2, 207, 239, 264.

Emergency vehicles, injuries resulting from operation of—Veh C §§ 17001, 17004.

Erroneous conviction of felony—Pen C §§ 4900-4906.

Hospital facilities, failure to conform to applicable standards—Govt C § 855.

Joint powers agreements between public entities, injuries caused in the performance of—Govt C § 895.2.

Livestock killed by dogs—Ag C § 439.55.

Mandatory duty imposed by enactment, failure to exercise reasonable diligence to discharge—Govt C § 815.6.

Private property commandeered by governor in emergency, liability to compensate for—Mil & V C § 1585.

Relocation of utility facilities, restoration of street crossings, and repair of other damage caused by public improvement projects—see numerous statutory provisions cited in California Law Revision Commission, *A Study Relating to Sovereign Immunity* 78-97.

“Save harmless” clauses in contracts, indemnification by public entity—see Note 3, § 814.

See generally, Van Alstyne, *supra*, at 501-502 and §§ 5.32-5.37.

Certain general substantive principles may be garnered from § 815.2 of the Act and the provisions that follow. First, the principle of *respondeat superior* was accepted by the Legislature and hence a public entity is vicariously liable for the “acts or omissions” of its employee in the course of public employment. Liability for the “acts or omissions” of an employee would include acts commonly classified as intentional torts. See *Van Alstyne, supra*, §§ 7.3 (at 285) and 7.34 (at 317). A public entity paying any judgment arising out of the wrongful conduct of its employee, however, may recover the amount it paid out from the employee if he “acted or failed to act because of actual fraud, corruption or actual malice.” § 825.6. Second, a public entity is generally immune if its employee is immune. (See the discussion, *supra*, for the exceptions to this rule.) Third, a public entity is generally liable if its employee is liable.

The situations where a public employee’s liability is broader than his entity’s are collected in *Van Alstyne, supra*, § 5.35 (at 145):

The general rule of vicarious liability in Govt C § 815.2 (a) (see § 5.33), like all other public entity liabilities in the California Tort Claims Act, is subject to the qualification in § 815 (b) that statutory liabilities are subordinated to statutory immunities. See § 5.27. Thus, in certain cases, even though a public employee is liable, his entity employer may be protected against vicarious liability by a statutory immunity. Examples are:

(1) Exemplary and punitive damages may be awarded against public employees, but not against public entities (Govt C § 818);

(2) Public employees may be liable for misrepresentation motivated by actual fraud, corruption or actual malice (Govt C § 822.2);

(3) Public entities are immune from liability for injuries sustained by prisoners, other than injuries resulting from negligent operation of motor vehicles (Govt C § 844.6(a)); public employees are generally liable for injuries to prisoners (Govt C § 844.6(d));

(4) Public employees are liable for willful misconduct in transporting injured persons from the scene of a fire to medical aid, but public entities are entirely immune in such cases (Govt C § 850.8); and

(5) Public entities are immune for injuries, other than those resulting from negligent operation of motor vehicles, sustained by a person committed or admitted to a mental institution (Govt C § 854.8(a)); public employees generally are liable (Govt C § 854.8(d)).

These are entity immunities from *direct* liability. The public entity often still is financially liable, because of its statutory duty to indemnify employees against personal loss from their torts in the scope of employment. Govt C §§ 825-825.6; see §§ 10.21-10.26.

Another instance where an entity would be immune even though its employee is liable involves suits under the Federal Civil Rights Act, 42 U.S.C. § 1983. That provision permits an individual to sue "persons" acting "under color of law" for actions operating to abridge or deny constitutional rights. Since it was held in *Mouroe v. Pape*, 365 U.S. 167, 190 (1961), the seminal decision dealing with § 1983 liability, that cities and counties are not "persons" within the meaning of § 1983, it would appear that a public entity could not be liable for damages under § 1983 although its employee might. However, the entity still would be under a duty to defend or indemnify its employee under certain circumstances, since the entity's duty "to provide a defense and to indemnify extends to 'any claim or judgment.'" *Van Alstyne, 1967 Supplement, supra*, § 5.34 (at 9).

B. *Entity and Employee Immunities*

The following express immunities are provided to a public entity under the Act:

§ 818.2—No liability for the adoption or failure to adopt or enforce an enactment or law.

§ 818.4—No liability for the issuance, denial, suspension or revocation of a permit, license, etc.

§ 818.6—No liability for the failure to inspect, or the negligent inspection of property other than the entity's.

§ 818.7—No liability (for either the entity or its employee) for the publication of records relating to narcotics law violators, provided a reasonable effort is made to keep the name of the violator confidential.

§ 818.8—No liability for misrepresentations by public employees, whether or not such misrepresentation be negligent or intentional.

The rationale behind the adoption of most of the above-mentioned immunities is apparent from a reading of the provisions. The only immunity which merits discussion is § 818.7, which bars liability for the publication of records relating to narcotics law violators if a reasonable effort was made to keep the name of the violator confidential.

Section 818.7 was added to the Act in 1968. It was not recommended by the California Law Revision Commission, and no official comment to the provision was adopted with it. The intent of the provision appears to be to allow the dissemination of reports and other information pertaining to the use of narcotics, while at the same time safeguarding the right of privacy of one included in such information.

The following immunities are provided generally to a *public employee* under the Act:

§ 820.2—No liability for discretionary acts.

§ 820.4—No liability, if due care exercised, for the execution or enforcement of laws, except for false arrest or false imprisonment.

§ 820.6—No liability for good faith acts (without malice) under the apparent authority of an invalid or inapplicable enactment.

§ 820.8—No liability for the acts or omissions of other persons.

§ 821—No liability for the adoption or the failure to adopt or enforce an enactment.

§ 821.2—No liability for the issuance, denial, suspension or revocation of a permit, a license, etc.

§ 821.4—No liability for the failure to inspect, or negligent inspection of property other than that of the entity.

§ 821.6—No liability for the institution or prosecution of judicial or administrative proceedings within the scope of employment, even if done so maliciously without probable cause.

§ 821.8—No liability for entry upon property expressly or impliedly authorized by law.

§ 822.—No liability for money stolen from official custody.

§ 822.2—No liability for negligent or intentional misrepresentation, unless actual fraud, corruption or actual malice is involved.

Once again, the motivation behind most of the above mentioned immunities is evident from the language of the particular provision. The only provision meriting discussion is § 820.4, which immunizes a public employee, exercising due care, in the execution or enforcement of any law.

A similar provision to § 820.4 appears in the Federal Tort Claims Act, § 28 U.S.C. § 2680(a). With the exception of false arrest and false imprisonment charges, § 820.4 appears to be intended to free public employees from the threat of law suits for vigorously enforcing valid State "laws" if due care is used. A "law" is defined in the Act to include both enactments and decisional law. § 811. Immunity is similarly afforded public employees acting, in good faith without malice, under the apparent authority of an "enactment" which is unconstitutional, invalid or inapplicable. § 820.6. An "enactment" is defined in the Act to include constitutional provisions, charters, ordinances, and administrative regulations, as well as statutes. § 811. Section 820.6 is seemingly an attempt to remove any inhibition to vigorous enforcement of a law which a public employee might have if a particular law he is proceeding under is of questionable validity or applicability. The provision rightly assumes that legal decisions as to the validity or applicability of an enactment are beyond the function of the ordinary public employee.

C. Dangerous Conditions on Public Property

The Act contains a separate and somewhat confusing chapter dealing with an entity's and a public employee's liability for

dangerous conditions on public property. As a general proposition, it may be stated that entity liability exists for injury caused by the dangerous conditions on public property if the entity created the dangerous condition or had actual or constructive notice of it and failed to take reasonable measures to protect against injury from the condition. § 835-835.4. Under more limited circumstances a public employee may be liable for injuries caused by a dangerous condition on public property. In order to establish constructive notice against the employee, however, a plaintiff must establish that the employee had both the authority and duty to inspect public property and that the funds and other means for making inspection were immediately available to him.

According to State officials, the greatest potential source of liability for a public entity is liability for the plan or design of a construction of, or an improvement to public property. The Act provides a public entity and public employees with the following immunity (§ 830.6):

Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, *if the trial or appellate court determines* that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

Section 830.6 was enacted as recommended by the Law Revision Commission. In particular, the Commission was concerned with the State's liability exposure for the design of its older highways. For example, at the time of construction three lane highways, "Y" turns and narrow lane roads were considered safe, but under modern standards such designs might be considered unsafe. The provision was initially interpreted to confer immunity if a particular plan or design was reason-

able at the time of its adoption, even though subsequent experience showed defects or shortcomings in the plan or design. *Cabell v. State*, 67 Cal. 2d 150, 60 Cal. Rptr. 476, 430 P. 2d 34; (1967) *Becker v. Johnston*, 67 Cal. 2d 163, 60 Cal. Rptr. 485, 430 P. 2d 43 (1967).

In *Cabell, supra*, the California Supreme Court rejected the contention that college officials were obligated to abandon the use of a certain type of glass commonly used in lavatory doors after a number of accidents involving that type of glass had occurred in a college dormitory. The Court's reasoning as to the scope of the California plan or design immunity is instructive (430 p. 2d at 37):

However, the summary judgment declarations further disclose that as early as December 1960 another student had been injured when the glass in the sixth-floor lavatory door in the dormitory had given way and broken when he had attempted to push the door open; that approximately one month before plaintiff was allegedly injured in December 1961 the glass in the door involved in plaintiff's accident had shattered and broken into pieces when a student's arm had come in contact with it, and had been replaced by the college maintenance department with the same type of glass as that originally installed; the glass pane in another lavatory door on the same floor of the dormitory had also broken about a month before plaintiff's accident.

Plaintiff contends that the type of glass originally installed had thus been shown to be dangerous and that replacement of the broken glass with the same type as originally used constituted maintenance of a dangerous condition by defendant State to which the plan or design immunity does not apply. We are persuaded that there is no merit in this contention. As noted hereinabove, the plan or design is to be judged as of the time it was adopted or approved. If the broken glass had not been replaced at all but instead had been left with sharp or jagged pieces still in the door, or if it had been replaced with glass inferior to that originally used, then a charge of dangerous condition could not be met with the plan or design defense. But when, as here, the maintenance was in conformity with the original plans and specifications, the immunity provided by § 830.6 comes into play.

Our holding that the immunity applies with respect to ordinary routine maintenance of public property is, of course, to be distinguished from a situation in which reconstruction or new construction is engaged in and in which the showing of reasonableness should relate to the time of adoption of the plan or design for such reconstruction or new construction and not to the time of adoption of the original plan or design.

(Interestingly, the Attorney General's Office received an estimate that it would have cost the State approximately \$1,000,000 to replace the type of glass mentioned in *Cabell* in all its State college dormitories.)

The California Law Revision Commission's *Tentative Recommendation Relating to Sovereign Immunity: Revision of the Governmental Liability Act* (1970) proposed that the plan or design immunity be narrowed so as to subject an entity to liability for injuries caused by a condition arising subsequent to the construction of an improvement to public property where the public entity acted unreasonably in failing to protect against a dangerous condition it was aware of. The proposed amendment to § 830.6 expressly stated that it did not apply where an "injury is caused by the condition of a street or highway." Nonetheless, the Commission's proposal evoked intense opposition from the Torts Section of the Attorney General's Office and other governmental agencies and was not submitted to the Legislature in 1970.

The most recent development in the State of California relating to plan or design immunity was the California Supreme Court's decision in *Baldwin v. State*, 99 Cal. Rptr. 145, 491 P. 2d 1121 (1972). In this case an action was brought by a truck driver against the State and a motorist when his truck was hit in the rear while he was attempting to make a left hand turn from the "fast" lane of a four lane highway. The plaintiff argued that the intersection where the accident occurred was a dangerous condition because of the absence of a left hand turn lane, the history of many accidents at this site, the heavy traffic experience and the recognized high speeds on this particular Boulevard. In support of his contentions the plaintiff introduced documentary evidence demonstrating the past history of accidents at the intersection, prior engineering recommendations for corrective action, and the dramatic increase in vehicle use of the intersection in recent years. Although the trial court

granted the State's motion for summary judgment on the basis of its conclusion that plan or design immunity was perpetual once it attached, the California Supreme Court in an apparent reversal of previous decisions concluded that plan or design immunity is not perpetual and that if future events result in the creation of a dangerous condition the State's traditional plan or design immunity will not foreclose liability. The California Supreme Court reasoned as follows:

“To recapitulate we hold that where a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under changed physical conditions produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6.”

In reaching its conclusion the California Supreme Court indicated its belief that prior to the adoption of the California Tort Claims Act in 1963 there was no serious consideration of whether or not plan or design immunity should be perpetual. This reading of the legislative history is perhaps questionable but it is noteworthy that without a specific statutory provision indicating perpetual immunity, the California Supreme Court has rejected that proposition. In addition, the court “unhesitatingly rejected” the argument that a narrow interpretation of design immunity would bankrupt the State. The court pointed out that no fiscal disaster appears to have resulted in earlier California experience where local units of government were liable for dangerous conditions on public property without design immunity or in New York or Illinois where plan or design immunity dissolves if a change of circumstances occurs. The California Supreme Court therefore specifically overruled *Cabell, supra.*, to the extent that it was inconsistent with its ruling in *Baldwin*.

It is anticipated that the Department of Public Works of California will draft legislation to statutorily overrule *Baldwin*, but the officials contacted in California since the time of that decision foresaw little possibility that such legislation would be passed.

Aside from the plan or design immunity, the following immunities are provided generally in the dangerous conditions chapter:

§ 830.4—No liability for the mere failure to provide traffic control or regulatory signals or signs in accordance with the Vehicle Code. (Section 830.8, however, imposes liability for the failure to provide traffic warning signals, signs or markings, if a traffic or warning signal, marking or devices described in the Vehicle Code is necessary to *warn* of a dangerous condition not reasonably apparent to one exercising due care.)

§ 830.9—No liability for the operation or nonoperation of official traffic control signals when controlled by emergency vehicle.

§ 831—No liability for the effect on the use of highways and streets of weather conditions.

§ 831.2—No liability for the natural condition of any unimproved property.

§ 831.4—No liability for unpaved access roads to recreational areas.

§ 831.6—No liability for unimproved and unoccupied portions of certain lands.

§ 831.8—No liability, with certain exceptions, for condition of reservoirs, canals, conduits, or drains.

The California Act does not *specifically* deal with the State's liability for injuries occurring on or in its recreational facilities; rather, the State's liability falls within the State's general duty to keep its property free of dangerous conditions and to warn of the existence of such conditions. A number of the immunities in the dangerous conditions chapter, §§ 831.2 and 831.4, *supra*, are undoubtedly an attempt to afford the State some measure of protection because of the significant liability exposure occasioned by the vast amount of recreational facilities maintained by the State in California.

According to the Attorney General's Office, public recreational facility injuries are the type of tort claims with which that Office is most involved. Additionally, the number of these claims is increasing every year. The suggestion was forthcoming from Willard Shank, the Assistant Attorney General in charge of the Torts Section, that New Jersey should seriously consider im-

munizing both public entities and public employees for any injuries occurring on public recreational facilities. Shank reasoned that since recreational facilities are usually low priority items in an entity's budget, a citizen should be willing to assume the risk of injury if he desires to use public recreational facilities. It was also suggested by the Attorney General's Office that if full immunity is not afforded an entity for conditions on its recreational property, any statute treating an entity's liability for its recreational facilities should spell out that an individual using such facilities *assumes the risk* of injury resulting from any dangerous condition on the property of which he knew or should have known.

D. *Law Enforcement and Correctional Activities.*

Public entities in California are liable for the "acts and omissions" of their employees, and this liability includes intentional as well as negligent torts committed by law enforcement officers within the scope of their employment. And, although law enforcement officials (acting with due care) are expressly immunized from liability for acts or omissions in the execution or enforcement of valid laws, the immunity provision also states that nothing "in the section exonerates a public employee from liability for false arrest or false imprisonment." § 820.4. Law enforcement officers are also liable for civil damages under the Federal Civil Rights Act, 42 U.S.C. § 1983, for the wrongful deprivation of any constitutional rights, privileges, or immunities "under color of law." Additionally, the remedy provided by the Federal Civil Rights Act would appear not to be subject to the tort immunities granted by State law. See *Van Alstyne Supplement, supra*, § 5.35 (at 9).

Aside from the general provisions in the Act which apply to law enforcement officers as well as to other public employees, there is a separate chapter dealing with the liabilities and immunities surrounding police and correctional activities. Section 844.6 provides that a *public entity* is immune from liability for any injury caused *by* or *to* a prisoner. A *public employee*, however, may be held liable for injuries *to* or caused *by* a prisoner, and although the public entity is not *required* to indemnify the employee for any judgment against him, it *may* do so if it chooses. § 844.6(d). Paragraph "C" of § 844.6 makes clear that a public entity is liable for dangerous conditions on prison property, *except* for an injury to a prisoner.

The immunity granted public entities by § 844.6 was not recommended by the Law Revision Commission. The provision was inserted into the Act by the Senate Finance Committee shortly before passage for two reasons: first, there was a fear that entity liability for torts to prisoners would lead to an incalculable amount of law suits which would ultimately result in substantial judgments against public entities; and second, there was a fear that somehow the ability of a prisoner to sue a public entity would have a disruptive effect upon prison discipline. *See generally, Note, California Public Entity Immunity From Tort Claims by Prisoners*, 19 *Hast. L. J.* 573, 581 (1968).

The immunity provided public entities from tort actions by prisoners has been subjected to criticism on the ground that it is both insensitive and irrational. Moreover, the research of one commentator indicates that the Legislature's fears of high damage awards and the resultant disruption of prison discipline are groundless (Note, *supra*, 19 *Hast. L. J.* at 581-82):

The experience of the federal government which permits suits by prisoners, has shown that the expectations of frivolous suits and the resultant damage to prison administration and discipline have failed to materialize. Likewise, the fear of a higher cost of operation if prisoners are permitted to recover from public entities has been shown to be unmerited. The California Senate Fact Finding Committee on Judiciary issued a report which should have illustrated to the legislature that the fear of prohibitive cost was groundless. New York had 486 tort claims filed against it in 1959, of which only 10 arose in the penal system. Of the 10, 6 were dismissed and the one in which recovery was allowed resulted in a verdict of only \$15,015. Illinois, on the other hand, had a somewhat higher percentage of claims arising out of its penal system, but during the period from 1950 to 1960, the total award of damages was only about \$13,000.

This chapter also provides some additional immunities pertaining to police and correctional activities. Neither a public entity nor a public employee is liable for the failure to provide police protection, § 845; for the failure to provide adequate prison, jail or correctional facilities, § 845.2; for the failure to provide adequate medical care for prisoners in custody (unless there is actual or constructive knowledge of an immediate need), § 845.6; for injuries caused by a decision whether to parole or

release a prisoner, as to the terms and conditions of parole, or whether to revoke parole; or for injury caused by an escaped or escaping prisoner or arrested person, or a person resisting arrest, § 845.8; or for the failure to make an arrest or to retain the person arrested in custody, § 846.

Liability does exist on the part of the public entity for the intentional and unjustifiable interference by a public employee with the right of a prisoner "to obtain a judicial determination or review of the legality of his confinement." § 845.4. But in order for a prisoner to *institute an action* under this provision, he must show that it "has first been determined that his confinement was illegal." According to the Legislative Committee Comment on § 845.4, the determination of illegality may be "judicial or administrative." A similar cause of action exists for the interference with the right of an inmate of a medical facility to judicial determination or review of the legality of his confinement.

E. Fire Protection

The subject of fire protection is also given individualized treatment in the Act. There is no liability for either a public entity or a public employee for the failure to establish a fire department or otherwise provide fire protection service (§ 850), and immunity is likewise provided for the failure to provide or maintain sufficient personnel, equipment or fire protection facilities. § 850.2. Absolute immunity is provided both an entity and its employee for injuries caused in fighting fires, or by the condition of fire protection or fire fighting equipment. § 850.4. Neither a public entity or employee is liable for an injury sustained by one injured by fire, or by a fire protection operation *while being transported* to a physician or hospital (if the injured person does not object to such transportation), except that a public employee is liable for an injury caused by his *willful misconduct* in transporting the injured person or arranging for such transportation. § 850.8. An entity is liable, however, for the negligent operation of fire trucks or fire department motor vehicles. § 850.4.

All of the above mentioned provisions were enacted as recommended by the Law Revision Commission. The immunities contained in §§ 850, 850.2, and 850.4 were proposed by the Law Revision Commission because the determination as to whether and to what extent fire protection should be provided are

political decisions within the domain of policy making officials of government, and hence a provision subjecting such determinations to judicial review "would remove the ultimate decision making authority from those politically responsible for making the decisions." Law Revision Commission Comment at § 850.

At the suggestion of the Law Revision Commission a provision was adopted that a public entity providing fire fighting service outside the regular area of its jurisdiction is liable for any act or omission of its employees that is a basis for liability, but that the public entity calling for assistance is not vicariously liable for the acts or omissions of the entity providing the assistance. The intent of the provision is to allocate liability so that "unless the entities otherwise agree, each entity is financially responsible only for the torts of its own personnel." Law Revision Commission Comment to § 850.6.

F. Medical, Hospital and Public Health Activities.

The chapter in the Act pertaining to medical, hospital and public health activities primarily sets forth immunities in areas where the Legislature made the policy determination that liability should not apply to governmental action. Before sketching out the broad immunities and (in some cases) the limited liabilities in these areas, it will be helpful to set forth some general principles.

Subject to certain express immunities, State employees of any type (including doctors) engaged in medical, hospital and public health activities are liable under ordinary negligence principles for injuries caused by their acts or omissions in the course of employment. Accordingly, the public entity involved would be vicariously liable for the conduct of its employees in the scope of employment under the doctrine of *respondeat superior*. This general liability would sustain a suit in negligence, for instance, medical malpractice, as well as for intentional torts. A doctor suffering a malpractice judgment, as well as an employee engaged in any public health activities, has a right to indemnification both under certain special provisions in this chapter (discussed *infra*) and the general indemnification provisions in the Act (discussed in section "H" *infra*).

The liabilities and immunities afforded a public entity and public employee for his actions toward patients in a mental hospital is similar to the approach employed with respect to

police and correctional activities. § 854.8. Section 854.8 provides that a public entity is immune for any injury caused by a patient or to an inpatient of a mental institution. A public employee under this provision is liable for his negligent or intentional acts or omissions, and although an entity is not required to indemnify an employee for such a judgment against him, it may do so if it chooses. A public entity is liable for injuries arising out of dangerous conditions on its public property, *except* for an injury to an inpatient of a mental institution. Liability is imposed, however, on a public entity operating or maintaining medical facilities where the public entity fails to comply with applicable minimum standards for equipment, personnel or facilities, *unless* the entity concerned establishes that it exercised reasonable diligence to conform with such minimum standards. § 855.

Under this chapter, neither a public entity nor a public employee is liable for the consequences of a discretionary decision respecting the prevention of disease or controlling the communication of disease, § 855.4; nor, except for an examination or diagnosis for *purposes of treatment*, is a public entity or public employee liable for the *failure* to make a physical or mental examination, or for the failure to make an adequate physical or mental examination for the purpose of determining whether a person has a disease or a physical or mental condition that would constitute a hazard to the health or safety of himself or others. § 855.6. In a similar vein, both an entity and an employee are immune for *diagnosing* or *failing to diagnose* mental illness or addiction, but no immunity exists for the malpractice of a public employee who undertakes to *prescribe treatment* for mental illness or addiction. § 855.8. There is no liability on the part of either a public entity or a public employee for an injury caused by an escaping or escaped person who has been confined for mental illness or addiction, or an injury to or the wrongful death of an escaping or escaped person who has been confined for mental illness or addiction. § 856.2. A public employee is not exonerated by this section from liability if he acted because of actual fraud, corruption or malice, or for injuries inflicted because of his own negligent or wrongful act or omission on an escaped or escaping mental patient in recapturing him. § 856.2.

Immunity is also provided a public entity or public employee for determinations whether to confine, release or grant a leave of absence to a person for mental illness or drug addiction; ex-

cept that a public employee may be liable for negligence in carrying out such determinations. § 856.

With respect to indemnification for malpractice actions, § 854.8 provides that a public entity must indemnify one "who is lawfully engaged in the practice of one of the healing arts under any law of this State" for any injury to patients of a mental institution. A similar provision requires the indemnification of medical personnel for malpractice judgments involving injuries to prisoners. § 844.6. Both of these provisions were amended in 1970 in order to ensure that the indemnification requirement would apply to medical personnel licensed under any law of the State rather than solely to those licensed under the Business and Professional Code. See the Legislative Committee Comment to §§ 844.6 and 854.8

G. Administration of the Tax Laws and The Use of Pesticides

Two other immunity chapters exist which merit brief mention. Both a public entity and public employees are immunized by § 860.2 for decisions as to whether (a) a judicial or administrative proceeding should be instituted in a tax matter; and (b) an act or omission in the interpretation of a tax law. § 860.2. The discretionary decisions respecting the administration of tax laws would most likely come within the ambit of the general discretionary immunity provided in § 820.2. This provision was enacted "in order to obviate the necessity for test cases to determine whether the discretionary immunity extends this far." See Legislative Committee Comment to § 860.

A recent chapter, adopted in 1970, was added to the Act to clarify a public entity's liability with regard to the use of "pesticides." According to § 862, a public entity is liable for the use of pesticides "to the same extent as a private person," except that no presumption of negligence arises from the failure of an entity or public employee to comply with applicable State statutes or regulations if the statute or regulation is made inapplicable to a public entity or employee by its terms. The principal purpose of § 862 was to make certain that the standard of liability applying to private persons in the area of pesticides would apply equally to public entities. See Law Revision Commission Comment to § 862.

H. Indemnification.

The general policy of the Legislature respecting the indemnification of public employees for their tortious conduct is set forth in a somewhat confusing maze of provisions in the Act. Although there are varying procedural contexts in which the indemnification issue may arise, a governing entity may *avoid* the duty to indemnify if (1) the tort was committed outside the scope of the employee's employment; or (2) the employee acted or failed to act because of actual fraud, corruption or actual malice. In actions involving injuries to prisoners and mental patients, specific provisions make indemnification of the public employee discretionary. See §§ 844.6(d) and 854.8(d).

Under the Act, the entity's decision as to the conditions of defense can be critical. If the entity conducts an employee's defense pursuant to a reservation of rights agreement consented to by the employee, the public entity is entitled to recover from the employee the amount of any claim or judgment paid unless (1) the employee establishes that the act causing the injury arose in the course of employment, and (2) the entity fails to establish that the employee acted or failed to act because of actual fraud, corruption or actual malice. § 825.6. If an entity provides its employee with an unconditional defense, the entity is obligated to pay the judgment without any further recourse against the employee. § 825.6. However, there is no authorization in the Act for an entity's payment of the punitive damages portion of a claim or judgment. As previously noted with respect to the defense of public employees, the State and local attorneys contacted in California stated that in actual practice a public entity rarely if ever refuses to indemnify its employee or former employee. The normal procedure is to tender a defense without requiring an employee to enter into a reservation of rights agreement. However, under no circumstances may a public entity satisfy a portion of a judgment against an employee consisting of a punitive damage award; nor may the entity indemnify its employee for the portion of an award paid by the employee involving punitive damages.

IV. Funding Judgments Against A Public Entity

A. The State

For the first fiscal year after the passage of the Act, the State of California purchased comprehensive liability insurance to

protect itself against tort judgments, but such coverage was discontinued after one year because it was felt that the premiums charged were excessive. The State presently carries liability insurance only for its motor vehicles; air craft; State College parking lots; some college dormitories; The Los Angeles Coliseum; the Museum of Science; the California Fair; and District Agricultural Associations. California is otherwise self-insured in the sense that it pays all settlements and judgments against it by appropriations from the legislature.

When direct liability coverage was discontinued, the State proceeded to protect itself by purchasing catastrophe or risk insurance with a limit in the amount of \$55,000,000, the first \$1,000,000 being deductible for each occurrence. This type of policy of course would only cover the State's liability for damages *over* \$1,000,000 for a particular occurrence, but it would not go into effect when the aggregate total of claims against the State totaled \$1,000,000 or less. The cost of the catastrophe insurance was approximately \$158,000 per year. Within the past year the State decided to purchase a \$2,000,000 deductible catastrophe insurance policy with the same outside limit; this was done to reduce the premium which is now \$125,000.

There is some sentiment among California officials to discontinue even catastrophe insurance, since the State has never had to use its coverage. At the present time, however, it appears that the State will continue to purchase such coverage as a necessary precaution.

As noted in a previous section pertaining to the role of the public attorney, all judgments against the State in tort cases in which the Attorney General is involved are paid from a general tort fund appropriated annually by the Legislature in advance of each fiscal year. Any funds remaining in the tort fund at the end of a fiscal year revert to the general treasury. So far, the amount appropriated has been adequate to cover settlements reached and judgments rendered in a given year. The appropriation to the tort fund for the 1970-71 fiscal year made \$1,700,000 available for the payment of tort claims and judgments.

With respect to contract appropriations, funds for settlements or judgments in cases in which the Attorney General's Office handles the litigation are taken from the budget of the specific agency entering into the contract. If insufficient funds exist in

the particular agency's budget to satisfy the settlement or judgment, then the Legislature must appropriate the necessary amount or the claimant must wait for the next fiscal year.

With respect to the Department of Public Works, funds for tort or contract claims, settlements or judgments are taken directly from its budget. The Department's budget is appropriated on an annual basis by the Legislature. No approval is needed for tort or contract settlements by the Department of Public Works no matter how much the amount involved. The Attorney General's Office suggests that the mechanism employed for funding judgments by the Department is superior to that used by its office, since it must obtain the personal authorization of the Director of Finance for settlements over a specified amount.

B. Local Public Entities

Because of the drastic increase in the premiums for comprehensive liability insurance and the diminishing number of companies willing to provide such coverage, some local public entities have been placed in a position of funding their tort claim settlements and judgments through self-insurance, that is, by appropriations.

At present the City of Los Angeles is almost completely uninsured. The City does not even purchase catastrophe insurance or liability insurance for its motor vehicles. Funds for the settlement of tort claims or the satisfaction of judgments are appropriated by the City Council. With the exception of liability insurance on its airport property and a few other items, the City of San Francisco is also self-insured. San Francisco does purchase catastrophe insurance, however, and this provides coverage for a judgment or judgments arising out of one occurrence which *exceeds* \$1,037,500. Funds to satisfy tort judgments against the City are appropriated by the San Francisco Board of Supervisors.

Although the larger California municipalities such as Los Angeles and San Francisco are economically capable of funding their tort judgments through direct appropriations and maintaining the legal and investigative staff necessary to process tort claims, the smaller municipalities are extremely anxious to maintain insurance coverage because of their fear of the financial crisis that could be occasioned by a heavy tort judg-

ment or a series of tort judgments arising out of the same occurrence. In recent years, however, small and moderate size municipalities have been complaining that the cost of the premiums for a comprehensive liability policy has become prohibitive. The increasing cost of such liability insurance has been induced by several factors: (1) the liberal attitude on the part of the courts in rendering judgments against municipalities; (2) the peculiar problems in California with the doctrine of inverse condemnation; (3) the apparently questionable actuarial studies used to fix the premium rate charged cities; and (4) the insurer's concern with the absence of authority in today's contemporary society.

Recent hearings before the legislature in California have demonstrated that the availability of municipal liability insurance has become an acute problem because of ever-increasing costs of premiums. It may be due in part to the functional ineffectiveness of governmental units themselves as well as the failure perhaps of the insurance industry to fully comprehend and respond to the public's interest in the financial support of local units of government. In any event, the current California situation with respect to insurance problems of governmental entities is indicative of a problem which may indeed foreshadow similar difficulties in the State of New Jersey. It should encourage a careful examination at this time of the insurance experience of our local units of government in an effort to determine the most effective way for governmental units to respond to civil liability.

Section 970.2 of the Act directs that "a local public entity shall pay any tort judgment in the manner provided in this article." This provision was apparently included in the Act because at common law the fiscal inability of a public entity to pay a tort judgment against it was a basis for sovereign immunity. That basis for immunity from suit had been recognized in California. *Hensley v. Reclamation District No. 556*, 121 Cal. 96, 53 P. 401 (1898). See generally, *Van Alstyne, supra*, §§ 1.8 and 2.33.

The Act makes every attempt to facilitate the payment of a tort judgment in the succeeding provisions. Sections 971 directs that the usual debt limitations and restrictions on tax rates contained in any charter or ordinance of a local entity do not apply to the payment of tort judgments, §§ 970.8 (a), 971. And

if local public entities determine that paying a large tort judgment would be an undue hardship, statutory authorization exists for paying the judgment, with interest, in a maximum of ten annual installments, § 970.6 (B). Other provisions in the act empower a local taxing entity to issue general obligation bonds when deemed necessary to fund a tort judgment, §§ 975-978.8. Similarly, the act permits, but does not direct, public entities to insure against tort liability by purchasing commercial liability insurance, or by self-insurance. §§ 990-990.4. The insurance to be purchased could protect against entity liability, employee liability and the expense of defending claims. §§ 989-991.2. The insurance authority granted public entities includes both negligent and intentional torts. The Act also contains express authorization for local public entities to enter into joint insurance programs if they do so desire. § 990.8.

V. *Claims Experience and Administrative Impact*

1. *The State*

a. *Attorney General's Office*

The Tort section of the Attorney General's office, which handles approximately fifty per cent of the suits filed against the State and its employees, was able to provide the most detailed statistical information regarding its claims experience. In analyzing the statistical data provided below it should be remembered that the tort claims included therein do not include those involving state motor vehicles, since the State has liability coverage for its motor vehicles and claims of this nature are immediately turned over to the carrier.

ANNUAL REPORT TORT SECTION

Fiscal Year 1964-1965

Number of Incident Reports	2,451
Number of Claims Received [Board of Control] ..	335
Files Created	395
Total Amount Claimed	\$35,298,013.00
Number of Claims Paid	41
Total Amount Paid	\$32,690.00
Number of Law Suits	60
Total Amount of Suits	\$48,408,117.00

* * * * *

Fiscal Year 1965-1966

Number of Incident Reports	2,426
Number of Claims Received [Board of Control]	994
Files Created	496
Total Amount Claimed	\$583,942,632.00
Number of Claims Paid	44
Total Amount Paid	\$47,376.00
Number of Law Suits	40
Total Amount of Suits	\$26,767,704.00

* * * * *

Fiscal Year 1966-1967

Number of Incident Reports	2,578
Number of Claims Received [Board of Control]	453
Files Created	442
Total Amount Claimed	\$39,266,741.00
Number of Claims Paid	41
Total Amount Paid	\$35,246.00
Number of Law Suits	173
Total Amount of Suits	\$27,210,017.00

* * * * *

An analysis of the above reports from the Torts Section shows that the amount claimed by tort victims has very little relation to the amount of claims actually paid out. For example, in the fiscal year 1966-67 a total of \$39,266,741 in claims were filed, whereas only \$35,246 was paid out in claim settlements. [Unfortunately no figures are available for litigation settlements or judgments during these years.] Similarly, the disparity between the number of claims filed with the Board of Control and the number of law suits eventually filed is significant. For example, in the fiscal year 1965-66, 994 claims were received but only 40 suits were filed, whereas in 1966-67, 453 claims were received whereas 173 suits were filed.

The annual report of the Torts Section has more complete statistics for the fiscal year 1968-69:

Fiscal Year 1968-1969

Incidents reported	2,376
Files created	1,059
Files investigated	677
B/C claims [Board of Control]	895

Amount of B/C claims	\$138,198,237.15
Amount of B/C settlements	\$45,467.66
Settlements	56
Court cases pending 7-1-68	246
San Francisco	68
Sacramento	67
Los Angeles	111
Court cases filed	172
San Francisco	43
Sacramento	52
Los Angeles	77
Court cases closed	89
San Francisco	29
Sacramento	20
Los Angeles	40
Court cases pending 7-1-69	329
San Francisco	76
Sacramento	100
Los Angeles	153
Amount of Settlements/Judgments	\$1,024,861.00

* * * * *

The preceding figures show that although 895 claims were filed with the Board of Control for a total of \$138,198,237, the amount paid out in the 56 settlements was only \$45,467.66. Despite the fact that 895 claims were filed with the Board of Control, there were 56 settlements and only 172 suits filed. Thus 667 of the claims filed with the Board of Control were never pressed forward to suit or settled.

The figure provided for the total amount of settlements and judgments during the fiscal year 1968-69 is \$1,024,861. That amount is unusually high, however, since it represents a \$500,000 settlement on appeal (after an \$800,000 verdict) in a case where the tort victim suffered injuries resulting in paraplegia. The approximate total cost of the abolition of sovereign immunity during the fiscal year 1968-69 can be seen by computing three figures:

- \$ 264,000 (approximate administrative budget for tort claims)
- 158,000 (cost of catastrophic insurance)
- 1,024,861 (amount of settlements and judgments)

Total \$1,446,861

Detailed statistical information is also available for the fiscal year 1969-70:

Fiscal Year 1969-1970

Incidents reported	2,672
Tort Files created	617
Tort Files investigated	449
Board of Control claims	472
Amount of Board of Control claims	\$109,115,721.59
Amount of Board of Control settlements	15,722.14
Settlements	53
Court cases pending 7-1-69	335
San Francisco	76
Sacramento	109
Los Angeles	150
Court Cases filed	150
San Francisco	57
Sacramento	32
Los Angeles	61
Court cases closed	119
San Francisco	25
Sacramento	36
Los Angeles	58
Court cases pending	366
San Francisco	108
Sacramento	105
Los Angeles	153
Amount of Settlements/Judgments	\$509,276.69

Once again, the figures show that there is no relation between the monetary amount of Board of Control claims (\$109,115,721) and the amount of Board of Control settlements (\$15,722). Additionally, it can be seen that despite the fact that 472 claims were filed with the Board of Control, there were only 53 settlements and 150 suits filed. Hence 269 claims were abandoned at some-time after filing with the Board.

The approximate total cost to the Attorney General's Office of the abolition of sovereign immunity during 1969-70 can be calculated by computing the following figures:

\$280,000 (approximate administrative budget for tort claims)
 509,276 (amount of settlements and judgments)
 158,000 (cost of catastrophe insurance)

Total \$947,276

The California Attorney General's Office also provided detailed statistical information for the first half of the fiscal year 1970-71:

	Six Months—7/1/70	12/31/70
Incidents reported		1,603
Tort Files created		317
Tort Files investigated		210
Board of Control claims		249
Amount of Board of Control claims		\$100,002,762.02
Amount of Board of Control settlements		\$3,878.24
Court cases pending 7/1/70		366
San Francisco	108	
Sacramento	105	
Los Angeles	153	
Court cases filed		73
San Francisco	13	
Sacramento	25	
Los Angeles	35	
Amount of Settlements/Judgments		\$105,325.00

* * * * *

While similar detailed figures for the second half of the fiscal years 1970-71 were not available at the time of this report, the *total* amount of settlements and judgments for that entire year was \$426,431. The following figures indicate that the approximate total cost to the Attorney General's Office during the fiscal years 1970-71 was \$892,431.

\$341,000 (approximate administrative budget for tort claims)
 426,431 (amount of settlements and judgments)
 125,000 (premium on catastrophe insurance)

Total \$892,431

If the figures for the past three fiscal years (1968-69 and 1970-71) are averaged, it appears that the average annual amount of settlements and judgments during the three years is \$653,522.66. The average annual approximate total cost to the Attorney General's Office over the past three fiscal years is \$1,095,522.66.

b. *Department of Public Works*

The Department of Public Works is involved in the remainder of the tort suits involving the State of California. These claims almost always contain allegations with respect to injuries arising out of the use of the State's highways. Unfortunately, at the time of the writing of this report the Department of Public Works was unable to provide the same quantity of statistical data given by the Attorney General's Office. Information furnished by the State Board of Control, however, indicates that in the fiscal year 1968-1969 a total of 762 claims were filed involving the Department of Public Works, whereas in the fiscal year 1969-1970 a total of 739 claims were filed. Preliminary figures indicate that approximately 200 tort suits a year are filed in matters involving the Department of Public Works.

Since the Department of Public Works has been unable to provide statistics respecting its administrative costs and the amount of tort judgments and settlements it enters into, it is impossible to compute the total cost to the State (in administrative costs and settlements and judgments) created by the waiver of sovereign immunity. It must be stressed that the approximate total cost figures attributed to the Attorney General's Office do not include the Department of Public Works and hence they are roughly only one-half of the State's annual cost.

2. *Local Entities*

a. *San Francisco*

Information provided by the Chief Trial Deputy of the San Francisco City Attorney's Office, William Mullins, indicates that the quantity of tort litigation which the City is involved in is leveling off. For instance, according to the information provided, tort actions concluded (either by settlements, dismissals or judgments) were as follows:

1967-68	1968-69	1969-70
678	599	645
	127	

On the other hand, the amounts paid out for settlements and judgments involving tort claims were as follows:

1967-68	1968-69	1969-70
\$1,398,175	\$938,707	\$1,129,645

A breakdown of the type of tort actions in which the City is involved and the amounts paid out as to each type of action is provided in the following charts:

SUMMARY OF 645 TORT ACTIONS
Concluded During Fiscal Year—1969-70

<i>Department</i>	<i>No. of Cases</i>	<i>Judgments Paid</i>	<i>Litigated Settlements</i>	<i>Won or Dismissed</i>
Electricity	1	..	..	1
Fire	5	..	3	2
Housing Authority ...	1	..	..	1
Library	1	1	..	..
Municipal Railway ...	500	62	288	150
Opera House	1	..	..	1
Parking Authority ...	1	..	..	1
Police	29	5	6	18
Public Health	7	1	1	5
Public Works	70	5	36	29
RACCSF	1	..	..	1
Recreation & Park ...	4	1	2	1
Registrar	1	..	..	1
Retirement	3	..	3	..
SFUSD	9	1	2	6
Sheriff	3	..	1	2
Superior Court	1	..	..	1
Water	7	1	3	3
<i>Total</i>	645	77	345	223

TORT ACTIONS CONCLUDED

Departments—Amounts Paid—1969-70

<i>Departments</i>	<i>No. of Cases</i>	<i>Prayers</i>	<i>Amount Paid</i>
Electricity	1	\$200,000	.....
Fire	5	57,200	\$2,700
Housing Authority	1	5,000	.....
Library	1	100	50
Municipal Railway	500	12,766,712	1,005,750
Opera House	1	4,000,345	.....
Parking Authority	1	190	.....
Police	29	3,628,570	42,275
Public Health	7	2,229,800	10,105
Public Works	70	4,461,155	57,925
RACCSF	1	280	.....
Recreation & Park	4	65,610	4,615
Registrar	1	1,200,000	.....
Retirement	3	(3,655)	(2,790)
SFUSD	9	167,595	2,770
Sheriff	3	4,000,345	.....
Superior Court	1	18,030,000	.....
Water	7	168,255	3,455
<i>Total</i>	645	\$46,980,772	\$1,129,645

In considering the number of tort suits and the amount paid out in tort settlements and judgments by the City of San Francisco, it should be remembered that the largest single source of municipal liability there, i.e., the Municipal Railway, does not exist in New Jersey municipalities. If an attempt is made to project liability in New Jersey on the basis of the San Francisco experience, the tort figures involving the Municipal Railway should be disregarded. Under this type of analysis, it should be posited that the City of San Francisco concluded 145 tort cases for an amount totaling \$123,895, rather than 600 tort cases for an amount totaling \$1,129,645.

There was one point emphasized by members of the legal staff of the San Francisco City Attorney's Office which is not reflected in any statistics. That is, the particularly troublesome nature of law suits against the police. It was observed that defending a police officer in a "police brutality" type suit was

tantamount to preparing for a criminal trial, and the actual trial consumed a disproportionate amount of time.

b. *Los Angeles*

Although the City Attorney's Office of Los Angeles was unable to provide any statistical information at the time of this writing, it was represented by the attorney in charge of the litigation section that there had been an increase in the amount of their tort claims and litigation since *Muskopf*. Accidents involving municipal motor vehicles and city sidewalks, and police brutality complaints were said to be the principal sources of litigation. The troublesome nature of police brutality suits was also noted.

In sum, it may be concluded after discussions with various State and local officials about the impact of the abrogation of sovereign immunity with respect to local public entities, that although there was some increase in claims and attendant litigation this increase did not present the local entities with an intolerable burden either as to finances or manpower requirements.

3. *The Courts*

The administrative Office of the California Courts is of the view that the Legislature's decision to process tort suits against public entities through the regular judicial channels has not had a dramatic impact on the State's court system or significantly increased calendar congestion. Statistics provided by that Office support its conclusion. When it is considered that in the California Superior Courts during the fiscal year 1968-1969, 35,206 suits were filed involving motor vehicle personal injury, death and property damage; that 13,761 suits were filed involving other personal injuries, death and property damage; that 120,740 actions were filed seeking divorce, separate maintenance and annulment; and that 58,510 criminal matters were disposed of by trial or by plea, *Judicial Council of California, Part II, Annual Report of the Administrative Office of the California Courts*, at 137-146 (1970), it can be seen that the few hundred additional suits against the State which were filed each year after the 1963 Act became effective undoubtedly did not have a great impact.

In assessing the view of the Administrative Office of the California Courts it should be borne in mind that public entities

were generally suable for their non-governmental torts before *Muskopf* and the California judicial system processes a great volume of law suits annually. Thus it is understandable why the Legislature's decision to process suits against all public entities through the courts did not have a dramatic impact. Regretably, no data is available as to the *total number* of suits in tort or contract filed against all public entities in a given year.

VI. Conclusion

After detailed examination of the experience of California governmental units since the abolition of sovereign immunity in 1963, the following conclusion may be drawn:

The fears of those that argued that sovereign immunity should be maintained because its abolition would virtually bankrupt the public treasury were proven unjustified. The figures provided by the Office of the Attorney General—which handles fifty per cent of the tort litigation involving the State—show that the *average* amount of settlement and judgments paid out during the past three years was only \$653,522.66, and the average approximate total cost of the abolition of sovereign immunity (based on the administrative budget, amount of settlements and judgments and cost of catastrophe insurance) was \$1,095,522.66.

Nor has the decision by the Legislature to process *all* suits against the State through the regular court system resulted in the dramatic increase in calendar congestion that some had feared. The three-hundred and fifty to four hundred court suits filed against the State each year have been easily absorbed by the court system—a system in which during the fiscal year 1968-1969, 35,206 suits were filed involving motor vehicle personal injury, death and property damage and 13,761 suits were filed involving other personal injuries, deaths and property damage.

The decision to process tort suits against public entities through the regular court system appears sound. The arguments that the regular court system attracts better personnel and provides more flexibility in handling the total calendar than a special court of claims are persuasive. Discussions with California attorneys at all levels of State government cast doubt on the wisdom of submitting tort claims to an independent administrative review board before a suit may be filed, but the necessity for some form of an early claims notification procedure was uniformly agreed upon.

The Legislature's decision to enact a statute spelling out the liabilities and immunities applicable to governmental activities is certainly meritorious. This provided the Courts with guidance for the myriad of substantive problems arising from the abrogation of sovereign immunity, and it also served to minimize litigation and encourage settlements since the broad rules for liability and detailed immunities were known in advance. The determination to enact a body of substantive law applicable to all public entities is also commendable, since it has operated to promote uniformity in the treatment of litigants and eliminate injustice.

There is one factor about the California System which is not reflected in the cases, statutes or reports alluded to throughout this discussion—the caliber of people who are presently involved in the handling of tort and contract litigation for public entities. It seems that the California governmental units contacted have had the facility for not only attracting competent and articulate lawyers to handle their claims litigation, but of also persuading such individuals to stay on and hence preserve the momentum and continuity established in a program. A practical lesson to be learned from the California experience is that it is absolutely critical for the State to attract and keep competent attorneys on its staff in a quantity sufficient to devote the attention necessary to handle complex tort and contract litigation.

CHAPTER 5

THE NEW YORK EXPERIENCE

I. *Introduction and History*

From 1777 until 1897 the State of New York did not permit any claim for damages to be asserted against it in any court. Individuals suffering injury to their persons or properties through the activities of public employees were not, however, necessarily without some type of remedy. The remedy provided in the State of New York at that time was by way of petition to the Legislature for redress in the form of private legislation—a procedure somewhat similar to that which is in existence in New Jersey *today*. In 1817 an additional administrative remedy was provided which made some claims related to the Erie Canal susceptible of payment to private individuals. With this exception and others relating to the management and operation of canals in the State of New York, the Legislature continually remained the only source of relief for private litigants against the State. This legislative power to audit private claims reportedly led to widespread abuse and, at the Constitutional Convention of 1867, the delegates adopted a provision creating a Court of Claims and eliminating the Legislature's power to audit and allow claims. The voters, however, disapproved the Constitution and therefore the provisions proposed by the Convention were never enacted.

In 1874, the legislative power to audit private claims was curtailed by constitutional amendment. This amendment provided that:

“The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law.”

This amendment was apparently prompted by continuing disclosures of corruption in the auditing of private claims as well as by several other reasons which are consistently raised in opposition to a legislative review of private claims, namely: (1) the Legislature should not act as a judicial body; (2) claims were actually decided in committee and the entire body of the

Legislature never knew what they were voting for: (3) the Legislature did not have adequate time to make proper investigations of claims; (4) a separate agency would give greater uniformity of decisions.

Thus, in 1876 the State Board of Audit was established to hear all claims against the State. In 1883 the Board of Claims, the forerunner of the present Court of Claims, was established to hear all claims against the State of New York. This Board became the Court of Claims in 1897, the Board of Claims again in 1911 and finally, in 1915, the Court of Claims once more, although it did not become a constitutional court until 1950.

At first the Board of Claims could hear and audit only those cases specifically referred to it by the Legislature. Gradually over the years the State waived more and more of its sovereign immunity and gave the Board of Claims, later the Court of Claims, jurisdiction to hear an increasing variety of claims. This development culminated in 1929 with the almost complete waiver by the State of its sovereign immunity for tort liability.

The Court of Claims today has been a constitutional court since January 1, 1950. The Constitution granted the Court "Jurisdiction to hear and determine claims against the State or by the State against the claimant or between conflicting claimants as the Legislature may provide." The Court of Claims today is a court of record and it has sixteen judges appointed by the Governor by and with the consent of the Senate for a term of office of nine years. The present salary of each of the sixteen judges is \$34,000 and the present budget of the Court of Claims (exclusive of amounts provided for judgments and interest) is \$2,961,858. This figure also does not include the rental expense and the maintenance expense of the various court rooms throughout the State of New York and those being built in the capital in Albany specifically for the purpose of housing the New York Court of Claims.

The Court of Claims is a completely independent unit both physically and administratively. It has a central clerk's office located in Albany and it has the power to make its own rules of procedure. The presiding judge assumes responsibility for the assignment of judges to trial terms and the designation of special terms. These judges are *not* available for assignment in the regular Supreme Court of New York (the trial court of general jurisdiction) and the assignment of judges to a particular locality generally averages approximately four weeks duration.

The New York Court of Claims has jurisdiction over appropriation claims (condemnation matters) and those claims arising in contract or resulting from tortious conduct of officers or employees of the State acting in the scope of their duties. The Legislature has granted the Court jurisdiction in several other significant areas: (1) claims arising from public authorities, (2) moral obligations of the State, (3) torts of military employees, and (4) claims of prisoners pardoned as innocent. The Court does not possess equitable powers, nor does the Court of Claims have jurisdiction with respect to actions against political subdivisions such as municipalities and counties.

In addition, the Court of Claims does not have jurisdiction over suits against State employees—in other words, the only defendant in the Court of Claims is the State of New York. Suits against State employees must be filed in the Supreme Court of New York—a fact which undoubtedly contributes to the small number of suits actually filed against State employees since the practice is to sue the better defendant, the State of New York, in the Court of Claims.

For an excellent discussion of the history and present operation of the New York Court of Claims see *McNamara, The Court of Claims: its development and present role in the unified court system*, 40 St. John's L.Rev. 1 (1965); see also Second Annual Report of the Judicial Conference of the State of New York (Legislative Document No. 88 (1957)).

II. *Court of Claims Procedure*

The Court of Claims Act requires application of the same rules of substantive law in determining the liability of the State as are applied in the Supreme Court in actions against individuals or corporations. Similarly, the same rules of evidence are applied in the Court of Claims as in the Supreme Court. The practice in the Court of Claims, however, is somewhat different from that in the Supreme Court. The practice generally follows the rules provided by the Court of Claims. If a particular point is not covered therein, the Civil Practice Law and Rules generally applicable in New York courts control. Unlike the customary time limits on contract and tort actions in New York, which are six and three years respectively, the statute of limitations in the Court of Claims is rather restrictive. Under Section 10 of the Act a claim must be filed within ninety days in tort actions and six months in contract actions unless a written notice of intention

to file a claim is served within those periods. In such a case the notice serves to extend the time for filing each type of claim to *two years*. The Act does provide, however, that a court may, in its discretion, grant permission to file a late claim if it concludes that a reasonable excuse is shown and the interests of the State are not substantially prejudiced thereby. The trial is held *without a jury* and in the same manner as a trial in the regular trial courts. After trial the judge renders a decision and states essential facts upon which it was based. Judgment is entered upon the decision. An appeal is taken to the Appellate Division in the same manner as an appeal from the Supreme Court.

III. *The Role of the State Attorney General*

The Department of Law, headed by the Attorney General of New York, contains a Special Bureau of Claims and Litigation which is headed and directed by an assistant attorney general. The function of this Bureau is to represent the State of New York in virtually all claims by or against it either in the New York Court of Claims or elsewhere within the New York court system. In addition, it is the sole responsibility of the Attorney General and his staff to represent State employees who are defendants in a civil action arising out of conduct within the scope of their duties. It has been the policy of the Attorney General's Office in New York to represent a State employee even when the issue of whether the activity was within the scope of the employee's duty is questionable. All representation has been provided upon obtaining the understanding of the defendant-employee that he has a right to his own attorney and that in the event a judgment is rendered against him he has the duty to pay any such judgment. Until July 1, 1971 individual State employees in New York were not indemnified and were thus individually liable for their negligent acts. There were certain specific exceptions to this rule but State employees were generally liable. Consequently, if the employee had obtained private counsel, the State was not obligated to pay for his defense—a practice which of course effectively deterred the use of outside counsel. In practice, however, very few cases have been filed against employees individually due to the recognition by attorneys for claimants that recovery against the State provides a more effective and more extensive remedy. In addition, State employees were not subject to suit in the New York Court of Claims; thus it was necessary to institute two suits, one in the

Court of Claims against the State and one in the Supreme Court against a State employee if a plaintiff wished to sue both the State and the employee.

Effective July 2, 1971 the State of New York passed legislation which effectively provides for the indemnification of all State employees from financial loss arising from alleged negligence or other acts within the scope of their duties. Public Officers Law § 17 (L. 1971, c. 1104). This statute excludes indemnification for damages resulting from "the willful and wrongful act or gross negligence of such officer and employee." It also specifically provides that "the Attorney General *may* assume control of the representation of such officer or employee." (Emphasis added.) Prior to the enactment of this statute the Attorney General of New York represented all State employees under a general grant of authority to represent the public interest: "The Attorney General shall: (1) Prosecute and defend all actions and proceedings in which the State is interested." N.Y. Exec. Law § 63.

While it has ordinarily not been the policy of the Attorney General to defend employees where the allegation is criminal rather than tortious in nature, the Attorney General has nonetheless decided to represent several State employees charged with criminal offenses in several recent incidents. In one case, a State driver was charged criminally with respect to violation of a village street weight limitation. The other incident related to a charge of criminal trespass against an investigator from the Attorney General's Office who was attempting to serve papers in support of a restraining order application. In effect, the policy followed in practice by the Attorney General of New York is one of deciding in the individual case whether the nature of the activity involved and whether the public interest involved are of a sufficient nature to warrant representation by the Attorney General, so long as no conflict of interest is created. This approach comports with that currently followed in practice and by statute in the State of California.

The only exception to the aforementioned representation afforded the State and State employees by the Attorney General is that which is provided under the automobile liability policy in force in the State of New York. In cases involving motor vehicles driven by State employees, the defense is conducted by attorneys for the insurance carrier whose policy covers such State activity. While the investigation of the claims and the actual representa-

tion by the attorneys is conducted by the insurance company, the Attorney General nonetheless has the ultimate control of the litigation if he so desires.

The Attorney General follows a specific policy of refusing to settle most cases in an effort to cut down on the potential number of frivolous claims against State employees and the State of New York. It is his belief that this has been an effective deterrent to the filing of frivolous claims. The Attorney General nonetheless does settle a number of cases and he does possess by statute the specific power to settle tort cases up to a maximum of \$2500, if the appropriate department head certifies that a tort has been committed. Thus, the sole and ultimate authority for settling tort cases up to \$2500 rests with the Attorney General. The Attorney General, however, has no power to settle cases in which the claim exceeds \$2500. In practice the Attorney General's authority has resulted in the settlement of most meritorious claims under \$2500.

In contract cases, however, the Attorney General does possess the ultimate authority to settle claims irrespective of the amount involved. While the Attorney General believes he solely possesses inherent power to reach settlement, he nonetheless follows an informally accepted rule of law in New York which forecloses his ability to settle contracts unilaterally without specific statutory authority. As a result, he only settles contract cases with the approval of the State department involved.

In exercising the practical power to settle contract cases, the Attorney General's first step prior to the preparation for trial or settlement is to have independent audits made of a contractor's books and records with respect to the claims. If a tentative settlement is reached with the attorney for the contractor, that attorney writes a letter proposing the terms thereof to the assistant attorney general who is chief of the Bureau of Claims and Litigation. The Chief obtains a report from the staff attorney and, if approved, sends the file to counsel for the agency in question. If approval of counsel is obtained, a prima facie case and an agreement not to appeal is formally placed on the record before the Court of Claims. This is accomplished merely by the submission of certain documents to that effect and a "decision judgment" is then entered. The Chief of the Litigation Section then prepares a certificate of no appeal which is countersigned by the Solicitor General and forwarded to the Comptroller for his review and payment of the claim.

In order to handle the caseload produced by claims against the State in tort, contract and condemnation matters, the Attorney General's Bureau of Claims and Litigation has a staff of eighty attorneys and forty investigators, plus supporting personnel. Unfortunately, complete budgetary figures, including rental space and incidental travel expenses, were not available. It should be noted, however, that this section does all of the trial work for the State of New York and in particular does all of the appropriation work—known as condemnation work in New Jersey—and a substantial number of the attorneys assigned to the Litigation Section are engaged in appropriation matters. This would follow from the fact that appropriation matters themselves occupy approximately 65–70% of the calendar of the New York Court of Claims. In addition, it should be noted that the various departments of the State of New York also employ in-house counsel who actually do the legal counseling of these departments. These various in-house counsel, however, do not participate in the actual litigation involving these departments; that task is reserved solely for the Attorney General's Office and occupies the entire time and efforts of the eighty staff attorneys assigned to the litigation section. Certainly in making any comparison between the New York Attorney General's Office and the Office of the Attorney General of the State of New Jersey, the extent of the workload and the size of the State and its activities must be examined. New York State is approximately double the size of New Jersey in population and the numerous activities in which it is engaged undoubtedly substantially exceed those in which the State of New Jersey is involved. In addition, the condemnation work of the State of New York undoubtedly exceeds that of our State of New Jersey and, therefore, the size of the Attorney General's staff in New York need not dictate a similar size for the State of New Jersey. In particular, the State of New Jersey already has deputy attorneys general assigned to condemnation matters and since this condemnation work of the State of New York greatly exceeds that of the State of New Jersey, it can be readily seen that substantially fewer numbers of attorneys would be necessary in the State of New Jersey to handle the workload produced by the abolition of sovereign immunity.

IV. *Substantive Provisions: General*

Section 8 of the New York Court of Claims Act provides for a waiver of immunity from liability as follows:

“The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the Workmen’s Compensation Law.”

Although this provision appears extremely broad in the scope of its waiver, it must be recognized that there is a significant difference between treating the State “in respect of its legal status” like any individual or corporation and saying that the State is on a parity with private corporations or individuals “in respect of all of its defenses.” See *Weiss v. Fote*, 7 N.Y. 2d 579, 200 N.Y.S. 2d 409, 167 N.E. 2d 63 (Ct. App. 1960). In other words, the nature of the sovereign’s activity will still affect the nature and extent of its liability. In addition, it must be recognized that there are several areas of sovereign activity in which the courts have absolved the State and its employees from liability. For example, acts of a judicial officer or executive officer of the State exercising his constitutional and legal powers (*Jamieson v. State*, 4 Misc. 2d 326, 158 N.Y.S. 2d 496 (Ct. Cl. 1956), *aff’d*, 7 App. Div. 2d 944, 182 N.Y.S. 2d 41 (3d Dep’t 1959)); acts pursuant to legislative policy (*Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (1917)); and acts amounting to errors of judgment (*Bertch v. State*, 193 Misc. 259, 83 N.Y.S. 2d 814 (Ct. Cl. 1948)) have all been held immune from liability for both the State and the employee. Clearly, the State and its employees are imbued with a peculiar measure of immunity from suit as a result of the nature and extent of activities in which they are engaged.

Certain particularly troublesome areas of public liability of the entity and the employee throughout the country have been treated in the following ways in New York State:

A. *Torts of Militia Members and Military and Navy Employees.*

In Section 8A of the Court of Claims Act, the State waived its immunity from liability and action with respect to

“the torts of members of the organized militia and employees in the Division of Military and Naval Affairs of the Executive Department in the operation, maintenance

and control of vehicles, including aircraft, owned by the State or issued or loaned or assigned to the State by the United States for the use of such organized militia or such employees, and in the operation, maintenance and control of armories devoted to the use of the organized militia of the State, while acting within the scope and in the performance of their duties in the military service of the State * * *.”

It is apparent that with certain specified exceptions contained in the Military Service Law military employees have been determined liable for the operation, maintenance and control of *vehicles* and for the operation, maintenance and control of *armories*.

B. *Medical and Public Health Activities*

The general rule is that the State is liable for the malpractice of its medical personnel, but it is not liable for acts producing injury or causing injury which were based upon the exercise of professional judgment. See *Kaplan v. State*, 277 App. Div. 1065, 100 N.Y.S. 2d 693 (1950). Employees of mental institutions are generally not held liable for torts committed by mentally unstable inmates unless it can be shown that the employee and thus the State had actual notice of the dangerous tendencies of the inmate and were in a position to be able to respond to any foreseeable injury. See *Mobley v. State*, 1 App. Div. 2d 731, 147 N.Y.S. 2d 414 (1955); *Weihls v. State*, 267 App. Div. 233, 45 N.Y.S. 2d 542 (1943).

C. *Recreational Areas*

While the State must generally oversee its parks and recreation areas, it is not usually required to furnish immediate supervision. See *Zarillo v. State*, 7 N.Y. 2d 943, 198 N.Y.S. 2d 314 (1960). Nor will the state be held liable in damages for a mere failure to enforce park regulations where there has been no notice of violation. See *Blanc v. State*, 19 Misc. 2d 585, 193 N.Y.S. 2d 350 (Ct. Claims 1960). While certain decisions, such as *Battalla v. State*, 10 N.Y. 2d 237, 219 N.Y.S. 2d 34 (1961), have imposed liability on the state for the negligence of its employees in the operation of waterways, winter facilities and amusement devices within park areas, the doctrine of assumption of risk has been effectively utilized to foreclose a burdensome increase in the amount of Claims.

D. *Dangerous Conditions and Highway Claims*

Generally, the State of New York is liable for the operation of public and educational buildings of the State to the same extent as an ordinary landlord. Essentially, the State is liable for dangerous conditions existing on its property of which it has knowledge or of which it should have knowledge. Cases involving sidewalks and building maintenance include *Rue v. State*, 11 Misc. 2d 337, 174 N.Y.S. 2d 556 (Ct. Cl. 1958) and *Mitchell v. State*, 20 Misc. 2d 381, 195 N.Y.S. 2d 511 (Ct. Cl. 1959).

Perhaps the largest group of claims arising in the State of New York result from the negligent construction and maintenance of the State highway system. Particular rules which have evolved and have been applied to the determination of negligence under those claims are as follows:

1. Lawfully authorized governmental planning and design will not give rise to tort liability for a dangerous condition—plan or design immunity. *Weiss v. Fote*, 7 N.Y. 2d 579, 200 N.Y.S. 2d 409, 167 N.E. 2d 63 (1960);
2. Engineering standards will be viewed as of the time of construction, *White v. State*, 18 Misc. 2d 441, 188 N.Y.S. 2d 865 (Ct. Cl. 1959);
3. Signs, in accordance with national standards, must warn of known dangers, *Canepa v. State*, 306 N.Y. 272, 117 N.E. 2d 550 (1954);
4. The highways must be free of rocks or debris, or the State may be liable for injuries caused thereby, *Juliano v. State*, 273 App. Div. 936, 77 N.Y.S. 2d 826 (3d Dep't 1948);
5. Guardrails must be installed where there is a foreseeable hazard, *Falkowski v. State*, 15 App. Div. 2d 717 223 N.Y.S. 2d 833 (3d Dep't 1962);
6. The State is generally not liable for the consequences of the weather, *McCauley v. State*, 8 N.Y. 2d 938, 204 N.Y.S. 2d 174 (1960);
7. The State is generally not liable for the failure to erect ordinary traffic signs and signals.

As in all negligence cases contributory negligence of the claimant is a bar to relief. For a discussion of the above principles see generally, *Davison, Claims Against the State of New York*, c. 47—c. 55, pp. 489-591 (1954).

E. *Police and Correctional Activities*

The courts have generally held the State liable for negligence on the part of the State Police, whether such negligence be a failure to give an alarm that proximately resulted in injury, or whether such negligence resulted from the careless operation of a motor vehicle. See e.g., *Slavin v. State*, 249 App. Div. 72, 291 N.Y. Supp. 721 (3d Dep't 1936). Suits against the State Police for false arrest and malicious prosecution have produced the following rule:

Both the officer and the State are protected if the officer acted pursuant to a warrant valid on its face. If no warrant had been obtained, the result depends on whether there existed probable cause—an issue that presents a question of law for the court.

In assault cases the issue is the degree of force used by the police officer and whether it is deemed excessive or unjustified. *Lippert v. State*, 207 Misc. 632, 139 N.Y.S. 2d 751 (Ct. Cl. 1955). If an assault occurs outside the scope of authority, the State is exculpated while the officer remains personally and individually liable. See *Nisbett v. State*, 31 Misc. 2d 32, 222 N.Y.S. 2d 867 (Ct. Cl. 1961).

Generally, the State of New York is not liable for injury to prisoners arising from acts of other inmates unless the act was foreseeable as a result of the State being on notice of the tortfeasor's dangerous tendencies. Prisoners injured as a result of unsafe job conditions are permitted to sue the State, since it is believed that the State must furnish a reasonably safe place to work (*Webb v. State*, 3 N.Y. 2d 948, 146 N.E. 2d 285, 168 N.Y.S. 2d 316 (1957)) and the courts will not permit the State to say that a prisoner assumes the risk. *Melton v. State*, 198 Misc. 654, 99 N.Y.S. 2d 737 (Ct. Cl. 1950). Nevertheless, in an appropriate instance the prisoner may be deemed contributorily negligent.

It must be noted, however, that New York law suspends the civil rights of prisoners so long as they are incarcerated and does not permit them to sue until such time as they are released. Their right of action is not abolished during their terms of imprisonment, but it is merely stayed until such time as they are released. N.Y. Civil Rights Law § 79.

V. *Employee Immunity and Indemnification*

Although there is no general employee immunity in the State of New York, there now exists an indemnification statute providing for general indemnification of all State employees. The specific statutory provision read as follows:

“The State shall save harmless and indemnify all officers and employees of the State from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act by such officer or employee provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the willful and wrongful act or gross negligence of such officer or employee and provided further that such officer or employee shall, within five days of the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy thereof to the Attorney General.” Public Officer’s Law § 17 (L. 1971, c. 1104) July 2, 1971.

Prior to the adoption of this statute the State of New York provided indemnification to certain State employees through legislation. Such legislation included the following provisions:

1. Mental Hygiene law § 44 provided that:

“No civil action shall be brought in any court against the commissioner or an officer or employee of the department of mental hygiene, member of the board of visitors or an officer or employee of a state institution in the department or other person rendering authorized personal services to patients at any such institution, in his personal capacity, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of a judge of the supreme court, first had and obtained. Such commissioner, visitor, officer, employee or other person rendering authorized personal services to patients in any such action shall not be liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause.

Any just claim for damages against any of the persons named herein for which the state would be legally or

equitably liable, shall be brought and maintained in the court of claims as a claim against the State.”

2. Mental Hygiene Law § 203-a provided for the following protection against officers and employees of the Narcotic Addiction Control Commission:

“The State shall save harmless and protect all officers and employees of the commission whose duties involve the care, treatment or supervision of persons certified to the facilities operated by the commission, whether within such facilities or on aftercare therefrom or whose duties involve services to or for residents of a facility or rehabilitants on aftercare, from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act by such officer or employee occurring in the course of providing such care, treatment, supervision or services, and resulting in personal injury, provided that such officer or employee, at the time such injury was sustained, was acting in the discharge of his duties and within the scope of his employment and that such injury did not result from the willful act or gross negligence of such officer or employee, and provided further, that such officer or employee shall, within five days of the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy of the same to the attorney general. Upon such delivery the attorney general may assume control of the representation of such officer or employee, who shall cooperate fully with the attorney general’s defense.”

3. § 24 of the Correction Law provided for the following protection of officers and employees of the Department of Corrections:

“No civil action shall be brought in any court against the commissioner or a deputy commissioner of correction or an officer or employee of an institution in the department, in his personal capacity, for alleged damages because of any act done or failure to perform any act, while discharging his official duties, without leave of judge of a supreme court, first had and obtained. Any such officer or employee in any such action shall not be

liable for damages if he shall have acted in good faith, with reasonable care and upon probable cause.

Any just claim for damages against such commissioner, officer or employee for which the state would be legally or equitably liable, shall be brought and maintained in the court of claims as a claim against the state.”

4. Executive Law, § 229 provided the following indemnification of members of the Division of State Police :

“The state shall save harmless and protect all members of the division of state police from financial loss arising out of any claim, demand, suit or judgment by reason of the alleged negligence or other act of any such member provided the member, at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the negligence of such member, and provided further that the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy of the same to the attorney general. Upon such delivery the attorney general may assume control of the representation of such member of the division of state police. Such person shall cooperate fully with the attorney general’s defense.”

See also Civil Service Law § 10; Education Law § 362; Public Health Law § 14; Social Services Law § 41; Labor Law § 18-A.

It was apparent in New York that a selective and rather haphazard statutory manner of indemnification was provided to protect the various State employees. Undoubtedly the specific statutory protections were induced to a certain degree by the amount of persuasion these individual departments possessed in the Legislature of the State of New York. It seemed clear that one of the shortcomings in New York law was this lack of uniformity in the treatment of State employees. After years of experience and particularly in recognition of its own shortcomings in protecting its State employees, the New York Legislature passed Public Officer’s Law § 17 quoted above and repealed all the existing indemnification statutes also cited above. This legislation was prepared and prompted by the Attorney General’s Office in New York and it now provides a comprehensive basis for indemnifying New York State employees for negligence while

acting in the discharge of their duties and within the scope of their employment.

VI. *Funding of Claims and Judgments*

In 1942, \$1,050,000 was appropriated for the payment of Court of Claims judgments in tort and contract matters. In 1970, \$5,000,000 was appropriated for that purpose. All appropriations matters are debited and credited to the individual department of State government; consequently, these claims are not included in the Court of Claims Budgetary request out of which tort and contract claims are paid. The actual \$5 million appropriation in 1970 is appropriated to the Court of Claims and is requested by the presiding judge and the clerk directly through the Governor and the Legislature without review by the Budget Bureau. This \$5 million figure, however, and any other figure which becomes the appropriated amount in a given year, is controlled by the Department of Audit and Control headed by the Comptroller General. This appropriated sum of money is invested by the Department (there are no limits other than general limits on government investments) and all payments out of the Court of Claims judgment appropriation are made only after a review by the counsel and financial auditors of the Department of Audit and Control. Interest on any judgment is paid for a maximum of twenty days or until a certificate of no appeal is filed by the Attorney General's Office. This procedure is specifically established in the Court of Claims Act at § 20-5a.

The review function provided by the Comptroller and his Department of Audit and Control is usually a cursory one unless the case appears to be somewhat complex and then the Comptroller provides a thorough and independent review before the actual payment of a judgment or settlement previously rendered or entered into. This review, however, has never resulted in the failure to pay a judgment entered by the Court of Claims; it does, nonetheless, serve as an effective check upon excessive or improper settlements being paid out of the State appropriations.

The procedure above referred to and performed primarily through the Department of Audit and Control is the one usually followed in all Court of Claims matters. It should be noted, however, that the Legislature has retained power to pass special bills authorizing the payment of "moral obligations" of the State of New York. Moral obligations are generally defined as

those which do not technically fall within the principles of legal liability otherwise imposed upon the State of New York. In any event, these small numbers of bills result in the payment of additional monies without the normal processing through the Department of Audit and Control. The Legislature has also retained additional power to confer jurisdiction upon the Court of Claims by way of special bills. Most of these bills are passed in order to correct inequities resulting from the inability of a claimant to comply with filing time limitations of the Act. There is a limitation upon the legislative remedy in that the time extension may not result in a longer statute of limitations in favor of the claimant than would be accorded in a similar cause of action between private litigants. This special bill process, it might be added, is also used on rare occasions by the Legislature in hardship cases which might not otherwise fall within the jurisdiction of the Court of Claims. Essentially, it provides a mechanism for legislative redress of the unusual and emotionally appealing case. Any judgment rendered as a result of such special legislation, however, is processed through the Department of Audit and Control which performs its normal independent review.

VII. *Claims Experience—New York Court of Claims*

You are Viewing an Archived Copy from the New Jersey State Library

The following chart indicates the claims experience of the New York Court of Claims during the indicated years. This chart, it should be noted, reflects claims relating to contract, tort and appropriations matters.

	1965-1966	1966-1967	1967-1968	1968-1969	1969-1970	1970-1971
Claims pending at start of period	3,194	2,779	2,529	2,390	2,411	2,609
Claims filed during period*	1,406	1,780	1,578	1,578	1,660	1,486
<i>Total</i>	<u>4,600</u>	<u>4,559</u>	<u>4,107</u>	<u>3,977</u>	<u>4,071</u>	<u>4,095</u>
Claims dismissed during period	1,180	1,337	1,103	961	939	894
Claims in which awards were made during period	639	693	614	605	523	594
<i>Total</i>	<u>1,819</u>	<u>2,030</u>	<u>1,717</u>	<u>1,566</u>	<u>1,462</u>	<u>1,488</u>
Claims pending at end of period	2,781	2,529	2,390	2,411	2,609	2,607

* These figures include newly filed claims, claims held on calendar in which judgments have been entered after order of severance, claims restored by order of the Court of Appeals, by order of the Appellate Divisions and by order of the Court of Claims.

During the year July 1, 1968 through June 30, 1969, the nature of the claims experienced in the Court of Claims was as followed

Nature of Claim		Torts		TOTAL											
		Motor Vehicle	State Vehicle												
Claims Pending prior to July 1968	50	18	90	262	4	17	27	91	40	3	14	33	124	1	2,390
Claims filed July 1, 1968 thru June 30, 1969	74	32	87	161	4	7	13	40	8	3	14	13	83	4	1,587
Total Claims in Court	124	50	177	423	4	24	40	134	48	3	28	46	207	5	3,977
Contract															
Appropriation															
Tax															
Motor Vehicle															
State Vehicle															
Highway															
National Guard															
Overflow															
Park															
Institution															
Prison															
Canal															
False Arrest															
Other Tort															
Other type claim															
Assault															

You are Viewing an Archived Copy from the New Jersey State Library

This chart would suggest that the bulk of claims filed with the Court of Claims (exclusive of appropriation matters) are concentrated in the following areas: highways, institutions, motor vehicles and contracts. Unfortunately, statistics are not kept on the amounts of judgments rendered in these various types of cases. Over 400 of these claims were settled prior to trial. Approximately 700 of the claims were disposed of through the judicial process.

The following chart illustrates the caseload trends of the Court of Claims, as well as the percentage of claims which ultimately resulted in awards. From examination of the chart, it is apparent that the caseload has remained fairly steady over the last decade and that approximately 40% of all claims filed resulted in actual awards.

Judicial Year	Cases Filed	Dismissals	Awards	Terminated	Claims Pending end of Judicial Year
1959-1960	1,270	512	384	896	2,699
1960-1961	1,424	414	380	794	3,329
1961-1962	1,440	810	669	1,479	3,290
1962-1963	1,929	622	804	1,426	3,793
1963-1964	1,618	856	842	1,698	3,713
1964-1965	1,477	1,313	683	1,996	3,194
1965-1966	1,406	1,180	639	1,819	2,779
1966-1967	1,780	1,337	693	2,030	2,529
1967-1968	1,578	1,103	614	1,717	2,390
1968-1969	1,587	961	605	1,566	2,411
1969-1970	1,660	939	523	N/A*	2,609
1970-1971	1,486	894	594	N/A*	2,607

* Not available at the time of this report.

The following table sets forth not only the number of claims and awards made, but also provides the related monetary figures.

THE COURT OF CLAIMS

July 1, 1968 through June 30, 1969

	<i>Number</i>	<i>Amount</i>
1. Claims pending July 1, 1968	2,390	\$516,364,224.42
2. Claims filed during the period	1,587	281,403,361.93
3. Total claims in the Court	3,977	\$797,767,586.35
4. Claims disposed of during the period	1,566	239,246,964.53
(a) Claims dismissed during the period	961	148,141,267.76
(b) Claims in which awards were made during the period	605	
Amount claimed		91,105,696.77
Amount awarded		30,052,642.81
5. Claims pending June 30, 1969	2,411	\$562,737,232.99 ^a

There were 1,475 daily sessions held by the Court of Claims during the period. The authorized strength of the Court is 16 judges. In addition to the 1,566 claims disposed of, 789 motions were decided by the Court.

^a This figure includes an increase of \$4,216,611.17 by way of amendments to the original amounts of claims.

THE COURT OF CLAIMS

July 1, 1969 through June 30, 1970

	<i>Number</i>	<i>Amount</i>
1. Claims pending July 1, 1969	2,411	\$562,737,232.99
2. Claims filed during the period . . .	1,660	405,619,871.53
3. Total claims in the Court	4,071	\$968,357,104.52
4. Claims disposed of during the period	1,462	220,514,524.24
(a) Claims dismissed during the period	939	129,753,582.17
(b) Claims in which awards were made during the period	523	
Amount claimed		90,760,942.07
Amount awarded		28,995,916.69
5. Claims pending June 30, 1969	2,609	\$751,915,747.77 ^a

There were 1,723 daily sessions held by the Court of Claims during the period. The authorized strength of the Court is 16 judges. In addition to the 1,462 claims disposed of, 851 motions were decided by the Court.

^a This figure includes an increase of \$4,073,167.49 by way of amendments to the original amounts of claims.

THE COURT OF CLAIMS

July 1, 1970 through June 30, 1971

	<i>Number</i>	<i>Amount</i>
1. Claims pending July 1, 1970	2,609	\$751,915,747.77
2. Claims filed during the period	1,486	411,141,816.64
3. Total claims in the Court	4,095	\$1,163,057,564.41
4. Claims disposed of during the period	1,488	308,457,751.40
(a) Claims dismissed during the period	894	147,587,193.96
(b) Claims in which awards were made during the period	594	
Amount claimed		160,870,557.44
Amount awarded		43,912,054.35
5. Claims pending June 30, 1971	2,607	\$859,657,575.78 ^a

There were 1,493 daily sessions held by the Court of Claims during the period. The authorized strength of the Court is 16 judges. In addition to the 1,488 claims disposed of, 935 motions were decided by the Court.

^a This figure includes an increase of \$5,057,762.77 by way of amendments to the original amounts of claims.

The pattern of claims and awards seems reasonably constant and it must be recognized that the amount requested in the Court of Claims budget for the payment of contract and tort judgments in fiscal years 1970 and 1971 also remained constant at \$5 million. Thus the above charts indicate that not only do appropriation claims (condemnation matters) occupy 65% of the court's calendar, but they also amount to approximately 85% of the court's monetary awards.

VIII. *The New York Court of Claims—An Evaluation*

In their Judicial Resource Kit of 1969 at page 16, the New York League of Women Voters makes the following statement:

“The League also seeks the abolition of the Court of Claims. This Court hears and determines claims by and against the State. Here again, it has been argued that this is a highly specialized Court, requiring great expertise. Proponents of consolidation have reiterated that this jurisdiction is no more complex or important than any others. Those appointed to the Court have usually not specialized in cases falling within its jurisdiction and appointees have almost always been ranking political figures.”

While this is a brief and somewhat cryptic criticism of the New York Court of Claims, it does indicate that there is some disenchantment in the State of New York with the operations of this specialized Court. The proponents of the retention of this separate Court of Claims in the State of New York make the following arguments:

1. The Court of Claims is a highly centralized, well-organized Court with unequalled flexibility in meeting its caseload. [The point here emphasized is because of central administration of the Court of Claims it is more easily susceptible of greater efficiency and flexibility in the assignment of judges, as well as in the administration of its court calendar throughout the State.]
2. The volume of business justifies a separate court. This argument is based upon the fact that the statistics for the Court of Claims show that there is a sufficient number of new claims filed each year to utilize effectively all the resources of the Court of Claims. This fact is undoubtedly true since as indicated in a previous section the caseload of the Court of Claims has remained fairly constant and fairly heavy over the course of years. [It must be pointed out, however, that approximately 70% of that caseload relates to appropriation matters; this has particular significance when trying to relate the need for a Court of Claims in New Jersey with the value of a Court of Claims in New York.]
3. A single centralized court handling claims against the State permits the most efficient handling of the work of the court and the Attorney General. This argument is essentially based on centralization of the Attorney General's Office in the City of Albany and the ease

with which that office can handle its work physically, since both the main facilities for the Court of Claims and for the Attorney General's Office are located in Albany. [This particular argument does not have the same degree of importance and relevance to the New Jersey Attorney General's Office in light of the obvious differences in geography.]

4. A separate court results in uniform decisions. [This argument, of course, has some merit but similar uniformity can be better achieved by a particularized statute such as that provided in California as opposed to the case-by-case method which New York State otherwise pursues.]
5. The Court of Claims Judges have become experts in handling the somewhat specialized issues presented by claims against the State. [This argument has greater relevance when applied to appropriation claims in the State of New York than it does to the general run of cases involving the liability of governmental entities. The nature of government liability in tort and contract does not generally require any particular degree of expertise different from that which judges of courts of general jurisdiction otherwise must possess. If necessary, such expertise can be accomplished by selectivity in the assignment of judges as well as by the establishment and implementation of a special calendar in our existing court system.]

See Second Annual Report of the Judicial Conference of the State of New York. (Legislative Document No. 88 (1957).)

The New York Court of Claims has apparently developed into a very efficient and effective Court in the State of New York. Nonetheless, there are strong arguments in that State favoring consolidation of the Court of Claims into the Supreme Court or Court of General Jurisdiction. The basic position of the proponents of consolidation is that there is no adequate justification for maintaining a separate court solely because of the identity of the defendant. These proponents do not believe that a separate court is needed for the protection of the State, because to suggest otherwise would indicate that judges of general jurisdiction are less concerned with and are less inclined to understand the concept of justice to the State than are judges of the

You are Viewing an Archived Copy from the New Jersey State Library Court of Claims. The proponents of consolidation in New York also argue that it would eliminate the difficulties in third-party practice presented by having a separate Court of Claims which does not provide a jury trial. This problem is a realistic one and has presented difficulty in the State of New York. In joint tort-feasor cases there is no way for the State of New York to force a third party to relinquish his right to a jury trial and to join in the action in the Court of Claims. The Attorney General's Office does attempt to notice third parties in and to utilize the doctrine of collateral estoppel in subsequent actions in the Supreme Court; however, where joint tort-feasor cases are involved, the New York Court of Claims generally follows a policy to let the trial in the Supreme Court proceed first.

In New York the proponents of consolidation argue that it would promote overall efficiency of their judicial system. This argument is based upon the fact that they think that using the judges and facilities of the Court of Claims would help alleviate the burden presently imposed upon the courts of general jurisdiction throughout the State of New York.

While there are certainly reasonable arguments put forth by both sides of the Court of Claims consolidation question, it is clear that a Court of Claims similar to that existing in New York would be inadvisable for the State of New Jersey. There are many reasons for this conclusion which are referred to earlier in this report. Several of the most significant appear to be:

1. 70% of the calendar of the New York State Court of Claims is occupied by appropriation cases (condemnation matters) and all of such cases in the State of New Jersey are handled by our regular court system today. Thus, we are only talking about a Court which handles 30% of the claims not presently handled by New Jersey's regular court system.
2. As indicated earlier, the operating budget of the New York State Court of Claims is close to \$3 million, exclusive of building costs and maintenance of such buildings. The obvious expense involved with the establishment of a separate court is clearly a reason for shying away from it.
3. The administrative benefits provided by the New York State Court of Claims result from the fact that the

regular court system in New York is administered on a countywide basis without centralized administration. Thus, because the New York State Court of Claims is administered centrally through Albany, it provides a benefit peculiar to the New York system of court administration. This benefit, however, would not result in the State of New Jersey since we do have a centrally located and centrally administered office of our courts.

Consequently, whatever the merits of the Court of Claims in the State of New York, it should not be established in the State of New Jersey.

CHAPTER 6

THE FEDERAL EXPERIENCE

I. *The Federal Tort Claims Act*

A. *Introduction*

The Federal Tort Claims Act [FTCA] took effect on January 1, 1945. Essentially, it waived the Federal Government's immunity from civil liability and provided that henceforth personal injury actions may be brought against the United States Government in the various United States District Courts throughout the country and that they would be tried without a jury trial and pursuant to the rules and procedures adopted under the FTCA. The major reasons behind the passage of the Federal Tort Claims Act were that:

1. There was a desire on the part of the Government in the interest of justice and fair play to permit a private litigant to satisfy his legal claims for injury or damage suffered at the hands of a United States employee acting in the scope of his employment;
2. The Federal Government, and in particular the United States Congress, was most anxious to relieve itself from the burden imposed by multitudinous bills for private relief arising from tort claims against government employees;
3. The Government was anxious to provide an impartial *judicial* forum for *both* the complainant and the Government; in which to discover the facts in the same manner as private law suits;
4. The Congress desired to expedite the payment of just claims.

See *Muniz v. United States*. 374 U.S. 150 (1963).

The keynote change wrought by the Federal Tort Claims Act in 1946 was that it opened the door to tort suits against the Federal Government on a broad front not previously known. This was the primary reason why a nonjury trial in the Federal

District Court was chosen as the appropriate mechanism for processing claims against the Federal Government. The concern with a proliferation of suits against the Government also prompted the Congress to provide a statute and to authorize the issuance of rules and regulations thereunder for the purpose of limiting the number, types and extent of claims filed against the Federal Government. In addition, procedures specifically designed to apply in cases against the Government were established and applied in tort suits against the United States.

The basic waiver of sovereign immunity in tort is set forth in 28 U.S.C.A., § 1346 (2) (b) which reads in pertinent part:

“Subject to the provisions of chapter 171 of this Title, the district courts, * * * shall have exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurs * * *.”

Thus, the United States Government was made liable under the principle of *respondet superior* for the negligence of its employees while acting within the scope of their employment. It should be noted that in a suit under the Federal Tort Claims Act there is no limitation on the amount of possible damages awarded or on the type of damages which may be recovered. For example, pain and suffering are permissible as elements of damages and no statutory limits such as may be found in some other states are imposed.

B. Procedure of the FTCA

Initially, it should be noted that if a tort claim falls under the FTCA it becomes the sole and exclusive remedy against the United States Government. In addition, neither military personnel nor Federal employees may maintain suit under the Federal Tort Claims Act for personal injuries or death if the claim arose out of their respective scopes of employment. In each

case the applicable compensation acts pertaining to Federal employees form the only basis for relief.

A claim arising under the Federal Tort Claims Act must be filed with the appropriate Federal agency and must be so filed within two years of the cause of action. If, however, the claim is inadvertently filed with the wrong Federal agency, the Act imposes the obligation upon that agency to appropriately notify the agency involved—the agency employing the tortfeasor. The agency then has six months in which to act upon the claim presented to it. The detailed procedures to be followed in the administrative processing of his claim are set forth in regulations promulgated by the Attorney General of the United States pursuant to authority granted to him by 28 U.S.C.A., § 2672. These regulations are set forth at 28 C.F.R., §§ 14.1 - 14.11.

Briefly, these regulations provide a series of steps to be taken by the claimant in processing his claim. Initially, he must execute a Standard Form 95 or present an equivalent notification of the incident giving rise to his claim, and he must also expressly demand money damages in a sum certain. As indicated earlier, this notification must be filed with the appropriate agency. The claim form may be signed and presented by the person injured or whose property has been damaged, or by his authorized agent or legal representative. In the latter case the capacity of the one presenting it must be set forth together with evidence of his authority. The evidentiary requirements outlined in § 14.4 of the Attorney General's regulations differentiate between wrongful death and injury claims, but as a general rule include such items as medical treatment, medical bills, physician statements, employer statements, death certificates, and so forth.

Once the claim has been properly filed with the appropriate Federal agency, that agency then initiates its own review. An authorized employee of the particular Federal agency involved may settle any claim under \$1,000. Settlement of any claim exceeding \$1,000 and less than \$25,000 must be settled by the head of the agency or his designee and only after a review by the legal officer of the agency. Any award, compromise or settlement of a claim by an agency in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee. In the following situations the Federal agency involved must clear any settlement, compromise or award of the claim under \$25,000 with the Attorney General.

1. Where a new precedent or new point of law is involved;
2. Where a question of policy is or may be involved;
3. Where the United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third-party claim;
4. Where the compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed \$25,000.

In addition, no administrative claim may be settled without the concurrence of the Department of Justice when the Federal agency involved is informed or is otherwise aware that the United States or an employee, agent, or cost plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

Acceptance by a claimant of any award or settlement determined administratively is final and conclusive upon the claimant and is a complete release from liability for both the United States and the alleged tort-feasor of the United States Government. Settlement effectively operates to bar any future claim in the United States Courts arising out of the same transaction.

If after appropriate review, the Federal agency decides to deny the claim, it is required by the Attorney General's regulation to inform the claimant of this denial in writing and to state to him that if he is dissatisfied with the agency action he may file suit in the appropriate U.S. District Court not later than six months after the date of mailing of the notification.

It is significant to note that in 1966 important amendments were passed by the United States Congress designed to improve certain existing problems which had arisen under the 1945 Tort Claims Act. In particular, these amendments were designed to overcome the following problems:

1. Under the Act as originally written the Federal agency head or the Court in their respective discretion could set attorneys' fees and could place a maximum fee of 10% on settlements and 20% upon judgments. This provision not only discouraged attorneys from seeking settlement but apparently had a demoralizing effect

upon the attorney-client relationship and upon attorneys generally. Consequently, the 1966 Amendment eliminated both the agency head and the Court from the setting of attorneys' fees and established statutory maximum fees of 20% for settlements and 25% in all other situations, the actual fee to be otherwise determined between the attorney and his client below the statutorily established limits;

2. Perhaps most significantly the 1945 law permitted agency settlements only on claims involving \$2,500 or less. This apparently had the undesirable effect of reducing the ability of the agency to settle claims and creating a log jam of cases in the court system. Consequently, the 1966 Amendment raised the figure to \$25,000 and the only limit it established on claims above that (aside from those already noted above) was that the Attorney General of the United States must approve settlement of all claims above \$25,000. In addition, the 1966 Amendment removed the necessity for the Attorney General to get court approval of settlement of a claim after an action had been commenced in the Federal courts. The earlier law had required the Attorney General to obtain court approval before entering into a settlement. This change was designed to and has in fact expedited the settlement machinery of the Federal Government;
3. The 1966 Amendment also allows for the possibility of enlargement of the normal two-year statute of limitations. Since an agency has six months within which to administratively determine a claim, it is now possible under the new Amendment for a claimant to file a suit within approximately two years and six months of the date of accrual of the claim. In effect, the Amendment permitted a claim to be filed within six months of the final denial of the administrative agency even if the time of filing of suit would exceed a two-year limitation—in effect a maximum two and one-half year limitation now exists. This change was designed undoubtedly to provide substantial justice to the claimant and to permit more time to the administrative agency to process the claim and settle it properly.

C. *The Role of the Department of Justice Attorneys*

The eighty-seven United States Attorney Offices throughout the country handle the defense of Federal Tort Claims Act cases. General supervision of all claims is provided by the Tort Claims Section of the Department of Justice in Washington, D. C. The Chief of that Section has a staff of eighteen attorneys and he reports to the Assistant Attorney General in charge of the Civil Division. While it is apparently not mandated upon the Attorney General of the United States, he nevertheless does represent all Federal employees; if there is a close question of whether the employee was acting within the scope of his employment, the Department of Justice follows a policy of representing the employee. It should be noted, however, that less than a dozen cases arise a year in which employees are sued individually, and in fiscal 1970 only six suits were filed throughout the country against Federal employees individually.

While the particular government agency involved is supposed to do the initial investigation of a tort claim, the Federal Bureau of Investigation investigates prison cases and enters into all actions once a suit has been filed in the Federal District Court. Thus the United States Attorneys and the United States Attorney General are able to tap the expertise of the Federal Bureau of Investigation when preparing cases for trial.

D. *Federal Employees*

As a general rule most Federal employees are individually liable for negligence within the scope of their employment. Although such actions are authorized against Federal employees individually, various common law immunities protect them to a great extent. These immunities, however, are similar to those shared by all governmental employees throughout Federal, State and local government employment. In addition, the Federal Government provides the following specific immunities for Federal employees.

1. Under the Federal Driver's Act, (28 U.S.C.A. § 2679 (b)-(e) (1966)) when suit is brought in a State court against an employee of the United States for an injury resulting from the operation of a motor vehicle by such employee while acting within the scope of his employment the Attorney General to the United States District Court shall remove the case and the United States

must be substituted as a defendant—the employee therefore cannot be liable and the plaintiff's exclusive remedy is under the Federal Tort Claims Act;

2. 38 U.S.C.A. 4116 (1969) provides immunity from liability for negligence within the scope of employment for doctors, dentists, nurses and supporting personnel of the Veterans Administration in a similar manner to that which is provided under the Federal Driver's Statute;
3. As indicated earlier, any settlement operates as a complete bar against the Federal employee involved. 28 U.S.C.A. § 2679(b) (1966).

It should also be noted that during the last two years there has been a bill pending in Congress to provide, in effect, immunity for all Federal employees similar to that which is provided by the Federal Driver's Act—in other words, complete immunity for all employees and the substitution of the United States Government as the party-defendant in all cases in which the allegation is negligence against the employee acting within the scope of his employment.

Although there appears to be rather broad individual liability and no immunity and/or indemnification for large numbers of Federal employees, it has nonetheless been the case (as indicated earlier) that very few suits have been filed against Federal employees. Officials of the United States Government in fact could only recall one judgment suffered by a Federal employee as an individual—a uniformed physician within the Armed Services for malpractice—and it was recalled that the Department had encouraged and helped effectuate the introduction and passage of a private bill to reimburse the doctor for the \$3,000 judgment against him. In addition, while there has been no clear decision on the question, the potential liability of the United States Attorneys and the legal personnel of the United States Attorney General's Office has never been officially tested. Although they are unprotected by indemnification or federally paid insurance, there is not much concern in the Department of Justice concerning a potential liability of their government lawyers to suit.

E. *Substantive Law*

As indicated earlier, the United States Government is generally subject to liability for the negligent acts of its employees

within the scope of their employment. There are specific exceptions established under the act, perhaps the primary one of which is that of discretionary immunity provided for the employee and the Government. Other exceptions include immunity for:

- a. The assessment or collection of any taxes;
- b. The detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer;
- c. Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abusive process, libel, slander, misrepresentation, deceit, or interference with contract;
- d. Any claim arising out of the combatant activities of the military or naval forces, or the coast guard, during time of war. 28 U.S.C.A. § 2680 (1946).

The two most common defenses used by the United States Government are that either the employee was not at fault, or that he was engaged in the performance of a discretionary function or duty. The Federal courts, like their State counterparts, have been laboring for quite some time to definitively explain the meaning of the term "discretionary immunity". *Dalehite v. United States*, 346 U.S. 15 (1953). While there have been numerous attempts, there nonetheless remains the necessity of relying upon the case-by-case development of the term consistent with the general proposition that decision making and policy formulation are clearly discretionary and operational level activities are generally considered ministerial and thus subject the Government and its employees to liability. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *Rayonier Inc. v. United States*, 352 U.S. 315 (1957).

The Federal Act, as is indicated by the foregoing discussion, does not provide an extensive statutory exposition of substantive law. This is the result primarily of the fact that the various Federal courts throughout the country generally have to apply the law of the State in which they are located and therefore the applicable substantive law depends upon the State jurisdiction involved. The Federal courts have nonetheless established the following substantive principles:

1. Federal prisoners may sue under the Federal Tort Claims Act for injuries during imprisonment arising

from the negligence of government employees. *Muniz v. United States*, 374, U.S. 150 (1963);

2. The United States has the same duty as private landlords with respect to safety of the premises to invitees and licensees. *Haginikitos v. United States*, 412 F.2d 219 (3d Cir. 1969)
3. The doctrines of attractive nuisance and *res ipsa loquitur* are applied, but no liability may be imposed upon the Federal Government on a theory of warranty, products liability or absolute liability. *United States v. Hull*, 195 F.2d 64 (1st Cir. 1952)
4. No liability may be imposed upon the Federal Government as a result of the intentional torts of its employees. *Alaniz v. United States*, 257 F.2d 108 (10th Cir. 1958)

F. FTCA—Funding of Judgments and Claims Experience

The United States Government has established in the Government Accounting Office a revolving fund for the purpose of paying judgments rendered by the Federal District Courts in tort and the United States Court of Claims in contract. If a judgment is under \$100,000, a request to pay the same goes directly to the General Accounting Office for disposition. They perform their independent review as the watchdog agency of Congress and then order payment of the judgment out of the revolving fund. If the judgment exceeds \$100,000, the Department of Justice forwards the request for payment to the Department of the Treasury and the Department of the Treasury requests a supplemental appropriation from the United States Congress.

In 1968, the total amount of tort awards was approximately \$13 million, the same figure was awarded in 1969, and approximately \$12 million has been awarded in the year 1970. Approximately one-third of these amounts are attributable to airplane cases and over one-third of the cases filed in the Federal District Courts last year involved auto accident cases. During calendar year 1968, the Administrative Conference conducted a survey with respect to the effectiveness of the previously mentioned 1966 FTC Amendments which increased the administrative settlement power of the various Federal agencies to \$25,000. This survey resulted in a finding that of approximately 10,000 claims filed under the Federal Tort Claims Act during a two-year period of

1967 and 1968, 84% of the claims had been disposed of administratively—a substantially higher percentage of disposition than in any other previous year under the Federal Tort Claims Act.

II. *Government Contracts and the U.S. Court of Claims*

A. *U.S. Contracts—Administrative Remedies*

The experience of the United States Government provides a valuable insight into a seasoned and effective mechanism for settling contract disputes. As early as 1821, the United States Supreme Court held that the doctrine of sovereign immunity was applicable to suits against the United States Government and therefore the Government was immune from suits in both tort and contract. *Cohens v. Virginia*, 18 U.S. 264, 411 (1821). In 1887, however, the United States Congress authorized suit against the Federal Government “founded upon any expressed or implied contract with the United States.” 28 U.S.C.A., § 1491 (4). Since that day forward, the United States Government has obtained a wealth of experience and built a substantial body of law in the public contract field.

One of the most significant clauses utilized by the Federal Government and found to be of substantial value in the processing of contract disputes is referred to as “The Disputes Article.” It is a contract provision which establishes an administrative procedure for settling disputes arising out of Government contracts. Essentially, it provides that a claim shall be filed with a designated contracting officer from whose decision on the claim an appeal shall be taken to the head of the appropriate Federal agency or a board designated by him. This appeal must be taken within a thirty-day period after the contracting officer’s decision. Originally, the determination of the agency head or the designated board of contract appeals was considered final and subject only to limited review by the Federal courts to the extent that it could be shown that the decision was fraudulent. In *United States v. Wunderlich*, 342 U. S. 98 (1951), the United States Supreme Court sanctioned the use of such contract clauses and held that when a contract clause was used which stated that the decision of the department head or his duly authorized representative would be final and conclusive as to questions of fact, the courts would only exercise the most limited review—“the decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.” 342 U.S. at 100.

In 1954, however, the United States Congress responded to the decision in the *Wunderlich* case and passed the following statute, which is contained in 41 U.S.C.A., § 321.

“No provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessary to imply bad faith, or is not supported by substantial evidence.”

It was the obvious purpose of this legislation to provide what Congress believed to be a more adequate judicial review of administrative decisions on claims arising under Government contracts than that which was provided by virtue of the decision in *United States v. Wunderlich, supra*. This chapter was intended to require utilization of administrative procedures contractually bargained for and in the event an administrative record was defective or inadequate or revealed commission of prejudice or error, it was the intent of Congress that either (1) judicial proceedings initiated in the Court of Claims should be stayed pending further action before the agency or (2) judgment should be granted for the complaining contractor in a proper case. See *Crown Coat Front Co. v. U.S.*, 386 U.S. 503 (1967); *U.S. v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966). It has also been held that this statutory provision was intended to mean that the limited review provided therein was applicable only to questions of fact and that the Court of Claims or any other Federal Court possesses *de novo* jurisdiction as to questions of law. This is true even in those cases where questions of fact before administrative agencies necessitate consideration of incidental questions of law. In other words, today there is essentially an appellate review of administrative factual conclusions and *de novo* review of any legal questions decided by an administrative board.

Although there are many contractual provisions utilized by the Federal Government, the most significant provision gen-

erally required in all Federal Government contracts is that which has been previously referred to as "The Disputes Article." The General Services Administration has prescribed the following disputes article in their Standard Form 32 which contains the general provisions for Government supply contracts:

Section 12: Disputes—

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. The decision of the contracting officer shall be final and conclusive unless, within 20 days from the date of receipt of such copy, the contractor mails or otherwise furnishes to the contracting officer a written appeal addressed to the secretary [in this case the head of the General Services Administration]. The decision of the secretary or his duly authorized representative for the determination of such appeal shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract in accordance with the contracting officer's decision.

(b) This "disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

As can be seen from the discussion preceding the above quoted provision, the disputes clause is not a creature of statute, but is a creature of government contracting practices which has been sanctioned by the United States Supreme Court and indirectly sanctioned by the United States Congress in its legislation

passed in 1954. The commonly referred to Boards of Contract Appeals—generally designated as authorized representatives of the department heads for the determination of contract disputes—are thus not creatures of statute but of the actual government contracts themselves.

It should be noted that the disputes procedure referred to in the above provision is the sole remedy when a dispute develops between the contractor and the contracting officer concerning a question of fact under the contract. It is often difficult to draw the line between a question of fact and a question of law. For example, the Armed Services Board of Contract Appeals has held that the meeting of a specification provision or the determination of what was performed under a contract is a question of fact, while a question involving an interpretation of the contract is said to be a question of law. *Dynamics Corporation of America v. United States*, 389 F.2d 424 (1968).

The contracting officer is the government official designated by the contract to act initially as to disputes. He generally is selected because he is familiar with the ongoing operations and performance under the contract, and his decision is generally rendered and based upon written correspondence presented by the parties as well as his own knowledge. His decision must be in writing and a copy thereof must be delivered to the contractor; perhaps significantly the contractual provision does not impose any time limitation upon the contracting officer's decision. His decision must inform the contractor of his right to appeal if he is dissatisfied with the contracting officer's conclusions; otherwise, his decision will not be considered a final decision from which an appeal must be taken within 30 days to the department head of the designated Board of Contract Appeals. If the contracting officer fails to render a decision within a reasonable period of time, however, the Board of Contract Appeals will consider a contractor's complaint on the basis of the records submitted to the contracting officer.

The contracting officer's decision is conclusive unless the contractor takes a written appeal from it to the head of the department or the designated Board within 30 days from the date of receipt of the decision. Failure to comply with this 30-day limitations period forecloses suit under the contract against the United States Government; this arises not only from the contractual provisions but also from the policy of exhaustion of

administrative remedies required by the United States Court of Claims.

It is significant that the disputes article itself enables the parties to achieve performance rather than to continue lengthy and prolonged litigation at the expense of the completion of the contract. For that reason it requires the contractor to process his dispute while at the same time continuing his contractual performance.

On appeal to a designated Board of Contract Appeals (BCA), the jurisdiction is *de novo* with respect to the admissibility of evidence but is appellate in the sense that it extends only to those issues that were placed before the contracting officer. These BCA's may pass upon the propriety of a termination for default; they may consider the propriety of the assessment of liquidated damages and excess costs on the reletting of a defaulted contract; and they may determine the rights of the parties in the amount of an equitable adjustment under the Changes or Changed Conditions Articles of Government contracts. These Boards may not, however, reinstate or reform a contract; and they may not direct the acceptance of an item or grant any relief on the basis of an implied contract, since to do so would be to make a determination on a question of law which is not within their province and jurisdiction.

An appeal before a Board of Contract Appeals is generally similar to a civil case before a Federal District Court sitting without a jury. The Boards generally try to comply with the general procedural requirements which would otherwise apply in a Federal District Court. The Boards promulgate rules applicable to the handling of these appeals. For example, the contractor must file his complaint within 30 days after receiving a notice of the docketing of his appeal; the Government then has 60 days within which to file an answer. The Government attorney must file with the Board copies of the contractor correspondence, the contracting officer's decision, the contract amendments thereto and any other relevant documents. These items form the administrative record upon which the appeal, as supplemented by the hearing, will be decided. At the hearing there is full examination and cross-examination of witnesses and introduction of documentary evidence. Although the Boards of Contract Appeals lack subpoena power, their rules do provide for the taking of depositions, interrogatories, inspection of documents and pre-hearing conferences. The Government arranges for a

You are Viewing an Archived Copy from the New Jersey State Library transcript to be taken at the hearings, most of which are held in Washington. Generally, the procedure from appeal to hearing takes less than one year. It is significant also that a large and growing percentage of cases are being settled prior to an established hearing date.

B. *The United States Court of Claims*

Until 1953, the United States Court of Claims was considered an Article I legislative court. In 1953, however, the U. S. Court of Claims was legislatively made an Article III judicial court, and in 1954 it was made a part of the United States Judicial Conference. It has its own ability to seek appropriations and it has a significant degree of independence in the administration of its Court. There are presently seven judges in the Court of Claims who are appointed by the President with the advice and consent of the Senate and who are generally considered the equivalent of judges on the United States Circuit Court of Appeals. The Court of Claims has fifteen commissioners who are on the level of U. S. District Court Judges and are appointed by the Court of Claims itself. While they in effect serve as the trial judges of the Court, they nonetheless do not possess the power of decision and their findings and conclusions are merely recommendations to the Judges of the Court of Claims for decisions in particular cases. In cases referred to the Court by Congress, however, the commissioners are granted the exclusive authority to investigate and to report directly to the House of Congress which made the reference; the judges of the Court, as such, are completely excluded from dealing with congressional references.

The Court of Claims was originally established in 1855 for the specific purpose of providing a means for the adjudication of certain kinds of claims against the United States. There has generally been no minimum or maximum jurisdictional amount imposed upon Court of Claims litigation and the Court has been granted authority only to render monetary relief; equitable relief, as such, may not be granted by the U. S. Court of Claims. The principal statute conferring jurisdiction upon the Court of Claims provides, in pertinent part, as follows:

“The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either under the Constitution, or any act of Congress, or any regulation of an Executive department, or

upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”

28 U.S.C.A., § 1491 (Supp. 1968).

Perhaps two of the most significant areas of exclusion from jurisdiction are (a) cases in which the claimant has not exhausted a required administrative remedy—such as a contractual requirement for review by a Board of Contract Appeals; (b) claims against Government corporations or Government officers and those in which the United States is a party-plaintiff. It should be noted also that within the limit of claims not exceeding \$10,000 the United States District Courts have concurrent jurisdiction with the Court of Claims for claims which Court of Claims jurisdiction is provided by 28 U.S.C.A., § 1491.

A contractor having a claim against the United States Government must file his claim with the Court of Claims within six years after the claim accrues. The fact that an administrative appeal is pending under the disputes article does not stop the running of this statute. In actual practice the Court action is officially begun by the filing of the claim, but it is then suspended until the administrative decision is reached. In the ordinary case the Government, represented by the Department of Justice, must answer the contractor's printed petition within 60 days after it is filed. Various pre-trial procedures established by the Court rules are then entered into by the parties.

Hearings are held by commissioners of the Court, without a jury. The commissioners make findings of fact which are reported to the Court together with any recommendations for conclusions of law that the Court may desire to receive. A full Court then hears oral argument. Decisions of the Court of Claims are appealable by petition to the Supreme Court for a writ of certiorari. It is noteworthy that only a very small number of petitions are granted by the United States Supreme Court and therefore it becomes apparent that the U.S. Court of Claims for all intents and purposes is a Court of last resort for the contractor.

The responsibility for the defense of the Government before the Court of Claims lies with the Court of Claims Section within the Civil Division of the Department of Justice. This Section presently has twenty-seven attorneys, is authorized to have thirty-six attorneys, and estimates the need for the services of

approximately forty attorneys. The present caseload consists of 1,020 cases pending before the Court of Claims and various district courts.

Under 28 U.S.C.A. § 501 there is authority given to the Attorney General to settle all contract cases. He has delegated authority to the Assistant Attorney General in charge of the Civil Division to settle cases up to \$250,000 and to the Chief, Court of Claims Section to settle up to a maximum amount of \$20,000. The Attorney General may settle anything above \$250,000. The settlement procedure calls for the Chief to request an informal settlement agreement from the agency, following which a letter from the contractor is elicited. Finally, a written stipulation is submitted to the Court of Claims and judgment is entered thereon. Payment is made by means of a *stipulated* judgment fund which is to be distinguished from the revolving fund out of which tort and most contract judgments are paid through the General Accounting Office.

The Contract Section of the Department of Justice uses the assistance of the Federal Bureau of Investigation for its necessary investigative work. The FBI is peculiarly well suited to perform this task because it does possess certified public accountants and engineers among its staff and therefore provides a needed investigative expertise for the Justice Department attorneys in the preparation and presentation of their contract cases before the Court of Claims. The Department of Justice also is granted the authority to hire outside experts for both the purpose of investigation and for the purpose of testifying in the more difficult contract cases which they handle.

The claims experience of the U. S. Court of Claims during the court year, September 30, 1969 to September 30, 1970 indicates that the Court disposed of 340 petitions and 12 appeals representing 625 claimants. Except for 46 of these cases, in which no given amounts were claimed, the total amount claimed was \$113,437,629.86. Of the cases disposed of the Court rendered judgments for claimants in the sum of approximately \$12 million, of which almost one-half carried interest. Many of these judgments were based upon settlements between the parties. In addition, the Court rendered judgments *for* the United States on counterclaims or offsets in the amount of \$733,000, of which almost half carried interest. The Clerk in January reported to the Congress the business of the Court for the above period,

showing the names of the claimants, the amounts involved, the nature of the cases and the disposition thereof. The number of petitions and appeals pending on September 30, 1970 totaled 1,402, representing 8,064 claimants. Of this total there were 41 petitions involving 6,042 claimants. While test cases in all probability would dispose of the majority of petitions in this latter group, practically all of the other 1,361 petitions would require proceedings before the Court and disposition by that Court. The following chart portrays the experience of the United States Court of Claims in the year 1969-70.

REPORT OF THE UNITED STATES COURT OF CLAIMS FOR THE
 COURT YEAR ENDED SEPTEMBER 30, 1970

	Pending Sept. 30, 1969		Filed		Disposed		Pending Sept. 30 1970	
	Pets	Pltfs	Pets	Pltfs	Pets	Pltfs	Pets	Pltfs
Cases other than class cases	1,234	1,855	453	558	332	397	1,355	2,016
¹ Class cases	31	5,694	18	564	8	216	41	6,042
Appeals from the Indian Claims Commission	7	7	11	11	12	12	6	6
Totals	1,272	7,556	482 ²	1,133	352	625	1,402	8,064
Cases other than class cases:								
Service pay	58	58	25	25	26	26	57	57
Civilian pay	61	61	27	27	30	30	58	58
³ Congressional	1	1	0	0	1	1	0	0
Contract	247	253	72	73	97	97	222	229
Indian	6	6	1	1	0	0	7	7
Patent	69	71	13	13	19	19	63	65
Property (taken)	53	487	18	18	17	17	54	488
Tax	363	526	139	243	119	184	383	585
Transportation	367	383	144	144	16	16	495	511
Miscellaneous	9	9	14	14	7	7	16	16
¹ Class Cases:								
Civilian pay	28	836	17	546	8	216	37	1,166
Service pay	0	0	1	18	0	0	1	18
Indian	3	4,858	0	0	0	0	3	4,858
Appeals from Indian Claims Commission	7	7	11	11	12	12	6	6

¹ Multiple-plaintiff petitions.

² Of the total number of petitions filed 5 were reinstated by order of the Court or of the Supreme Court.

³ Case shown was filed prior to the 1966 amendments of Title 28 U.S.C. §§ 1492 and 2509 (80 Stat. 958).

Comparison of the statistics in the preceding chart with those of similar years indicates that 1969-70 is representative of the numbers and types of claims handled by the United States Court of Claims on an annual basis. It is perhaps significant to note that contract claims and transportation claims occupy approximately 50% of the total claims filed annually. Another 25% of the cases are generated by tax refund cases.

Court of Claims judgments are paid through a revolving judgment fund set up by Congress to permit the General Accounting Office to pay either contract or tort judgments not in excess of \$100,000 in each case. This procedure was established in 1957 because the mechanism previously used required the United States Court of Claims judgments to be paid through the Department of the Treasury and only upon request for supplemental appropriations from Congress. This process was both cumbersome and burdensome for the Congress and as a result they established the revolving fund in 1957. If a particular judgment exceeds \$100,000, it must be paid through a special appropriation.

If a contractor cannot receive satisfaction through the administrative procedures established by contract or through the United States Court of Claims he has one further avenue of relief—requesting and obtaining the enactment by Congress of a private bill providing the means of satisfying an alleged liability of the Government. Such legislation may take either the form of an appropriation of a stated amount or a direction to the Court of Claims (a Congressional reference case) or to the Comptroller General for the specific purpose of considering the same for trial, settlement or dismissal.

CHAPTER 7

SUMMARY OF THE LAW OF THE SEVERAL STATES

While there has been a steady and growing movement away from sovereign immunity throughout other jurisdictions, the general rule which is still applied throughout the majority of states is that immunity exists in tort actions against the state. *All* of the states, however, have given a limited consent to be sued in certain situations.

In an effort to provide the proper prospective for this report the following summary of the law in other jurisdictions relating to tort and contract is being provided. The summary does not detail each and every aspect of a state's method of handling claims against itself. Nonetheless, it is hoped that this summary does provide a reasonably fair picture of the approach to liability taken by each of the respective states.

A. *Tort Liability of the Several States*

While a majority of states still follow the rule of immunity there are now at least 17 states which have abrogated that immunity to a substantial extent. These states are Alaska, Arizona, California, Colorado, Hawaii, Illinois, Iowa, Nevada, Oregon, Michigan, Rhode Island, Texas, Utah, Wisconsin, Vermont, Washington and New York. Almost all of these States have abolished their immunity within the last 10 years.

Some of the above states provide for the disposition of claims through an administrative court of claims. (See Illinois and Michigan). The great majority of these states, however, provide for disposition of claims against the state within the court system.

There are 32 states which can be classified as states retaining immunity but each of them have exceptions and many of them have administrative processes which provide for recovery in various instances. These states are Alabama (constitutional prohibition but the state is liable for proprietary functions), Kansas, Kentucky, Delaware, Florida (1968 Constitutional amendment permits suit but needs legislation), Georgia, Idaho, Indiana (state liable for proprietary functions), Louisiana,

Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina (administrative board akin to an administrative court of claims), North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wyoming, Nebraska (moving toward liability), Kentucky (has an administrative court of claims), Arkansas (constitutional prohibition but provides for an administrative claims disposition).

The above information which is reflected more specifically on the attached chart (including local political subdivisions of the various states) indicates that while the majority rule prevails, it is under increasing attack and the list of states which are recognizing the inequities attendant to it is continuing to grow. The pattern is clearly one of liability and this trend will undoubtedly continue as more and more states recognize that subjecting themselves to liability is not only the right thing to do but is economically feasible.

The following two jurisdictions, Arizona and Wisconsin, provide an interesting insight into two different approaches taken by individual states in response to judicial decisions abrogating their traditional sovereign immunity.

ARIZONA

The doctrine of sovereign immunity was abolished by judicial decision in 1963, *Stone v. Arizona Highway Comm.*, 93 Ariz. 384, 381 P. 2d 107 (1963), but that decision was not followed by legislative action. At present the procedural requirements for instituting suit against the State are still presently controlled by a general act which preceded the *Stone* decision.

Claims against the State for money damages are required to be made in accordance with rules promulgated by the Commissioner of Finance. A.R.S.A. 35-181.01. Service of process in tort suits against the State shall be made upon the Governor and the Attorney General. In order to initiate suit, a plaintiff must post a bond of not less than \$500 which will be applied towards court costs and expenses incurred by the State if plaintiff fails to recover a judgment. ARS Title 4, A.R.C.A. 12-823.

Under present Arizona practice a claimant has two years to commence all actions against the State, but a successful claimant

You are Viewing an Archived Copy from the New Jersey State Library is entitled to legal interest on his judgment from the date of the accrual of the claim.

The procedure utilized to fund tort claims is the same as existed prior to the abrogation of immunity. The Commissioner of Finance will draw his warrant to pay a tort claim upon receipt of an authenticated copy of a tort judgment and the Attorney General's approval for payment. A.R.S.A. 12-826.

Interestingly, Arizona is one of the few jurisdictions where sovereign immunity was abrogated for local units of government *after* that doctrine was abolished for the State. The decision, *Veach v. City of Phoenix*, 102 Ariz. 195, 427 P.2d 335 (1967), abolishing a municipality's immunity for governmental acts was not rendered until 1967—four years after *Stone*. Claimants suing either the State or local governmental units are entitled to a jury trial in Arizona.

A telephone conversation with the Attorney General's office produced the statement that Arizona is the epitome of a State with problems as a result of judicial abrogation of immunity and the failure of the Legislature to fairly and effectively respond.

WISCONSIN

The Wisconsin "Tort Claims Act" is limited to political subdivisions of the State. Wisconsin Statutes Annot., § 895.43 *et seq.* The Act, however, continues the immunity of a local entity from suits arising from acts done in the exercise of legislative, quasi-legislative and judicial function; and it extends this same immunity to the employees of the entity. § 895.43 (3). In addition, it provides that a governmental unit is not liable for the intentional torts of its employees, even though said employees may themselves be held liable. A significant feature of the Act is that it sets a ceiling of \$25,000 on the amount that can be recovered by a plaintiff in a tort judgment. § 895.43.

As a result of the abrogation of the substantive doctrine of sovereign immunity by the Wisconsin Supreme Court, *Holytz v. Milwaukee*, 17 Wisc. (2d) 26 (1962), the Wisconsin Legislature is presently considering the enactment of a general tort claims act relating to the State itself. (As of this time there exists a procedural bar to bringing suit against the State.) The Legislative hesitancy in permitting suit against the State is grounded in a fear that the State's liability would be uncertain and

potentially without limits. See the *Wisconsin Legislative Council Report* (1967).

Previously, and unrelated to the Court's abrogating substantive sovereign immunity, the Wisconsin Legislature had provided for administrative consideration of all claims against the State, including tort claims, through a claims commission [chapters 98, 652, 669, Laws 1955]. Under this arrangement, amounts of less than \$500 can be paid by a motion of the claims commission and claims in excess of that amount can be recommended for payment by the Legislature.

In 1967, the Legislature enacted a "back door" method of imposing tort liability on the State. It passed a "reimbursement" statute, stating that the *State* and its political subdivisions *shall* pay any judgment granted against an employee "because of acts committed while carrying out his duties as an officer or employee." This statute operates so that if a judgment is rendered against the employee for activities while in the scope of employment, the judgment as to damages entered against the officer or employee shall be satisfied by the governmental unit employing him.

A number of bills have recently been drafted and introduced in Wisconsin which attempt to set forth a comprehensive Tort Claims Policy. Typical of these is Senate Bill 4 (1967). It is cast in terms of a general waiver of immunity, subject to specifically enumerated exceptions, including exceptions for claims based (1) on acts or omissions of employees done in the exercise of "discretionary" functions, (2) on the intentional torts of employees and (3) on the improper maintenance of State highways where an agreement had been made with a political subdivision for its maintenance. The bill maintains the pre-existing claims commission to administratively handle claims of \$500 or less, and it creates a liability insurance board composed of the Attorney General, the Commissioner of Administration, and the Commissioner of Insurance, the function of which is to determine the manner in which the State should insure. The bill would have no dollar limitation on the amount for which the State could be sued, except as otherwise provided by statutes applying to *all* defendants.

STATE	IMMUNITY	LIABILITY	REMEDY
ALABAMA	Constitutional prohibition Art. 1, § 14		State Board of Adjustment
ALASKA		Waiver Alaska Stat. § 09.50.250 <i>et seq.</i>	Judicial
ARIZONA	Court decision	Substantive tort immunity abolished by court decision (<i>Stone v. Ariz. Hwy. Comm.</i> , 93 Ariz. 384, 381 P.2d 107 (1963))	Judicial Administrative § 12-821 to § 12-826 Ariz. Rev. St. Anno.
ARKANSAS	Constitutional prohibition Art. 5, § 20		Ark. St. State Claims Commission § 13.1401 <i>et seq.</i> Administrative Determination Final
CALIFORNIA	Cal. Govt. Code Legis. waiver § 810 <i>et seq.</i>	Acts of employees, independ. contractors, failure to perform Stat. duties, dangerous conditions of public prop.	Judicial
COLORADO	482 P2d 968 (1971) <i>Evans v. Bd. of County Comm. of the County of El Paso.</i>	Sovereign immunity abrogated as of 7/1/72 only. Recognized to extent of legislative enactment. Colo. L. 1971, C 323—governmental immunity Act.	Colorado Claims Comm. Judicial
CONNECTICUT	Immune	Hwy. defects § 13a-144, § 52-556 operation of motor vehicles C.G.S.A. § 13a-144, 52-556	Claim Comm. admin. determinations final if claim is \$2500 or less —if more than, then require legis. approval
DELAWARE	Immune unless waived by legis.	Art. 1, § 9, Del. Cons'l. suits may be brought acc'd. to negligent by law 18 Del. C. § 6501 <i>et seq.</i> Liable to extent of Insurance	Legislative

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
ALABAMA	Municipalities Counties	Gov't Functions	Defects in streets and sidewalks	Judicial
ALASKA	Municipalities		Tort liab. in exercise of either proprietary or functions	Judicial
ARIZONA	Municipalities	Gov't Functions	Liab. for streets and sidewalks, drainage construction and repair	Judicial
ARKANSAS	Subdivisions	Abolished tort Immun. for municip's. <i>Parish v. Pitts</i> , 244 Ark. 2139, 429 S.W. 2d 45 (1968)		Judicial
CALIFORNIA	Political Subdivisions	Legis. waiver	Same as for State	Judicial—may purchase liability ins., does not expand liability
COLORADO	Political Subdivisions	Waived in certain situations L. 1971, c. 323	Same as state	Procedures established by L. 1971, c. 323.
CONNECTICUT	Political Subdivisions	Gov't. Functions	Highway defects § 13a-149	
DELAWARE	Political Subdivisions	Gov't. Functions		

STATE	IMMUNITY	LIABILITY	REMEDY
FLORIDA	State immune but Hw'y Dept. liable for trespass. <i>State Road Dept. v. Hursey</i> 142 So. 2d 773 Fla. (1962).	May be waived by legis., Fla. Const., Art. 10, § 13 (1968)	Exc. F.S.A. 768.14 waiver of sovereign immunity counterclaim in suit by state.
GEORIGIA	Immune, <i>Natl Distrib. Co. v. Oxford</i> , 103 Ga. App. 72, 118 So. 2d. 274 (1961)		Claims Advisory Ga. Code Annot'd., § 47-504 <i>et seq.</i>
HAWAII	Waived by Hawaii Laws, § 662-1 <i>et seq.</i> (1968)		Judicial—provision for administrative settlement
IDAHO	Immune unless waived by stat. 79 Idaho 233 (1957), Board of Examiners Idaho Cons't., Art. 4 § 18.	Idaho Code, § 41-3501 <i>et seq.</i> Auth. to purchase Gen'l. Liab. Ins. Waiver of Immun. to extent of insurance	Judicial to extent of insurance administrative
ILLINOIS	Mandatory cons't provision, Art. IV. § 26, 299 Ill. App. 316, 20 N.E. 2d 130 (1939)		37 Ill. Anno. St. § 439.1 <i>et seq.</i> , Court of Claims (Admin) given juris. over tort claims against state, determin. final
INDIANA	State immun., officers person. liable, 258 Ind. 452, 151 N.E. 2d 697 (1958), State immune only as to governmental functions, 251 N.E. 2d 30 (1969).	In. Stat. Ann. § 39-1819, may purchase liab. ins. for vehicles or other prop., waived to extent of coverage—liable for proprietary function.	Judicial
IOWA	Waived by Iowa Code, § 25A.4 (1967)	Non-liability for discretionary functions § 25A.4	Administrative Proceeding—Judicial
KANSAS	Immune	For Hwy. defects, purchase of auto liab. ins. authorized, waiver to extent of ins., Kan. Stat. Ann., § 12-2602 (1904)	Insurance

STATE	TYPE OF SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
FLORIDA	Counties Municipalities	Immune, <i>Kaulakis v. Boyd.</i> , 138 So. 2d 505 (Fla. 1962).	Neglig. Performance of Gov't function	Judicial—Cities only
GEORGIA	Municipalities	Immune, 92 Ga. App. 216 (1955) Municip. corps. not liable for torts of officers discharge of duty Ga. Code Annot'd. § 69-307 (1957) Not liable for street defects (§ 69-303).	Waived to extent of Insurance Coverage	Judicial to extent of insurance coverage
HAWAII	Subdivisions		Liable for neglig. acts 388 P. 2d 214 (1963)	Judicial
IDAHO	Municipalities	Non-Gov't. Functions, 79 Idaho 499, 321 P.2d 559 (1958) Waiver of Immun. to extent of insurance		Judicial to extent of insurance Administrative
ILLINOIS	School district	Abrogated by ct. decision, 18 Ill, 2d 11, 163 N.E. 2d 89, (1959)—applies to all municip. corps.		Judicial
INDIANA	Political subdivisions	Abrogated by ct. decision, 239 N.E. 2d, 160 (Ind. Ct. App. 1968)		Judicial
IOWA	Cities Counties	Not liable under doctrine of respondeat superior neglig. acts of employees Immune, 245 Iowa, 310, 60 N.W. 2d 562 (1953)	Cities liable when neglig. due to municip. corp. and not employee	Judicial
KANSAS	Political subdivisions Towns and Counties	For gov't. Functions, 88 Kan. 722, 366 P. 2d 246 (1961)	Street defects, authorization to purchase liab. ins., § 12-2601 (1964)	Judicial Insurance

STATE	IMMUNITY	LIABILITY	REMEDY
KENTUCKY	Immune but recovery provided through adm. Bd. of Claims	No recovery through adm. Bd. for pain or suffering	Bd. of Claims, admin, determin. final, Ky. Rev. Stat. § 44.055 (1962)
LOUISIANA	Immun. unless waived by Legis. Park & Rec. Auth. State Univ. & College School Bd. exempted from possible waiver of immunity Const. Art. 3 § 35	Hwy. defects 154 So. 2d 439 (1963). La. Rev. Stat. § 13.1501 <i>et seq.</i> procedure for claims v. state where immun. otherwise waived	Legislative
MAINE	Immune unless waived by Legis.	Maine Rev. Stat. Ch. 17, 1451 (1964) Liab. of Towns & Counties for defects in State Hwys.	Legislative
MARYLAND	Immune, 180 Md. 584, 26 A. 2d 547 (1942) common law principle		
MISSOURI	Immune 353 S.W. 2d 645 (1962)		V.A.M.S. § 33.130 Procedure for processing claims against State.
MONTANA	Immune, 118 Mont. 65, 162 P.2d 772 (1945) Immunity recognized 480 P.2d 830 (1971)	To extent of insur. coverage, Mont. Rev. Code § 83-701 <i>et seq.</i>	Judicial to extent of ins. coverage, Bd. of Examiners, Mont. Rev. Code §§ 82-1113
NEBRASKA	Immune, 174 Neb. 515, 118 N.W. 2d 643 (1962). Neb. Rev. Stat. Ann., §§ 24-319 (1956) waiver of Immun. from suit only		Legislative

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
KENTUCKY	Municipalities		For neglig., 386 S.W. 2d 738 (Ky. 1964)	Judicial
LOUISIANA	Municipalities	For gov't functions 124 So. 2d 249 (La. 1960)	Street defects 114 So. 2d 62 (1959)	Judicial
MAINE	Municipalities Towns & Counties	Immune, 157 Me. 521, 174 A. 2d 660 (1961)		Judicial
MARYLAND	Political Subdivision	Immune, 230 Md. 504, 187 A.2d. 856 (1963)		
MISSOURI	Political subdivisions	For gov't functions, 366 S.W. 2d 446 (1963)		
MONTANA	County City	For gov't functions, 112 Mont. 70, 112 P.2d 1068 (1941)	For neglig. in discharge of proprietary functions, 101 Mont. 462, 54 P.2d 379 (1936)	Judicial
NEBRASKA	Political subdivisions Cities Public bodies Municipalities Counties Townships	For gov't functions, 166 Neb. 145, 88 N.W. 2d 235 (1958); <i>cf.</i> 187 N.W. 2d 290 (1971)	For neglig. operation of motor vehicles, 160 N.W. 2d 805 (Neb. 1968) For street, highway & sidewalk defects Neb. Rev. Stat. Ann., §§ 24-319 (1956)	

STATE	IMMUNITY	LIABILITY	REMEDY
NEVADA	Immun. waived by Nev. Stats. Ann. § 41,031 et seq. —immun. preserved for discretionary acts, acts or omissions in execution of a stat. or reg.	Limitation of maximum \$25,000 in tort, no pun. damages auth. to purchase liab. ins.	Judicial, Admin. determination up to \$1,000
NEW HAMPSHIRE	Common Law Immun. 97 N.H. 278, 80 A. 2d 342 (1952) 108 N.H. 187 230 A. 2d 750 (1967)		Legis.
NEW MEXICO	Immune. 69 N.M. 145, 364 P.2d 853 (1961)	N.M. Stat. Ann. §§ 5-6-18 et seq., auth. to purch. liab. ins., waiver to extent of coverage	Insurance
NEW YORK	Ct. of Claims Act. § 8 (1963) Stat. Waiver of Immun.		Judicial Ct. of Claims
NORTH CAROLINA	Immune from suit but see § 143-291 of N.C. Code Ann.		Industrial Comm. can bring claims v. State, § 143-291, with limit of \$15,000
NORTH DAKOTA	Immune Const. § 22 suit may be brought against state in such manner, in such courts and in such cases as the Legis. Assembly may, by law, direct. (No such legis. enacted).	Waiver to extent of coverage § 39-01-08 state to purch. ins. for motor vehicles & aircraft	Insurance
OHIO	Immune unless stat. waived, 172 Ohio St. 303, 175 N.E. 2d 725 (1961) Const. Art. I § 16 suits may be brought v. State in such courts and in such manner as may be provided by law. (Not self-executing)		Sundry claims board with jurisdiction limit of \$1,000 R.C. § 115.35 (claims v. State, money appropriated by legislature)
OKLAHOMA	Immune	State vehicles may be insured, 47 Okl. St. Ann. § 157.1 Ins. Co. may not set up defense of sovereign immunity	Insurance

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
NEVADA	Agencies, dept. pol. subdivisions Counties	Same as state	Same as state Neglig. operation of Road, 382 P. 2d 605 (1963)	Same as State Judicial
NEW HAMPSHIRE	Political subdivisions	Neglig. performance of gov't functions	For street & highway defects	Judicial
NEW MEXICO	Political subdivisions	For gov't functions, 72 N.M. 9, 380 P.2d 168 (1963) See also N.M.S.A. 14-9-7 municipality liable in certain instances (tort by officer in execution of municipal orders)	To extent of insurance	Insurance
NEW YORK	Political subdivisions		For torts 177 N.Y.S. 2d 744 (1958)	Judicial
NORTH CAROLINA	Political subdivisions	For gov't functions, 260 N.C. 69, 131 S.E. 2d 900 (1963)	Auth. for ins. waiver to extent of ins., N.C. Gen. Stat., § 153-9.44	Insurance (counties only).
NORTH DAKOTA ..	Political subdivisions	For gov't functions, 68 N.W. 2d 114 (1955) 189 N.W. 2d 675 (1971)	For street defects, auth. to purchase ins. for motor vehicles	
OHIO	Political subdivisions	For gov't functions	Proprietary functions only	Judicial (Proprietary functions only)
OKLAHOMA	Municipal corps.		See 11 Okl. St. Ann. § 1751	Judicial Provision for Admin. settlement

STATE	IMMUNITY	LIABILITY	REMEDY
OREGON	Waived by Stat., Ore. Rev. Stat., § 30.260 <i>et seq.</i>	General liability with certain specified exceptions	Judicial (certain notice requirements to State agencies involved)
PENNSYLVANIA	Immune, 410 Pa. 571, 190 A. 2d 111, (1963) Pa. Const. Art. 3, § 26. No bill shall be passed providing for the payment of any claim against the commonwealth.	Auth. purchase of auto liab. ins., 71 P.S. § 634	Insurance
RHODE ISLAND	Immunity waived by § 9.31-1 <i>et seq.</i> (1970) Pub. Laws 1970 § 9.31-1 <i>et seq.</i>	Limitation \$50,000 govt. functions	Judicial
SOUTH CAROLINA	Generally immune excepted as provided in S.C. governmental motor vehicle Tort Claims Act Code 1962 § 10-2621	For neglig. operation of motor vehicle § 10-2621 to 10-2625 (1968) Lims: \$10,000 pers. injury; \$5,000 prop. loss	Judicial
SOUTH DAKOTA	Generally immune, 122 N.W. 2d 83 (1963) 145 N.W. 2d 524 (1966) S.D. Const. Art. III, § 27 The Legislature shall direct by law in what manner and in what courts suits may be brought against the State		Administrative Procedure S.D.C.L. § 21-32-1 <i>et seq.</i> Judiciary provides advisory findings for Legislature
TENNESSEE	Immune, 368 S.W. 2d 69 (1963) Const. Art. I Sec. 17—Suits may be brought against such courts as the Legis. may by law direct. Actions v. State prohibited by Code § 20:1702	Highway Dept. and auto negligence to be paid through determination of Adm. Bd. of Claims	Bd. of Claims, Adm. Determination final § 9-801 <i>et seq.</i>
TEXAS	Immunity waiver by Title 110a, Art. 6.252-19		Judicial—Provision for administrative settlement
UTAH	Stat. waiver of immunity Utah Code § 63-30-1		Judicial

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
OREGON	Same as state	Same as state	Same as state	Same as state
PENNSYLVANIA ..	Townships Cities Counties	Immune	Auth. to purchase gen'l pub. liab. ins., 53 P. S. § 37403.57	Insurance
RHODE ISLAND ..	Political subdivision Cities Towns	Same as state	Same as state	Same as state
SOUTH CAROLINA	Political subdivision Counties Municipalities Municip. corps.	Generally immune	Same as state	Same as state
SOUTH DAKOTA ..	Political subdivisions	Immune, 77 S.D. 322, 91 N.W. 2d 606 (1958) Governmental only	Proprietary functions	
TENNESSEE	Political subdivisions	Immune for gov't func- tions, 50 Tenn. App. 532 362 S.W. 2d 813 (1962)		
TEXAS	Cities Counties Municipalities	For gov't functions, 371 S.W. 2d 767 (1963)	Neglig. operation of motor vehicle—lims. same as state	Provision for administra- tive settlement
UTAH	Counties Municipalities	Legis. Waiver	Same as state	Judicial, may purchase liability ins.

STATE	IMMUNITY	LIABILITY	REMEDY
VERMONT	Waiver by Stat. 12 V.S.A. § 5601	Max. 75,000	Judicial—provision for Admin. Settlement
VIRGINIA	Gen'l immunity 202 Va. 452, 117 S.E. 2d 685 (1961)	Va. Code, § 8-752 <i>et seq.</i> , auth. suit but does not waive substantive immunity Code 1950 § 8-752	Legislative
WASHINGTON	Gen'l waiver by Stat., R.C.W.A. § 4.92.010 <i>et seq.</i>	Gen'l liability for tortious conduct	Judicial—provision for Admin. Settlement
WEST VIRGINIA	Immunity mandated by State Const. Art. VI § 35	Adm. Court of Claims provides vehicles for remedy if existing appropriation or special appropriation made	Adm. determination Court of Claims established Code 14-2-2
WYOMING	Wyo. Const. Art. I, § 8 provides —suits may be brought v. State in such manner and in such courts as the legislature may by law direct. Wyoming has never given its consent to be sued.	Schools allowed to purchase liab. ins. \$50,000 minimum to one person \$500,000 for group, immun. waived to extent of ins. coverage	Judicial
WISCONSIN	Waived by Judiciary <i>Holytz v. Milwaukee</i> 17 Wisc. (2d) 26 (1962)	No legislative implementation ct. substantive judicial waiver	

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
VERMONT	Political subdivisions	Gov't functions 122 Vt. 284 171 A. 2d 58	Proprietary Functions	Judicial
VIRGINIA	Political subdivisions	Gov't functions 203 Va. 551, 125 S.E. 2d 808 (1962)	Proprietary functions	Judicial
WASHINGTON ...	Political subdivisions Municipal Corps.	General waiver by Statute R.C.W.A. § 4.96.010 <i>et seq.</i>	Gen'l liability for torts	Judicial—Provision for Admin. Settlement
WEST VIRGINIA ...	Political subdivisions Counties & Municipalities	Performance of duties im- posed by law. 122 S.E. 2d 177 (1961)	For street & sidewalk defects Municip's permitted to buy auto ins.	Judicial Insurance
WYOMING	Cities Town	For gov't functions	Authorizes to purchase gen'l liability ins.—waiver to extent of coverage	Insurance
WISCONSIN	All.	Statutory waiver with exceptions Wisc. Stat. Ann. § 893.43 <i>et seq.</i>	Same	Judicial

The procedures for presenting contract claims against a State set forth below indicate that the majority of jurisdictions have waived immunity and utilize their regular court systems for the ultimate disposition of contract claims. Twenty-five States adjudicate contract disputes with the State in the regular court system, although in many of these jurisdictions some form of administrative review is a pre-requisite to suit. Four jurisdictions provide that contract claims against the State be decided in a special Court of Claims. Additionally, seven other jurisdictions mandate that such claims be passed upon or audited by an administrative board, or an official in the legislative or executive branches of government, but permit suit against the State in a limited number of areas (e.g., cases involving the Department of Highways).

Jurisdictions which retain immunity from any suit in the courts generally provide for the review or audit of contract claims through an administrative tribunal, a legislative claims committee or through some official in the executive branch of government. Normally the procedure established for the review of contract claims is not binding upon the Legislature, but the Legislature usually defers to the decision that a claim is meritorious.

One State (Maine) retains its traditional immunity from suit, but provides for binding arbitration in contract cases involving disputes arising out of highway construction contracts.

SURVEY OF PROCEDURES FOR PROCESSING CONTRACT CLAIMS AGAINST THE STATE

1. *ALABAMA*

Claims are processed through an administrative proceeding before a Board of Adjustment which hears both tort and contract claims. Ala. Code. Tit. 55, §§ 333-344.

2. *ALASKA*

The Superior Court has jurisdiction over contract actions against the State. Alas. Stat. Ann., Civ. Pro. 09.50.250.

3. *ARIZONA*

The Courts have jurisdiction in contract claims against the State. *State v. Sharp*, 21 Ariz. 424, 189 P. 631 (1920); *State v. Stone*, 8 Ariz. App. 188, 443 P.2d 933, vacated on other grounds, 104 Ariz. 339, 452 P.2d 513 (1969).

4. *ARKANSAS*

Claims are adjudicated through a statutorily created Claims Commission. Ark. Stats. Ann. § 13-1401 *et seq.* *Parish v. Petts*, 244 Ark. 1239, 429 S.W.2d 45.

5. *CALIFORNIA*

The doctrine of sovereign immunity was never held to apply to contract actions against the State. *Chapman v. State*, 104 C. 690, 38 P.457 (1894). Claims are adjudicated through the regular court system.

6. *COLORADO*

Contract claims against the State adjudicated in regular court system. See *Ace Flying Service, Inc. v. Colo. Dept. of Agriculture*, 136 Colo. 19, 314 P.2d 278 (1957).

7. *CONNECTICUT*

Claims against the State normally determined administratively through a Commission on Claims, but the Commission *may* authorize suit where amount in controversy exceeds \$2,500 and issue of fact or law exists under which the State or a private person could be liable. Conn. Gen. Stat. § 4-160 *et seq.* (1965); *Beckroeth v. Public Realty Co.*, 211 Conn. 160, 211 A.2d 160 (Sup. Ct. 1956).

8. *DELAWARE*

Immunity from suit derived from Constitution, Art. I § 9, but General Assembly may waive immunity in actions against State, whether in tort or contract. *George and Lynch, Inc. v. State*, 197 A.2d 734 (Del. S. Ct. 1964). 17 Del. Code § 132(b)9 authorizes the State Highway Department to enter into contracts and has been construed as a waiver of the State's immunity to suit in court for breach of contract. *Georgia and Lynch, Inc. v. State, supra.*

9. *FLORIDA*

The State is still generally immune from suit for contract claims by Article 10, § 13 of the Constitution, but a limited waiver is permitted for certain types of claims against State. F.S.A. § 337.19 (Waiver for road claims).

10. *GEORGIA*

Claims are evaluated administratively by Claims Advisory Board, but suit is authorized against State Highway Department, Georgia Code, § 95-1505.

11. *HAWAII*

State suable for contract claims (except for *ultra vires* contracts) in a non-jury trial. 7 H.R.S. § 661-2.

12. *IDAHO*

State Constitution establishes a Board of Examiners to hear and determine claims against the State, Art. 4, § 18. Where Board of Examiners rejects claim then the courts may assume jurisdiction and adjudicate contract claims.

13. *ILLINOIS*

A general immunity from suit is conferred by the Constitution, Art. IV, § 26; contract claims are heard by legislatively created Court of Claims, Ill. Ann. Stat. §§ 439.1 to 439.25.

14. *INDIANA*

Although a constitutional provision confers immunity in the absence of a legislative waiver, a statutory provision authorizes suit without a jury on contract actions against the State. Ind. Stat. §§ 3-3401 to 3409 (Burns 1968).

15. *IOWA*

The State is generally immune from suit, but a partial waiver of the immunity exists for contract claims involving the Highway Department or for real estate transactions. Iowa Code Ann. § 613.8.

16. *KANSAS*

Immunity from suit is conferred by statute, Kan. S.A. 46-901(c), and still prevails.

17. *KENTUCKY*

After exhaustion of administrative remedies, a claimant may sue on a contract in the regular court system. K.Y.R.S. §§ 44-260 to 44-270. Suit is without a jury trial and recovery is limited to the original amount of the contract.

18. *LOUISIANA*

A general immunity to suit still exists, but the Legislature may waive the State's immunity. The Highway Department may be sued in contract matters. *Bazanac v. State*, 231 So.2d 373 (1970).

19. *MAINE*

Although the State is generally immune from suit, a statutory provision exists for arbitration in the case of disputes arising under highway construction contracts. 5 M.R.S.A. § 1749 (Supp. 1968).

20. *MARYLAND*

The State is immune from suit. See *Davis v. State*, 183 Md. 385., 37 A.2d 880 (1944).

21. *MASSACHUSETTS*

Contract claims against the State are adjudicated in the Superior Court. Mass. Gen. L. Ann. c. 258, § 1 *et seq.*

22. *MICHIGAN*

Contract suits are adjudicated in a statutory Court of Claims. Mich S. Ann. § 27A. 6431.

23. *MINNESOTA*

The Legislature has waived the State's immunity from suit in any controversy arising out of a contract for work, services or delivery of goods entered into by any State agency. Minn. Stats. Ann. § 3.751.

24. *MISSISSIPPI*

The Legislature permits the litigation of claims through the regular court system after a mandated administrative review by the State auditor. Miss. Code Ann. § 4387.

25. *MISSOURI*

The doctrine of sovereign immunity prevails generally and claims are processed administratively. A limited waiver is permitted for suits against the Highway Commission.

26. *MONTANA*

Contract actions are permitted in the regular court system. Mont. Rev. Code § 83-601.

27. *NEBRASKA*

The State may sue and be sued in the district court on claims founded upon or growing out of a contract. Neb. Rev. State. §§ 24-319 to 24-324.

28. *NEVADA*

Where no appropriations to satisfy a claim exists, a State Board of Examiners is authorized to review contract claims and issue an opinion on the merits which is then transmitted to the Legislature. Nev. R.S. 353.085. Where appropriations are available, a claimant may bring an action against the State to recover any portion of a claim which has been rejected by the Board of Examiners. N.R.S. § 41.010.

29. *NEW HAMPSHIRE*

Contract claims against the State are litigated in the Superior Court without a jury trial. N.H.R.S.A. § 491:8.

30. *NEW MEXICO*

Suits in contract actions against the State are expressly authorized by statute. N.Mex. S.A. § 22-23-1.

31. *NEW YORK*

Jurisdiction to hear all claims against the State arising out of a contract is vested in a Court of Claims. See New York Court of Claims Act, § 9(2) (McKinney).

32. *NORTH CAROLINA*

The Supreme Court has original jurisdiction to hear claims against State, but its decisions are merely recommendatory, and the decisions must be reported to the next session of the General Assembly for its action. N.C. Gen. Stat. § 7A-25.

33. *NORTH DAKOTA*

An action against the State arising out of contract may be brought in the district court the same as against a private person. N.D. Code § 32-12-02.

34. *OHIO*

The State has a sundry Claims Board with power to hear and investigate all claims and the power to approve such claims up to \$1,000. Ohio Rev. Code. Ann., Title 1, § 127-11 (Page). There appears to be no authority for suit against the State on contract claims.

35. *OKLAHOMA*

Contract claims are administratively reviewed and payment authorized if found to be meritorious. No right of suit exists. Okla. S.A. § 41.21.

36. *OREGON*

Contract suits are permitted in the regular court system so long as the contract is not *ultra vires*. Ore. R.S. § 30.320.

37. *PENNSYLVANIA*

An administrative tribunal, a Board of Arbitration of Claims against the State, was created to arbitrate claims against the commonwealth arising from its contracts. 72 P.S. § 4651-1.

38. *RHODE ISLAND*

Contract claims against the State are investigated and passed upon by a Joint Committee on Accounts and Claims in the Legislature. The Committee then reports in its findings to the Legislature which acts upon its recommendations. R.I. Gen. Laws §§ 22-7-1 to 22-7-8.

39. *SOUTH CAROLINA*

Under the South Carolina Constitution sovereign immunity exists unless legislatively waived. Art. 17, § 2. Claims against the State are processed through a State Budget and Control Board which reports to the Legislature. S.C. Code Ann. § 30-252.

40. *SOUTH DAKOTA*

After a mandatory review of a contract claim by the State auditor, a person aggrieved may commence an action in the regular court system. S.D.C.L. § 21-32-1.

41. *TENNESSEE*

Claims based on a contract are adjudicated before an administrative Board of Claims. Tenn. Code Ann. § 9-801. No right to suit exists.

42. *TEXAS*

Immunity from suit exists unless the Legislature expressly consents to suit. Contract claims are filed with the Comptroller who reviews them and then files a report with the Legislature on the merits. Tex. Ann. Civ. Stat. Art. 4344(11)-(12) (1966).

43. *UTAH*

The State's immunity from suit was waived by the Government Immunity Act. Utah Code Ann., § 63-30-1 *et seq.*

44. *VERMONT*

A Statutory Claims Commission entertains claims up to \$1,000. V.T.S.A. § 931 *et seq.* No procedure apparently exists for the adjudication of claims in excess of \$1,000.

45. *VIRGINIA*

Contract claims against the State may be litigated in the Courts after a mandated administrative processing of claims. Va. Code §§ 2.1-223.1 and 2.1-223.3.

46. *WASHINGTON*

Claims against the State may be adjudicated in the Superior Court. R.C.W.A. 4.92.010.

47. *WEST VIRGINIA*

Jurisdiction to adjudicate contract claims is vested in a special Court of Claims. W.Va. Code § 14.2.

48. *WISCONSIN*

A Board of Claims processes claims, but meritorious claims over \$500 must be submitted to Legislature for approval. Wis. S.A. §§ 16.007 and 16.53(8). Upon refusal of the Legislature to allow a claim, the claimant may commence an action in the courts after filing a \$1,000 bond. Wis. Stat. Ann. § 285.01 *et seq.* (1969).

49. *WYOMING*

Claims against the State are generally reviewed by the State auditor; where no appropriation exists meritorious claims are referred to the Legislature for action. There appears to be no general right to suit, but Wyo. Stat. Ann. § 24-29 permits suit against the State Highway Commission on claims arising out of contract.

CHAPTER 8

Index to Proposed Title 59—Claims Against Public Entities Subtitle 1. New Jersey Tort Claims Act

Chapter 1—General

	PAGE
59:1-1. Short Title	207
59:1-2. Legislative Declaration	207
59:1-3. Definitions	207
59:1-4. Effect Upon Liability Based on Contract or Right to Relief other than Damages	208
59:1-5. Workmen's Compensation Laws Not Repealed ..	208
59:1-6. Military and Veterans Law Not Repealed	208
59:1-7. Effect of Assumption of Liability by United States	208

Chapter 2—Immunity and Liability of Public Entity

59:2-1. Immunity of Public Entity Generally	209
59:2-2. Liability of Public Entity	210
59:2-3. Discretionary Activities	211
59:2-4. Adoption or Failure to Adopt or Enforce a Law	213
59:2-5. Issuance, Denial, Suspension or Revocation of Permit, License, etc.	213
59:2-6. Failure to Inspect, or Negligent Inspection of Property	214
59:2-7. Recreational Facilities	214
59:2-8. Public Assistance Programs—Termination of Benefits	214
59:2-9. Slander of Title	215
59:2-10. Public Employee Conduct—Limitation on Entity Liability	215

Chapter 3—Liability and Immunity of Public Employee

59:3-1. Generally	215
59:3-2. Discretionary Activities	215
59:3-3. Execution or Enforcement of Laws	216
59:3-4. Acting Under Unconstitutional, Invalid or Inap- plicable Laws	217
59:3-5. Adoption or Failure to Adopt or Enforce any Law	217
59:3-6. Issuance, Denial, Suspension or Revocation of Permit, License, etc.	217
59:3-7. Failure to Inspect, or Negligent Inspection of, Property	217

	PAGE
59:3-8. Institution or Prosecution of Judicial or Administrative Proceeding	218
59:3-9. Entry Upon Property	218
59:3-10. Misrepresentation	218
59:3-11. Recreational Facilities	219
59:3-12. Public Assistance Programs—Termination of Benefits	219
59:3-13. Slander of Title	219
59:3-14. Public Employee Immunity—Exception	219

Chapter 4—Conditions of Public Property Liability of the Public Entity

59:4-1. Definitions	219
59:4-2. Liability Generally	220
59:4-3. Actual Notice; Constructive Notice	221
59:4-4. Failure to Provide Emergency Warning Signals	221
59:4-5. Failure to Provide Ordinary Traffic Signals—Immunity	222
59:4-6. Plan or Design Immunity	222
59:4-7. Weather Conditions; Effect on Use of Streets and Highways—Immunity	223
59:4-8. Condition of Unimproved Public Property—Immunity	223
59:4-9. Unimproved and Unoccupied Portions of Certain Lands—Immunity	223

Chapter 5—Correction and Police Activities

59:5-1. Failure to Provide Prison, Jail or Correctional Facilities	224
59:5-2. Parole or Escape of Prisoner; Injuries Between Prisoners	225
59:5-3. Suits by Prisoners	225
59:5-4. Failure to Provide Police Protection	226
59:5-5. Failure to Make Arrest or Retain Person Arrested in Custody	226

Chapter 6—Medical, Hospital and Public Health Activities

59:6-1. Definitions	226
59:6-2. Failure to Provide Medical Facilities or Mental Institutions	227
59:6-3. Prevention of Disease Controlling Communication of Disease	227

	PAGE
59:6-4. Failure to Make Physical or Mental Examination or to Make Adequate Physical or Mental Examination	227
59:6-5. Diagnosing of Failing to Diagnose Mental Illness or Drug Dependence	228
59:6-6. Determinations in Accordance with Applicable Enactments	229
59:6-7. Escape of Person Confined; Injuries between Inmates	229
Chapter 7—Administration of Tax Laws	
59:7-1. “Tax” Defined	229
59:7-2. Liability of a Public Entity or Public Employee Generally	229
59:7-3. Applicability of Chapter	230
Chapter 8.—Claims Against Public Entities	
59:8-1. Date of Accrual of Cause of Action	230
59:8-2. Local Public Entity Defined	230
59:8-3. Claims For Damages Against Public Entities	230
59:8-4. Contents of Claim	231
59:8-5. Signature	231
59:8-6. Claim Forms; Additional Evidence and Information; Examinations	231
59:8-7. Place for Presentation of Claim	232
59:8-8. Time for Presentation of Claims	232
59:8-9. Notice of Late Claim	233
59:8-10. Presentation of Claim	233
59:8-11. Time of Presentation and Receipt; Proof of Mailing	233
Chapter 9—Conditions of Suit and Judgment	
59:9-1. Manner of Trial	233
59:9-2. Interest and Limitations on Judgments	233
59:9-3. Contribution by a Public Entity or Public Employee with a Joint Tortfeasor	235
59:9-4. Comparative Negligence	235
59:9-5. Discretion to Award Attorney’s Fees; Limitation	237
59:9-6. Suits Against Public Employees—Judgment or Settlement as Bar	238

Chapter 10—Indemnification

	PAGE
59:10-1. Indemnification	238
59:10-2. Refusal to Defend—Indemnification	238
59:10-3. Public Employee's Duty to Notify and Cooperate with Attorney General	239
59:10-4. Local Public Entities—Authority to Indemnify ..	240

Chapter 11—Settlement of Claims

59:11-1. Authority to Settle Claims	240
---	-----

Chapter 12—Establishment of Fund, Prospective
Applicability, Repealers

59:12-1. Fund Established	241
59:12-2. Repealers	242
59:12-3. Prospective Application of Act	242

Subtitle 2—New Jersey Contractual Liability Act

Chapter 13—General Provisions

59:13-1. Short Title	243
59:13-2. Definitions	243
59:13-3. Waiver of Immunity from Liability in Contract ..	243
59:13-4. Jurisdiction in the New Jersey Courts	243
59:13-5. Presentation and Consideration of Claims	243
59:13-6. Notice of Late Claim	244
59:13-7. Arbitration Statute Unaffected	244
59:13-8. Interest on Judgments	244
59:13-9. Payment of Claims	245
59:13-10. Claims Affected by this Chapter	245

Subtitle 3—Reports, Severability, Appropriations,
Effective Date

Chapter 14—General Provisions

59:14-1. Annual Reports; Report to the Legislature	246
59:14-2. Severability	246
59:14-3. Appropriation	247
59:14-4. Effective Date Provision	247

AN ACT concerning claims against the State and other public entities relating to tort and contract, making appropriations therefor and establishing a new Title to be known as Title 59 of the New Jersey Statutes, Claims Against Public Entities.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

SUBTITLE 1. NEW JERSEY TORT CLAIMS ACT

CHAPTER 1. GENERAL

59:1-1. Short title. This subtitle shall be known and may be cited as the "New Jersey Tort Claims Act."

59:1-2. Legislative declaration. The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carrying out the above legislative declaration.

59:1-3. Definitions. 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.

“Public entity” includes the State, and 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.

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

COMMENT

The definition of “Public Entity” provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions. The intent of this provision is to provide a basis upon which an established body of law may be uniformly applied. For the purposes of establishing liability in the State of New Jersey this definition is specifically intended to include such entities as the New Jersey Highway Authority and Turnpike Authority and Rutgers the State University.

59:1-4. Effect upon liability based on contract or right to relief other than damages. Nothing in this act shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees.

59:1-5. Workmen’s compensation laws not repealed. Nothing in this act shall be construed to affect, alter or repeal any provision of the workmen’s compensation laws of this State.

59:1-6. Military and veterans law not repealed. Nothing in this act shall be construed to affect, alter or repeal any provision of the military and veterans law of this State, except as specifically provided in repealer section 59:12-2 of this subtitle.

59:1-7. Effect of assumption of liability by United States. Any waiver of immunity and assumption of liability contained in this act shall not apply in circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability.

COMMENT

This provision is similar to the one provided in Section 8A of the New York Court of Claims Act and is intended to guarantee that by waiving immunity the State of New Jersey is not relieving the Federal Government of a liability which it has assumed in the absence of such a waiver. For example, in certain circumstances involving the National Guard the Federal Government assumes liability. 32 U.S.C.A. § 715. It is intended that to the extent of liability assumed by the United States in such circumstances the State of New Jersey will continue to remain immune.

CHAPTER 2. IMMUNITY AND LIABILITY OF PUBLIC ENTITY

59:2-1. Immunity of public entity generally. a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

COMMENT

Subsection (a) provides that the basic statutory approach of the New Jersey Tort Claims Act shall be that immunity of all governmental bodies in New Jersey is re-established. This provision adopts the reasoning of the California Law Revision Commission embodied in the California Tort Claims Act enacted in 1963. Cal. Gov't Code § 810 *et seq.* The Law Revision Commission reasoned:

"A statute imposing liability with specified exceptions will provide the governing bodies of public entities with little basis upon which to budget for the payment of claims and judgments for damages, for public unforeseen situations, any one of which could give rise to costly litigation and a possible damage judgment. Such a statute would invite actions brought in hopes of imposing liability on theories not yet tested in the courts and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of

insurance under such a statute would no doubt be greater than under a statute which provided for immunity except to the extent provided by enactment, since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under a statute imposing liability with specified exceptions.

Accordingly, the Legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by an enactment. This would provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability. Should further study in future years demonstrate that additional liability of public entities is justified, such liability may then be imposed by the Legislature within carefully drafted limits."

See California Law Revision Commission, *Recommendation Relating to Sovereign Immunity*, 811 (1963).

In the absence of a comprehensive statute the New Jersey Supreme Court has developed the analytical approach that courts "ought not to be . . . asking why immunity should not apply in a given situation but rather . . . asking whether there is any reason why it should apply." *B. W. King, Inc. v. West New York*, 49 N.J. 318, 325 (1967). This approach is no longer necessary in light of this comprehensive Tort Claims Act. Rather the approach should be *whether an immunity applies and if not, should liability attach*. It is hoped that in utilizing this approach the courts will exercise restraint in the acceptance of novel causes of action against public entities.

Subsection (b) is intended to insure that any immunity provisions provided in the act or by common law will prevail over the liability provisions. It is anticipated that the Courts will realistically interpret both the statutory and common law immunities in order to effectuate their intended scope.

59:2-2. Liability of public entity. a. A public entity is liable for injury proximately caused by an act or omission of a 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

The primary source of public entity liability is contained in subsection (a) of this section. It establishes the principle of vicarious liability for all public entities for "injury proximately caused by an act or omission of a public employee within the scope of his employment" and thereby relies upon established principles of law such as the doctrine of *respondeat superior*. This provision specifically adopts the general concept of vicarious liability expressed by the New Jersey Supreme Court in *McAndrew v. Mularchuk*, 33 N.J. 172 (1960). While the general approach of this act is immunity unless liability, this section provides a flexible liability provision which will permit the courts to adapt the principles established in this act to the particular circumstances of the cases coming before them. In addition it permits the courts to continue to recognize common law immunities to the extent they are consistent with the provisions of this act. See e.g. *Grove v. VanDuyn*, 44 N.J.L. 654 (E.&A. 1882); *Bedrock Foundations, Inc., v. Geo. H. Brewster & Son, Inc.*, 31 N.J. 124 (1959); and *Barr v. Mateo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L.ed. 2d 1434 (1959).

It is recognized, however, that the negligence principles commonly applied to private entrepreneurs cannot automatically be applied to public entities; for as pointed out by the New Jersey Supreme Court: "A private entrepreneur may readily be held for negligent omissions within the chosen ambit of his activity. But the area within which government has the power to act for the public good is almost without limit, and the State has no duty to do everything that might be done." *Fitzgerald v. Palmer*, 47 N.J. 106, 109 (1966).

Subsection (b) is intended to reduce the complexity of this act by providing that generally, entity liability tracks employee liability.

59:2-3. Discretionary activities. a. A public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity;

b. A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

c. A public entity is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

d. A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel, unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.

COMMENT

This provision is intended to codify the existing law in the State of New Jersey which immunizes both public employees and public entities for the exercise of discretion within the scope of employment. See *Willis v. Department of Conservation and Economic Development*, 55 N.J. 534, 540 (1970); *Amelchenko v. Freehold Borough*, 42 N.J. 541 (1964); *Bergen v. Koppental*, 52 N. J. 478 (1968).

Subsection (a) of this section provides the broad immunity for discretionary acts which has also been adopted in other jurisdictions throughout the country, including California (Cal. Gov't Code § 820.2) and the Federal Government (28 U.S.C.A. § 2680).

Subsection (b) specifies an absolute immunity which is contained in existing New Jersey case law and which recognizes the principle that certain high-level decisions calling for the exercise of official judgment or discretion must not be subject to the threat of tort liability. As the courts have pointed out "it cannot be a tort for government to govern." *Amelchenko v. Freehold Borough*, 42 N.J. 541, 550; *Willis v. Department of Conservation and Economic Development*, 55 N.J. 534, 540; *Miehl v. Darpino*, 53 N.J. 49 (1968); *Fahey v. City of Jersey City*, 52 N.J. 103 (1968); *Hoy v. Capelli*, 48 N.J. 81 (1966).

Subsection (c) is intended to specify with particularity the type of high-level policy decisions which must remain free from the threat of tort liability consistent with the principles established in the above cases. For example the decision to seek ap-

appropriations for the purchase of equipment or the construction of facilities or the hiring of personnel is a discretionary judgment of a coordinate branch of government and is reserved solely for decision by that branch of government. The discretionary decision involving whether or not to provide resources or to provide appropriations for personnel or facilities or equipment is another example of high-level decision making reserved to a coordinate branch of government—in this case the legislative branch of the public entity.

Subsection (d) specifies certain discretionary activities of a public entity which lend themselves to a very limited judicial review. Thus this subsection incorporates the thesis that once resources have been provided a public entity may be liable for its determination of priorities in the application of such resources if that determination is palpably unreasonable. This thesis was adopted by the New Jersey Supreme Court in *Bergen v. Koppcnal*, 52 N.J. 478 (1968).

This section also makes clear that once a public entity does act, then, "when it acts in a manner short of ordinary prudence, liability could be adjudged as in the case of a private party." *Fitzgerald v. Palmer*, 47 N.J. 106, 109 (1966). Thus this section adopts the test commonly applied by the courts that a public entity or public employee is liable for negligence in the performance of ministerial duties.

59:2-4. Adoption or failure to adopt or enforce a law. 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.

59:2-5. Issuance, denial, suspension or revocation of permit, license, etc. A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.

COMMENT

This immunity is necessitated by the almost unlimited exposure to which public entities would otherwise be subjected if they were liable for the numerous occasions on which they issue, deny, suspend or revoke permits and licenses. In addition, most

actions of this type by a public entity can be challenged through an existing administrative or judicial review process. See *Tyrell v. Burke*, 110 N.J.L. 225 (E.&A. 1933); *Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc.*, 31 N.J. 124 (1959); Cf. *Visidor Corp. v. Cliffside Park*, 48 N.J. 214 (1966).

59:2-6. Failure to inspect, or negligent inspection of, property. A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property; provided, however, that nothing in this section shall exonerate a public entity from liability for negligence during the course of, but outside the scope of, any inspection conducted by it, nor shall this section exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4.

COMMENT

This immunity is essential in light of the potential and existing inspection activities engaged in by public entities for the benefit of the public generally. These activities are to be encouraged rather than discouraged by the imposition of civil tort liability. The inclusion of the reference to Chapter 4 is intended to indicate that this immunity shall not apply when dangerous conditions of public property are involved. In those cases Chapter 4 of this act provides the controlling principles of liability.

59:2-7. Recreational facilities. A public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4.

COMMENT

This provision reflects existing New Jersey case law which provides that liability must be denied for the failure to provide supervision for public playgrounds and recreational facilities because the "employment of supervisors involves the type of governmental policy determination which must remain free from the threat of tort liability." *Fahey v. City of Jersey City*, 52 N.J. 103, 110 (1968).

59:2-8. Public assistance programs—termination of benefits. A public entity is not liable for injuries caused by the termination or reduction of benefits under a public assistance program.

59:2-9. Slander of title. A public entity is not liable for its acts or omissions resulting in a slander on the title of any property.

59:2-10. Public employee conduct—limitation on entity liability. A public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct.

COMMENT

This provision recognizes the existing law and public policy that a public entity should not be vicariously liable for such conduct of its employees. In addition it adopts the concept noted in *O'Connor v. Harms, et al.*, 111 N.J. Super. 22, 26-27 (App. Div. 1970) that:

“a public corporation such as a city or other public body, by reason of its being an artificial legal entity created by law to perform limited governmental functions, cannot entertain malice, as a public corporation.”

CHAPTER 3. LIABILITY AND IMMUNITY OF PUBLIC EMPLOYEE

59:3-1. Generally. 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.

COMMENT

This provision adopts existing case law in this State and throughout the country which has established the principle that public employees are liable for injury caused by their acts or omissions to the same extent as private persons unless granted immunity. See *Florio v. Jersey City*, 101 N.J.L. 535 (E.&A. 1925); *Bedrock Foundations, Inc. v. Geo. H. Brewster and Son, Inc.*, 31 N.J. 124 (1959); *Kisielewski v. State of New Jersey*, 68 N.J. Super. 258 (App. Div. 1961); *Czyzewski v. Schwartz*, 110 N.J. Super. 255 (App. Div. 1970); *Harris v. State*, — N.J. Super. — (App. Div. 1972).

59:3-2. Discretionary activities. a. A public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him;

b. A public employee is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

c. A public employee is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

d. A public employee is not liable for the exercise of discretion when, in the face of competing demands, he determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public employee was palpably unreasonable.

Nothing in this section shall exonerate a public employee for negligence arising out of his acts or omissions in carrying out his ministerial functions.

COMMENT

This provision is intended to codify the existing law in the State of New Jersey which immunizes a public employee for the exercise of discretion within the scope of his duties. See *Willis v. Department of Conservation and Economic Development*, 55 N.J. 534, 540 (1970); *Bedrock Foundations, Inc. v. George H. Brewster and Son, Inc.*, 31 N.J. 124 (1959); *Kisielewski v. State of New Jersey*, 68 N.J. Super. 258 (App. Div. 1961); *Czyzewski v. Schwartz*, 110 N.J. Super. 255 (App. Div. 1970); *Harris v. State*, — N.J. Super. — (App. Div. 1972). This is also the law of other jurisdictions throughout the country, including California (Cal. Gov't. Code § 820.2) and the Federal Government (28 U.S.C.A. § 2680). The reasoning contained in the comment to § 59:2-3 of this act is equally applicable to this section.

59:3-3. Execution or enforcement of laws. A public employee is not liable if he acts in good faith in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

COMMENT

The immunity provided by this section is similar to provisions contained in the California Tort Claims Act, § 820.4, the Federal

Tort Claims Act, 28 U.S.C. § 2630(a), and other statutes throughout the country. This section does not, however, immunize law enforcement officials from false arrest and false imprisonment. It is recognized that law enforcement officers are not now immune in the State of New Jersey and it is believed that existing principles of law provide sufficient protection for the officer from frivolous suits. Therefore it is the intent of this section to emphasize the importance of compensating a citizen whose freedom has been unreasonably restricted.

59:3-4. Acting under unconstitutional, invalid or inapplicable laws. If a public employee acts under the apparent authority of a law that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the law been constitutional, valid and applicable.

COMMENT

This provision embodies existing New Jersey case law. *Visidor Corp. v. Cliffside Park*, 48 N.J. 214 (1966). It is intended to remove any inhibition to vigorous enforcement of a law which a public employee might have if a particular law he is proceeding under is of questionable validity or applicability. The provision assumes that legal decisions as to the applicability or validity of a law are beyond the function of the ordinary public employee.

59:3-5. Adoption or failure to adopt or enforce any law. A public employee is not liable for an injury caused by his adoption of or failure to adopt any law or by his failure to enforce any law.

59:3-6. Issuance, denial, suspension or revocation of permit, license, etc. A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.

59:3-7. Failure to inspect, or negligent inspection of, property. A public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property; provided, however, that nothing in this section shall exonerate a public employee from

liability for negligence during the course of, but outside the scope of, any inspection conducted by him, nor shall this section exonerate a public employee from liability for failure to protect against a dangerous condition as provided in chapter 4.

59:3-8. Institution or prosecution of judicial or administrative proceeding. A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment.

COMMENT

This provision recognizes an immunity generally followed at common law. See *DeGroot v. Muccio*, 115 N.J. Super. 15 (Law Div. 1971); *Grove v. Van Duyn*, 44 N.J.L. 654 (E.&A. 1882); *Bedrock Foundations, Inc. v. Geo. H. Brewster & Son, Inc.*, 31 N.J. 124 (1959). It should be noted that the immunity does not extend to conduct amounting to a crime or constituting actual malice, actual fraud or willful misconduct. See § 59:3-14.

59:3-9. Entry upon property. A public employee is not liable for his entry upon any property where such entry is expressly or impliedly authorized by law. Nothing in this section exonerates a public employee from liability for an injury proximately caused subsequent to such entry by his own negligent or wrongful act or omission.

COMMENT

There are numerous instances when public employees are required to enter upon private property in order to exercise their public duties. This provision is intended to encourage the unfettered exercise of their duties.

59:3-10. Misrepresentation. A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation.

COMMENT

The breadth and scope of potential negligent misrepresentation by public employees acting within the scope of their employment and the consequent exposure to unforeseen liability of the public entity necessitates this provision. Public employees are encouraged to develop and disseminate information for the benefit of the public; the absence of the above provision would undoubtedly discourage public employees from performing this necessary function to its fullest extent.

You are Viewing an Archived Copy from the New Jersey State Library
59:3-11. Recreational facilities. A public employee is not liable for the failure to provide supervision of public recreational facilities. Nothing in this section exonerates a public employee for negligence in the supervision of a public recreational facility.

COMMENT

This immunity is similar to that contained in § 59:2-7 of this act, but a public employee (and hence a public entity) is not exonerated for negligence once he undertakes to supervise the facility.

59:3-12. Public assistance programs—termination of benefits. A public employee is not liable for damages resulting from the termination or reduction of benefits under a public assistance program.

59:3-13. Slander of title. A public employee is not liable for his acts or omissions resulting in a slander on the title of any property.

59:3-14. Public employee immunity—exception. a. Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

b. Nothing in this act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

COMMENT

It is the intent of this provision that a public employee guilty of outrageous conduct cannot avail himself of the limitations as to liability and damages contained in this act.

CHAPTER 4. CONDITIONS OF PUBLIC PROPERTY LIABILITY OF THE PUBLIC ENTITY

59:4-1. Definitions. As used in this chapter:

a. "Dangerous condition" means a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

b. "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.

c. "Public property" means real or personal property owned or controlled by the public entity, but does not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

59:4-2. Liability generally. A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

COMMENT

This provision sets forth the conditions of liability under which a public entity may be held liable for the dangerous conditions of its property. This provision comports generally with the principles of liability established by the New Jersey courts for local public entities in their capacity as landowners. See *B. W. King, Inc. v. West New York*, 49 N.J. 318 (1967); *Miehl v. Darpino*, 53 N.J. 49 (1968); *Hoy v. Capelli*, 48 N.J. 81 (1966); *Amelchenko v. Freehold Borough*, 42 N.J. 541 (1964); *Henry Clay v. Jersey City*, 74 N.J. Super. 490 (Ch. Div. 1962). It is anticipated that this section will be developed to the extent possible in accordance with common law principles of landowner liability.

This section recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property. Thus it is specifically provided that when a public entity exercises or fails to exercise its discretion in determining what action should or should not be taken to protect against the dangerous condition that judgment should only be reversed where it is clear to the court that it was palpably unreasonable. *Bergen v. Koppental*, 52 N.J. 478, 480 (1968). That decision was based on the thesis that a public entity's discretionary decisions to act or not to act in the face of competing demands should generally be free from the second guessing of a coordinate branch of Government. In addition, a public entity is not prohibited from asserting the traditional common law defenses to liability.

59:4-3. Actual notice; constructive notice. a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection (b.) of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

(b.) A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection (b.) of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

59:4-4. Failure to provide emergency warning signals. Subject to section 59:4-2 of this act, a public entity shall be liable for injury proximately caused by its failure to provide emergency signals, signs, markings or other devices if such devices were necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

COMMENT

This provision declares that liability may exist for the failure on the part of a public entity to provide an emergency warning signal or device when a condition exists constituting a "trap" to a person using a street or highway with due care. It should be noted, however, that a public entity's liability for failure to provide such signals or devices must be measured against the

standard of whether the entity's action or inaction was "palpably unreasonable." *Bergen v. Koppenal*, 52 N.J. 478, 480 (1968).

59:4-5. Failure to provide ordinary traffic signals—immunity. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices.

COMMENT

This section is consistent with existing New Jersey law and is to be contrasted with section (59:4-4) which relates only to the use or failure to use *emergency* warning devices. See *Hoy v. Capelli*, 48 N.J. 81 (1966); *cf. Visidor Corp. v. Cliffside Park*, 48 N.J. 214 (1966).

59:4-6. Plan or design immunity. a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

COMMENT

This section is intended to grant a public entity and a public employee complete immunity for injuries resulting from a plan or design of public property when it has been officially approved by an authorized body. This broad immunity is prompted by the fact that approval of plans or designs is peculiarly a function of the executive or legislative branch of government and is an example of the type of highly discretionary governmental activity which the courts have recognized should not be subject to the threat of tort liability. See *Fitzgerald v. Palmer*, 47 N.J. 106, 110 (1966); *Hughes v. County of Burlington*, 99 N.J. Super. 405 (App. Div. 1968). In addition, this particular area of governmental activity provides a very broad and extensive amount of exposure to liability against which the State would have difficulty providing economical and adequate protection. This immunity is similar to the immunity provided by judicial decision in the State of New York, see *Weiss v. Fote*, 7 N.Y. 2d

579, 200 N.Y.S. 2d 409, 167 N.E. 2d 63 (1960) and by legislation in the State of California. Cal. Gov't Code, § 830.6.

It is intended that the plan or design immunity provided in this section be perpetual. That is, once the immunity attaches no subsequent event or change of conditions shall render a public entity liable on the theory that the existing plan or design of public property constitutes a dangerous condition. After several years of difficulty with this immunity in California, the California Supreme Court adopted a contrary approach and concluded that plan or design immunity was not perpetual in California. See *State v. Baldwin*, 99 Cal. Rptr. 145, 491 P.2d 1121 (1972). After consideration, this approach has been specifically rejected as unrealistic and inconsistent with the thesis of discretionary immunity—that a coordinate branch of government should not be second-guessed by the judiciary for high level policy decisions.

59:4-7. Weather conditions; effect on use of streets and highways—immunity. Neither a public entity nor a public employee is liable for an injury caused solely by the effect on the use of streets and highways of weather conditions.

59:4-8. Condition of unimproved public property—immunity. Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

59:4-9. Unimproved and unoccupied portions of certain lands—immunity. Neither a public entity nor a public employee is liable for any injury caused by a condition of the unimproved and unoccupied portions of the tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State.

COMMENT

Sections 59:4-8 and 59:4-9 reflect the policy determination that it is desirable to permit the members of the public to use public property in its natural condition and that the burdens and expenses of putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition

and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received. A similar statutory approach was taken by the California Legislature. Cal. Gov't Code § 831.2, § 831.4, and § 831.6.

The State of New Jersey possesses thousands of acres of land set aside for the specific purpose of recreation and enjoyment. The Division of Fish, Game and Shell Fisheries has 127,000 acres, the Division of Parks and Forests 280,500 acres, the Division of Water Resources 7,600 acres and the Division of Marine Police has estimated upwards of 500,000 acres including all of the land in New Jersey now or formally flowed by the tides. The exposure to hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of the foregoing acreages, both land and water oriented. Thus in sections 59:4-8 and 59:4-9 a public entity is provided an absolute immunity irrespective of whether a particular condition is a dangerous one.

In addition it is intended under those sections that the term unimproved public property should be liberally construed and determined by comparing the nature and extent of the improvement with the nature and extent of the land. Certain improvements may be desirable and public entities should not be unreasonably deterred from making them by the threat of tort liability.

CHAPTER 5. CORRECTION AND POLICE ACTIVITIES

59:5-1. Failure to provide prison, jail or correctional facilities. Neither a public entity nor a public employee is liable for failure to provide a prison, jail or penal or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel or facilities in a prison or other correctional facility.

COMMENT

This provision recognizes a specific immunity for such high level discretionary decisions as whether to establish correctional facilities; this immunity would undoubtedly be recognized by the judiciary under section 59:2-3 of this act.

Similarly, this provision recognizes the judicially accepted principle that the allocation of equipment and personnel by

public entities "involves the type of governmental policy determination which must remain free from the threat of tort liability." *Fahey v. City of Jersey City*, 52 N.J. 103, 110 (1968).

59:5-2. Parole or escape of prisoner; injuries between prisoners. Neither a public entity nor a public employee is liable for:

a. an injury resulting from the parole or release of a prisoner or from the terms and conditions of his parole or release or from the revocation of his parole or release.

b. any injury caused by:

- (1) an escaping or escaped prisoner;
- (2) an escaping or escaped person; or
- (3) a person resisting arrest; or
- (4) a prisoner to any other prisoner.

COMMENT

Subsection (a) involves a particular type of discretionary activity which should not be subject to threat of tort liability.

Subsection (b) reflects the judgment that governmental liability should not be extended beyond reasonable limits.

Subsection b(4) also recognizes the practical problems inherent in supervising prisoners and particularly in preventing injuries caused by one prisoner upon another. While it is necessary to provide supervision, the decision to do so for the purpose of preventing inter-prisoner injuries should not be threatened with tort liability nor should the actions of prison guards in reacting to situations which may give rise to such injuries. Thus, this provision (as it relates to injuries to another prisoner) specifically rejects the reasoning of the Appellate Division in *Harris v. State*, — N.J. Super. — (1972).

59:5-3. Suits by prisoners. 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 requirements and the statute of limitations contained in chapter 8 of this act, 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.

COMMENT

This provision suspends the statute of limitations and the notice provisions of this act for the purpose of permitting prisoners to bring suit against a public entity or public employee only after they have been released from institutional confinement. This approach is similar to that of the State of New York. It is taken in the interest of prison harmony and in order to avoid the erosion of prison discipline as well as to discourage the bringing of frivolous suits and the traditional "outing in court" enjoyed by many inmates in connection therewith.

This provision also permits a prisoner to file a claim administratively in order to obtain recovery for any injury he might sustain. If, however, the State does not settle his claim, he is nonetheless entitled to bring suit after he is released from institutional confinement. Thus a prisoner is generally treated as any other claimant with the exception of the procedural disability contained in this section. While some jurisdictions (Ill. Rev. Stat. 1961, c. 37, § 439.8 and see *United States v. Muniz*, 374 U.S. 150 (1962)) treat prisoners the same as any other claimant, other jurisdictions (Cal. Gov't Code § 844.6) take a more restrictive view of prisoners' rights to suit. The policy behind § 5-3 is intended to strike an appropriate balance between those positions and the goals of fairly compensating prisoner injuries and reasonably limiting the administrative burden produced by the proliferation of prisoner suits.

59:5-4. Failure to provide police protection. 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.

59:5-5. Failure to make arrest or retain person arrested in custody. 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.

CHAPTER 6. MEDICAL, HOSPITAL AND PUBLIC HEALTH ACTIVITIES

59:6-1. Definitions. As used in this chapter:

"Medical facility" means a hospital, infirmary, clinic, dispensary, mental institution, or similar facility.

"Mental institution" means any facility for the care or treatment of persons committed for mental illness.

“Mental illness” means mental illness, mental disorder bordering on mental illness, mental deficiency, epilepsy, dipsomania or inebriety, sexual psychopathy, or such mental abnormality as to evidence utter lack of power to control sexual impulses.

“Drug dependent persons” means a person who is using a controlled dangerous substance and who is in a state of psychic or physical dependence, or both, arising from the use of that controlled dangerous substance on a continuous basis. Drug dependence is characterized by behavior or other responses, including but not limited to, a strong compulsion to take the substance on a recurring basis in order to experience its psychic effects or to avoid the discomfort of its absence.

59:6-2. Failure to provide medical facilities or mental institutions. Neither a public entity nor a public employee is liable for failure to provide a medical facility or mental institution, or if such facility or institution is provided, for the failure to provide sufficient equipment, personnel or facilities in a mental institution or medical facility.

COMMENT

This provision is prompted by reasoning similar to that contained in the comment to Section 59:5-1 of this act.

59:6-3. Prevention of disease or controlling communication of disease. Neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community.

COMMENT

This section declares a specific rule of discretionary immunity for acts or omissions relating to quarantine or other similar measures for the prevention or control of communicable diseases. This rule is consistent with the recognized approach taken by the New Jersey courts. See *Valentine v. Englewood*, 76 N.J.L. 509 (E.&A. 1908); *Bedrock Foundations, Inc. v. George H. Brewster & Son, Inc.*, 31 N.J. 124 (1959).

59:6-4. Failure to make physical or mental examination or to make adequate physical or mental examination. Except for an examination or diagnosis for the purpose of treatment, neither a

public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others.

COMMENT

This provision grants an immunity which has been recognized by the New York courts in the absence of statute and the State of California by statute. Cal. Gov't Code, Section 855.6. The immunity granted pertains to the failure to perform adequate public health examinations, such as public tuberculosis examinations, physical examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants. It does not apply to examinations for the purpose of treatment such as are ordinarily made in doctors' offices and public hospitals.

59:6-5. Diagnosing or failing to diagnose mental illness or drug dependence. a. Neither a public entity nor a public employee is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental illness or is a drug dependent person or from failing to prescribe for mental illness or drug dependence; provided, however, that nothing in this subsection exonerates a public entity or a public employee who has undertaken to prescribe for mental illness or drug dependence from liability for injury proximately caused by his negligence or by his wrongful act in so prescribing.

b. Nothing in subsection a. exonerates a public entity or a public employee from liability for injury proximately caused by a negligent or wrongful act or omission in administering any treatment prescribed for mental illness or drug dependence.

COMMENT

The section recognizes the difficulties involved for the physician when attempting to diagnose mental illness or drug dependence and when attempting to decide whether or not to prescribe for such conditions. The provision makes clear that once a public employee decides to prescribe for mental illness or drug dependence or when a public employee administers any treatment so prescribed the normal malpractice principles of liability apply.

59:6-6. Determinations in accordance with applicable enactments.
a. Neither a public entity nor a public employee is liable for any injury resulting from determining in accordance with any applicable enactment:

- (1) whether to confine a person for mental illness or drug dependence;
- (2) the terms and conditions of confinement for mental illness or drug dependence;
- (3) whether to parole, grant a leave of absence to, or release a person from confinement for mental illness or drug dependence.

COMMENT

This section recognizes a specific immunity for the discretionary acts of determining whether to confine such persons and the terms and conditions of their confinement as well as their release. Any claim for compensation resulting from the wrongful confinement in a medical facility or mental institution should be addressed to the Legislature as a moral obligation.

59:6-7. Escape of person confined; injuries between inmates. Neither a public entity nor a public employee is liable for:

- a. an injury caused by an escaping or escaped person who has been confined for mental illness or drug dependence;
- b. an injury caused by any person who has been confined for mental illness or drug dependence upon any other person so confined.

COMMENT

This provision is prompted by reasoning similar to that contained in the comment to section 59:5-2 of this act.

CHAPTER 7. ADMINISTRATION OF TAX LAWS

59:7-1. "Tax" defined. As used in this chapter, "tax" includes a tax, assessment, fee or charge.

59:7-2. Liability of a public entity or public employee generally. Neither a public entity nor a public employee is liable for an injury caused by:

- a. Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

b. An act or omission in the interpretation or application of any law relating to a tax.

59:7-3. Applicability of chapter. Nothing in this chapter affects any law relating to refund, rebate, exemption, cancellation, amendment or adjustment of taxes.

COMMENT

This chapter confers immunity upon public employees and public entities for their discretionary acts in the administration of the tax laws. Presumably this activity would be considered discretionary under existing law but it is desirable to make the immunity explicit in order to obviate the need for test litigation.

CHAPTER 8. CLAIMS AGAINST PUBLIC ENTITIES

59:8-1. Date of accrual of cause of action. Accrual shall mean the date on which the claim accrued and shall not be affected by the notice provisions contained herein.

COMMENT

The purpose of this section is to make clear that the notice provisions of this chapter do not affect the statute of limitations provision established herein. It is intended that the term accrual of cause of action shall be defined in accordance with existing law in the private sector.

59:8-2. Local Public Entity Defined. For purposes of this chapter "local public entity" means a public entity other than the State.

59:8-3. Claims for damages against public entities. No action shall be brought against a public entity 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.

COMMENT

This section mandates that no suit shall be brought against a public entity unless a claimant has furnished the appropriate public entity with a notification of claim. The purpose of the claims notification requirement in this Chapter is two-fold: (a) to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit; (b) to provide the public entity with

prompt notification of a claim in order to adequately investigate the facts and prepare a defense.

59:8-4. Contents of claim. A claim shall be presented by the claimant or by a person acting on his behalf and shall include:

- a. The name and post office address of the claimant;
- b. The post-office address to which the person presenting the claim desires notices to be sent;
- c. The date, place and other circumstances of the occurrence or transaction which gave rise 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.

59:8-5. Signature. The claim shall be signed by the claimant or by some person on his behalf.

59:8-6. Claim forms; additional evidence and information; examinations. A public entity may by rule or regulation adopt forms specifying information to be contained in claims filed against it under this act. Such forms shall include the requirements of 59:8-4 of this act and may include such additional information or evidence as (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 income lost; (5) if future treatment is necessary, a statement of anticipated expenses for such treatment.

In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the public entity and a claimant may be required to permit a public entity to inspect all appropriate records relating to his claim for liability and

damages including, but not limited to, income tax returns, hospital records, medical records and employment records.

The Attorney General is hereby authorized to issue rules and regulations on behalf of the State for the purpose of eliciting the types of information referred to in this section and for specifying any additional information which may be reasonably necessary for the administrative disposition of claims under this act.

COMMENT

This provision is necessary in order to assure the fair and full disclosure of information necessary to the orderly and expedient administrative disposition of claims. This section provides the Attorney General with authority similar to that exercised by the United States' Attorney General under the Federal Tort Claims Act. 28 U.S.C.A. 2672, 28 C.F.R. §§ 14.1-14.11.

59:8-7. Place for presentation of claim. A claim for damage or injury arising under this act against the State 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 shall be filed with that entity.

59:8-8. Time for presentation of claims. A claim relating to a cause of action for death or for 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 if:

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

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 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 arising under this act be filed later than 2 years from the time of the accrual of the claim.

59:8-10. Presentation of claim. a. A claim shall be presented to the public entity by delivering it to or mailing it certified mail to the office of the Attorney General or the office of the State agency allegedly involved in the action. A claim may be presented to a local public entity by delivering it or mailing it certified mail to the entity.

b. A claim or application shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided in this section if it is actually received at an office of the State or local public entity within the time prescribed for presentation thereof.

59:8-11. Time of presentation and receipt; proof of mailing. The claim shall be deemed to have been presented and received at the time of the deposit. Proof of mailing may be made in the manner prescribed by the Rules of Court.

CHAPTER 9. CONDITIONS OF SUIT AND JUDGMENT

59:9-1. Manner of trial. Tort claims against a public entity or public employee acting within the scope of his employment shall be heard by a judge sitting without a jury in accordance with the rules governing the courts of the State of New Jersey.

59:9-2. Interest and limitations on judgments. a. No interest shall accrue prior to the entry of judgment against a public entity or public employee.

b. No judgment shall be granted against a public entity or public employee on the basis of strict liability, implied warranty or products liability.

c. No punitive or exemplary damages shall be awarded against a public entity.

d. 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. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.

e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee.

COMMENT

The limitation on the recovery of damages in subparagraph (d) reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damages, such as pain and suffering, except in aggravated circumstances—cases involving permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$1,000. The limitation that pain and suffering may only be awarded when medical expenses exceed \$1,000 insures that such damages will not be awarded unless the loss is substantial.

The intent of subparagraph (e) is to prohibit the receipt of duplicate benefits by a claimant filing suit under the act. The phrase “any other source” is not intended to include a joint tortfeasor under the Joint Tortfeasors Contribution Law,

N.J.S. 2A:53-1 *et seq.* Problems surrounding the applicability of that statute to situations where a public entity is a joint tortfeasor are dealt with in section 59:9-3 of this act.

Subrogation is prohibited in subparagraph (e) in an effort to limit the exposure to liability of public entities. This provision is consistent with the “no duplicate benefits” approach in the act and reflects a recognition that profit-making insurance companies are in a better position to withstand losses which they contract for than are the already economically burdened public entities. Precedent exists both in statutory law (N.J.S. 2A:48-1, as amended in 1968) and case law (*A&B Auto Stores of Jones St., Inc. v. Newark*, 59 N.J. 5, 20-28 (1971)) for the determination to bar subrogation against a public entity by an insurance company. In addition it must be understood that public entities may subject themselves to suit under whatever conditions they consider appropriate, particularly with respect to protecting the public Treasury.

59:9-3. Contribution by a public entity or public employee with a joint tortfeasor. Notwithstanding any other law, in any case where a public entity or public employee acting within the scope of his employment is determined to be 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 party on account of a settlement or a judgment paid by an alleged tortfeasor shall be reduced pro tanto from the injured party's judgment against any other tortfeasor.

COMMENT

The purpose of subparagraph (a) is to make clear that in situations where a public entity or public employee is a joint tortfeasor and hence jointly and severally liable with any other tortfeasor to the injured party, the public entity's or public employee's liability and duty of contribution only extends to the damages provided under the act. Thus the *pro rata* share for which an entity or employee is responsible in contribution must be determined in relation to the possible amount of recovery permitted in section 59:9-2 rather than in relation to the claimant's total judgment. To the extent that this provision is inconsistent with the “Joint Tortfeasors Contribution Law,” N.J.S. 2A:53-1 *et seq.*, this act shall be controlling.

Subparagraph (b) mandates that any settlement by a joint-tortfeasor in a suit involving a public entity *or* public employee shall be deducted *pro tanto* from any judgment against another joint tortfeasor. This provision changes the existing law which provides that when a joint tortfeasor settles with a claimant there will be a *pro rata* reduction of the judgment against the remaining tortfeasors. In other words, the plaintiff does not now recover the full amount of his judgment if he settles with a joint tortfeasor below his *pro rata* share of the judgment (to the extent of the difference).

The above provision would rectify this inequity and permit a plaintiff to recover from any non-settling tortfeasor the difference between the total amount of his judgment and the amount of any settlement he may have reached. In addition to more fairly and fully compensating an injured plaintiff, this provision will undoubtedly encourage settlements by all parties.

59:9-4. Comparative negligence. a. In all actions brought against a public entity or public employee under this act the fact that the person injured may have been guilty of contributory negligence shall not bar a recovery, but the damages, to the extent permitted under this act, shall be diminished in proportion to the amount of negligence attributable to the person injured.

b. In any action to which paragraph a. applies, the court shall make findings of fact or the jury shall return a special verdict which shall state:

- (1) The amount of the damages incurred by each party irrespective of his negligence; and
- (2) The percentage of negligence attributable to each of the parties.

The court shall calculate the monetary damages in accordance with the percentage of negligence attributable to each of the parties and shall enter an appropriate judgment.

COMMENT

The purpose of this provision is to humanize the law by eliminating the harsh doctrine of contributory negligence and adopting in its place comparative negligence. Under the doctrine of contributory negligence a plaintiff is barred from recovery if his own negligence contributed to his injury—no matter how great or how slight that contributory negligence may have been.

Subparagraph (b) mandates that any settlement by a joint-tortfeasor in a suit involving a public entity *or* public employee shall be deducted *pro tanto* from any judgment against another joint tortfeasor. This provision changes the existing law which provides that when a joint tortfeasor settles with a claimant there will be a *pro rata* reduction of the judgment against the remaining tortfeasors. In other words, the plaintiff does not now recover the full amount of his judgment if he settles with a joint tortfeasor below his *pro rata* share of the judgment (to the extent of the difference).

The above provision would rectify this inequity and permit a plaintiff to recover from any non-settling tortfeasor the difference between the total amount of his judgment and the amount of any settlement he may have reached. In addition to more fairly and fully compensating an injured plaintiff, this provision will undoubtedly encourage settlements by all parties.

59:9-4. Comparative negligence. a. In all actions brought against a public entity or public employee under this act the fact that the person injured may have been guilty of contributory negligence shall not bar a recovery, but the damages, to the extent permitted under this act, shall be diminished in proportion to the amount of negligence attributable to the person injured.

b. In any action to which paragraph a. applies, the court shall make findings of fact or the jury shall return a special verdict which shall state:

(1) The amount of the damages incurred by each party irrespective of his negligence; and

(2) The percentage of negligence attributable to each of the parties.

The court shall calculate the monetary damages in accordance with the percentage of negligence attributable to each of the parties and shall enter an appropriate judgment.

COMMENT

The purpose of this provision is to humanize the law by eliminating the harsh doctrine of contributory negligence and adopting in its place comparative negligence. Under the doctrine of contributory negligence a plaintiff is barred from recovery if his own negligence contributed to his injury—no matter how great or how slight that contributory negligence may have been.

Under the comparative negligence doctrine contained in this provision the damages to which an injured party would be entitled under the act will be diminished in proportion to the amount of negligence attributable to him.

At least twelve states have adopted a form of the comparative negligence rule: Arkansas (*Ark. Stats. Ann.* § 27-1730.12 (1962)), Georgia (*Ga. Code Ann.* § 105-603 (1968)), Hawaii (*H.R.S.* § 663-31 (1969 supp.)), Maine (14 *M.R.S.A.* § 156 (1970-71 supp.)), Massachusetts (*Mass. Ann. Laws C.* 231, § 85 (1970 supp.)), Minnesota (*Minn. Stats.* § 604.01 (1971 supp.)), Mississippi (*Miss. Code Ann.* § 1454 (1956)), Nebraska (*Neb. Rev. Stat.* § 25-1151 (1964)), New Hampshire (*N.H. Rev. Stats. Ann.* § 507:7a (1970 supp.)), South Dakota (*S.D. Code* § 20-9-2 (1967)), Vermont (*Vt. Stats. Ann.* T. 12, § 1036 (1970 supp.)), Wisconsin (*Wis. Stat. Ann.* § 895.045 (1966)). See *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E. 2d 445, 450 (1968) (dissenting opinion). In fact, in a recent decision in which the New Jersey Supreme Court attempted to deal with the potential unfairness of the contributory negligence rule, Justice Francis, in a concurring opinion joined in by Justice Proctor, called upon the Legislature to adopt some form of comparative negligence. *O'Brien v. Bethlehem Steel Corporation*, 59 N.J. 114, 125-128 (1971).

Although there are a number of different comparative negligence plans, it is proposed that the so-called "pure form" of comparative negligence be adopted. This approach is presently the law in the State of Mississippi (*Miss. Code Ann.* § 1454) and it is and has been the law applied under the Federal Merchant Marine Act (46 U.S.C. § 688) and the Federal Employers' Liability Act (45 U.S.C. § 53). It is also consistent with the general approach of this act which is intended to increase settlement and to reasonably and fairly increase the compensation of injured persons. It is anticipated that this form of comparative negligence will apply in all actions in which a public entity or public employee is a party.

59:9-5. Discretion to award attorney's fees; limitation. In any action brought against a public entity or a public employee under this act, the court may, in its discretion, award a successful claimant (a) costs ordinarily allowable in the private sector, (b) expert witness fees not exceeding a total of \$100.00 and (c) reasonable attorney's fees; provided however that there shall be no such

recovery in any case where damages are awarded for pain and suffering.

COMMENT

With the exception of aggravated circumstances where pain and suffering is allowed, the underlying policy as to damages in this act is to reimburse an injured claimant to the full extent of his present and projected economic loss. Consistent with this thesis, discretion is vested in the trial judge to compensate a successful claimant against either a public entity or a public employee for the reasonable amount of his attorney's fees and for \$100 worth of his expert witness fees. This is done in order to insure that a claimant is compensated for virtually all of his economic loss.

59:9-6. Suits against public employees—judgment or settlement as bar. a. Where a claimant has pursued his remedy against a public entity for a claim arising out of the act or omission of a public employee of a public entity, a judgment or settlement shall be a complete bar to suit against the employee in a claim arising from the same subject matter.

b. Where a claimant has pursued his remedy against a public employee for a claim arising out of the act or omission of a public employee of a public entity, a judgment or settlement shall be a complete bar to suit against the entity in a claim arising from the same subject matter.

CHAPTER 10. INDEMNIFICATION

59:10-1. Indemnification. If pursuant to the provisions of P. L. c. Senate Bill No. 993 now pending before the Legislature the Attorney General provides for the defense of an employee or former employee, the State shall provide indemnification for the State employee.

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

59:10-2. Refusal to defend—indemnification. If the Attorney General refuses to provide for the defense of a State employee as required by the provisions of P. L. c. Senate Bill No. 993 now pending before the Legislature, the employee or former employee of the State shall be entitled to indemnification

from the State if he establishes that the act or omission upon which the claim or judgment was based occurred within the scope of his employment as an employee of the State and the State fails to establish that he acted or failed to act because of actual fraud, actual malice or willful misconduct.

If the State employee establishes that he was entitled to a defense under the provisions of this chapter, the State shall pay or reimburse him for any bona fide settlement agreements entered into by the employee, and shall pay or reimburse him for any judgments entered against the employee, and shall pay or reimburse him for all costs of defending the action, including reasonable counsel fees and expenses, together with costs of appeal, if any.

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

59:10-3. Public employee's duty to notify and cooperate with Attorney General. A State employee shall not be entitled to indemnification under this act unless within 10 calendar days of the time he is served with any summons, complaint, process, notice, demand or pleading, he delivers the original or a copy thereof to the Attorney General or his designee. Upon such delivery the Attorney General may, pursuant to the provisions of P. L. c. Senate Bill No. 993 now pending before the Legislature, assume exclusive control of the employee's representation and such employee shall cooperate fully with the Attorney General's defense.

COMMENT

An examination of the law of other jurisdictions and an analysis of present New Jersey law justifies the above indemnification provisions in order to fairly protect State employees in the performance of their duties. The above standard for indemnity will provide the public employee with the essential measure of security from liability in the performance of his duties while at the same time providing a necessary element of accountability for his performance by subjecting him to the possibility of suit. In order to insure that the State's interest will be adequately protected it is provided that a State employee shall not be entitled to indemnification unless he notifies the Attorney General and unless he cooperates fully with any defense provided by the Attorney General.

In addition public policy forecloses indemnification for punitive damages, exemplary damages or any damages resulting from a commission of a crime. Thus, whether or not the Attorney General represents the employee, indemnification may not be provided for those particular types of damages.

59:10-4. Local public entities—authority to indemnify. Local public entities are hereby empowered to indemnify local public employees consistent with the provisions of this act.

COMMENT

While this act provides mandated indemnification for State employees it provides only permissive authority for local jurisdictions to indemnify their employees. The above provision specifically permits such indemnification if a local public entity considers it appropriate.

The definition of "State" contained in section 59:1-3 was provided for the purposes of this Chapter in order to indicate that the indemnity provided by the State should only be for and to those persons generally considered employees of the State. This definition was intended to distinguish State employees from employees of public authorities and from employees of other public entities who, as indicated by the above provision, may be indemnified within the discretion of their employer—public entity. It is not therefore the intention of the State to indemnify persons who are not traditionally considered the State's employees but it is the position of the Legislature that indemnification of all public employees should be encouraged.

CHAPTER 11. SETTLEMENT OF CLAIMS

59:11-1. Authority to settle claims. a. The State Treasurer shall pay any tort claim or claim for indemnification against the State under this act not exceeding \$7,500.00 which is recommended for payment by the Attorney General or his designee. The State Treasurer shall pay any such claim exceeding \$7,500.00 upon the recommendation of the Attorney General or his designee and the approval of the Director of the Division of Budget and Accounting.

b. The State Treasurer shall pay all contract claims against the State upon the recommendation of the Attorney General or his designee with the approval of the appropriate Department or agency head and the Director of the Division of Budget and

COMMENT

The experience of other jurisdictions indicates that the most effective and expedient method for adjusting disputes is to place settlement authority within the Attorney General or his designee in appropriate instances so that the expeditious settlement of claims need not await an unnecessarily large number of approvals or the administrative delay usually attendant to them. This was particularly true with the Federal Government; when the Attorney General's power to settle was monetarily increased, there was a substantial increase in the number of settlements and a concomitant reduction in the case load.

This chapter provides that in tort claims against the State the Attorney General is being granted exclusive authority to settle claims amounting to \$7,500 or less. Tort claims above \$7,500 may be settled but only with the approval of both the Attorney General and the Director of the Division of Budget and Accounting. The approval of the agency involved is unnecessary in this case since the payment will be made not from a Departmental appropriation but from an appropriation to a tort claim fund established specifically for the purpose of paying tort claims against the State.

In all contract claims the approval of the respective agency involved as well as the Director of the Division of Budget and Accounting is required in addition to the recommendation of the Attorney General. These various approvals are provided because of the method of payment established for contract claims—payment from agency appropriations.

It is anticipated that the approach contained in this chapter will greatly assist the expeditious settlement of smaller claims and will not place within the Attorney General excessive authority to settle without appropriate budgetary review.

CHAPTER 12. ESTABLISHMENT OF FUND, PROSPECTIVE APPLICABILITY, REPEALERS

59:12-1. Fund established. There is hereby established in the custody of the State Treasurer a fund to be used for the payment of claims against the State arising out of tort. No money shall be

withdrawn from such fund unless the claim has been settled according to law or reduced to final judgment in a court of competent jurisdiction. Whenever any tort claim or claim for indemnification shall have been settled according to law or reduced to final judgment in a court of competent jurisdiction, the same shall be certified by the Attorney General or his designee, to the State Treasurer who shall pay the claim upon the warrant of the Director of the Division of Budget and Accounting out of moneys contained in the fund. Whenever the State Treasurer shall determine that funds are unavailable to pay any such claim, he shall certify the amount of such deficiency and the amount so certified shall be appropriated and paid to the claimant in the manner aforesaid.

59:12-2. Repealers. All acts and parts of acts inconsistent with this act are, to the extent of such inconsistency, repealed, including without limitation:

R. S. 40:9-2;

N. J. S. 18A:20-35;

N. J. S. 38A:4-9;

N. J. S. 38A:4-10;

R. S. 53:1-22.

59:12-3. Prospective application of act. This act applies only to claims that accrue on or after its effective date. Claims that accrued prior to the effective date of this act are not affected by this act but shall continue to be governed by the law applicable thereto prior to the effective date of this act; provided however that this act shall apply to the suit presently pending between *Willis and Department of Conservation and Economic Development*, Superior Court, Docket No. L-9817-66.

COMMENT

The general intent of this provision is to insure that this act shall have a prospective application. With respect to the State this will mean that the waiver of sovereign immunity only allows for it to be sued for injuries accruing on or after July 1, 1972; with respect to all other public entities this means that the substantive law of liability presently in effect shall govern until the act becomes operative.

An exception is made for the *Willis* case because of the "practical reason that case law is not likely to keep up with the needs of society if the litigant who successfully champions a

cause is left with only that distinction.” *Willis v. Department of Conservation and Economic Development*, 55 N. J. 534, 541 (1970). It is anticipated that the disposition of this suit will be made in accordance with the principles of liability and damages set forth in this act.

SUBTITLE 2. NEW JERSEY CONTRACTUAL LIABILITY ACT

CHAPTER 13. GENERAL PROVISIONS

59:13-1. Short title. This subtitle shall be known as the “New Jersey Contractual Liability Act.”

59:13-2. Definitions. As used in this chapter: “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.

“Contracting agency” shall mean the appropriate agency of the State which is charged by law with the responsibility of awarding contracts.

“Accrual of claim” shall mean the date on which the claim arose and shall not be affected by the notice provisions contained herein.

59:13-3. Waiver of immunity from liability in contract. The State of New Jersey hereby waives its sovereign immunity from liability arising out of an express contract or a contract implied in fact and consents to have the same determined in accordance with the rules of law applicable to individuals and corporations; provided, however, that there shall be no recovery against the State for punitive or consequential damages arising out of contract nor shall there be any recovery against the State for claims based upon implied warranties or upon contracts implied in law.

59:13-4. Jurisdiction in the New Jersey courts. The courts of competent jurisdiction of the State of New Jersey shall have jurisdiction over all claims against the State for breach of a contract, either express or implied in fact. Contract claims against the State shall be heard by a judge sitting without a jury. Except as otherwise expressly provided herein, all suits filed against the State under this chapter shall be in accordance with the rules governing the courts of the State of New Jersey.

59:13-5. Presentation and consideration of claims. It shall be the responsibility of parties contracting with the State to promptly

notify the State in writing of any situation or occurrence which may potentially result in the submission of a claim against the State. Except as otherwise provided in section 6, no notice of claim for breach of contract either express or implied in fact, shall be filed with the contracting agency later than 90 days after the accrual of such claim. A notice of claim shall include 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. After the expiration of 90 days from the date the notice of claim is received by the contracting agency, the claimant may file suit in a court of competent jurisdiction of the State of New Jersey.

In all contract claims against the State, the claimant shall be forever barred from recovering against the State if:

a. he fails to notify the appropriate contracting agency within 90 days of accrual of his claim except as otherwise provided in section 6 hereof; or

b. he fails to file suit within 2 years of accrual of his claim or within 1 year after completion of the contract giving rise to said claim, whichever may be later; or

c. the claimant accepts personally or through his agent or legal representative any award, compromise or settlement made by the State of New Jersey.

59:13-6. Notice of late claim. A claimant who fails to file notice of his claim within 90 days as provided in section 5 of this chapter, may, in the discretion of a judge of the Superior Court of the State of New Jersey, be permitted to file such notice at any time within 1 year after the accrual of his claim provided that the State has not been substantially prejudiced thereby. Application to a judge of the superior court for permission to file a late notice of claim shall be made upon motion based upon affidavits setting forth sufficient reason for the failure to file his notice of claim within the period of time prescribed by section 5 of this chapter.

59:13-7. Arbitration statute unaffected. Nothing in this chapter shall be construed to prohibit the parties from agreeing to settle contract disputes by arbitration in accordance with the provisions of N. J. S. 2A:24-1 *et seq.*

59:13-8. Interest on judgments. No interest shall accrue prior to the entry of judgment in a court of competent jurisdiction.

59:13-9. Payment of claims. Whenever any such claim shall have been settled according to law or reduced to final judgment in a court of competent jurisdiction, the same shall be certified by the Attorney General or his designee, to the State Treasurer who shall pay the claim upon the warrant of the Director of the Division of Budget and Accounting out of any funds available to the department or other agency against which the claim was made. Whenever the State Treasurer shall determine that funds are unavailable to pay any such claim, he shall certify the amount of such deficiency and the amount so certified shall be appropriated and paid to the claimant in the manner aforesaid.

59:13-10. Claims affected by this chapter. The time limitations contained in section 5 of this chapter shall not apply to those claims accruing prior to the effective date of this chapter; provided, however, that any law suits on such claims must be filed in a court of competent jurisdiction within 6 months of the effective date of this chapter or they shall be forever barred.

COMMENT

This bill waives the State's traditional sovereign immunity from suit in contract. The New Jersey Supreme Court has held that the defense of sovereign immunity is no longer available to the State in contract actions. *P, T & L Construction Co. v. Commissioner, Department of Transportation, State of New Jersey*, 55 N. J. 341 (1970). This position is in accord with the view of the great majority of states and with that of the Federal Government which have already subjected themselves to liability in contract matters. In fact, the New Jersey Supreme Court has held on March 20, 1972 that unless the Legislature designates a different tribunal, all claims based upon expressed contracts shall be adjudicated through the regular court system. *P, T & L Construction Co. v. Commissioner, Department of Transportation, State of New Jersey*, N. J. . . . , 1972.

The bill provides that all contract claims shall be heard within the existing court system by judges sitting without a jury. The strict notice and filing requirements contained in section 5 are intended to encourage all parties contracting with the State to notify the State as soon as possible of any existing or potential claims. At the same time these requirements provide a sufficient period of time within which the appropriate State agency and the Attorney General may take administrative action to adjust the dispute.

While this legislation is primarily intended to treat the State similarly to private individuals and corporations in matters arising out of contract, it is nonetheless provided that the State should not be subjected to liability on the basis of a contract implied at law, for breach of warranty or for punitive or consequential damages since the nature and extent of such liability and damages could expose the State to unforeseen risks.

Section 10 of this chapter is intended to permit suit on any claims which accrued prior to the effective date of this chapter and which are not barred by the general 6-year statute of limitations to be filed in a court of competent jurisdiction provided that such filing occurs within 6 months of the effective date of this chapter.

SUBTITLE 3. REPORTS, SEVERABILITY, APPROPRIATIONS,
EFFECTIVE DATE

CHAPTER 14. GENERAL PROVISIONS

59:14-1. Annual reports; report to the Legislature. 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.

COMMENT

It is the intent of this provision to provide for an effective reporting system so that the Legislature can intelligently assess the impact of this act upon the State and public entities throughout New Jersey. It is hoped that the furnishing of empirical data will provide the detailed information necessary for the State of New Jersey, unlike many other states, to effectively review the operation of such a comprehensive liability statute.

59:14-2. Severability. If any clause, sentence, subdivision, paragraph, section or part of this act be adjudged to be unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to

the clause, sentence, subdivision, paragraph, section or part thereof directly involved in the case in which said judgment shall have been rendered.

59:14-3. Appropriation. a. There is hereby appropriated to the fund established pursuant to section 59:12-1 of this act, the sum of \$750,000.00 for use during the fiscal year ending June 30, 1973.

b. There is hereby appropriated to the Division of Law in the Department of Law and Public Safety the sum of \$300,000.00 for use during the fiscal year ending June 30, 1973.

59:14-4. Effective date provision. a. Subtitle 1 of this act takes effect on July 1, 1972; provided however the Attorney General is authorized to take such anticipatory action prior to the said effective date as he deems appropriate.

b. Subtitle 2 and all other parts of this act shall take effect immediately.

CHAPTER 9

AN ACT concerning claims against the State supplementing "An act to establish a Department of Law in the State Government," approved March 7, 1944 (P. L. 1944, c. 20).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Attorney General's duty to defend State employees. Except as provided in section 2, the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action in tort brought against such State employee on account of an act or omission in the scope of his employment.

For the purposes of this section, the Attorney General's duty to defend shall extend to a cross-action, counterclaim or cross-complaint against an employee or former employee.

2. Grounds for refusal to provide defense. The Attorney General may refuse to provide for the defense of an action referred to in section 1 if he determines that:

(a) the act or omission was not within the scope of employment;
or

(b) the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or

(c) the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.

3. The Attorney General's authority to represent. In any other action or proceeding, including criminal proceedings, the Attorney General may provide for the defense of a State employee, if he concludes that such representation is in the best interest of the State.

4. Attorney General's exclusive control over litigation. Whenever the Attorney General provides for the defense of a State employee pursuant to this act the Attorney General may assume exclusive control over the representation of such employee and

such employee shall cooperate fully with the Attorney General's defense.

5. Methods of providing defense. The Attorney General may provide for a defense pursuant to this act by an attorney from his own staff or by employing other counsel for this purpose or by asserting the State's right under any appropriate insurance policy which requires the insurer to provide the defense.

6. Powers not in derogation of existing authority. The authority provided in the Attorney General by this act shall be in addition to and not in derogation of his existing authority to represent and defend State employees.

COMMENT

The above authority is provided primarily for the purpose of satisfying the needs for representation of State employees resulting from the passage of the New Jersey Tort Claims Act. Although this authority is undoubtedly possessed by the Attorney General under his existing powers, this amendment is intended to explicitly establish that authority and the circumstances under which it will be exercised.

In addition this amendment makes clear that the Attorney General shall have exclusive control of the litigation and State employees must cooperate with him fully or lose their right to indemnification provided in chapter 10 of the New Jersey Tort Claims Act.

You are Viewing an Archived Copy from the New Jersey State Library