Report to the Colorado General Assembly:

GOVERNMENTAL LIABILITY IN COLORADO

COLORADO LEGISLATIVE COUNCIL

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GOVERNMENTAL LIABILITY
IN COLORADO

Legislative Council

Report to the

Colorado General Assembly

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COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL
ROOM 341, STATE CAPITOL
DENVER, COLORADO 80203
222-9911 — EXTENSION 2285
AREA CODE 303

September 23, 1968

To Members of the Forty-seventh General Assembly:

Under direction of House Joint Resolution No. 1023, 1967 regular session, the Legislative Council appointed a committee to conduct "a study of the problem of governmental civil immunity with a view toward developing comprehensive legislation to define and limit the areas of immunity and to provide procedures for compensation to those affected and to balance the public and private interest involved." The report of this committee, is submitted herewith.

The committee submitted its report and draft of the proposed bill on September 23, 1968, at which time the report was accepted by the Legislative Council for transmittal to the Forty-seventh General Assembly.

Respectfully submitted,

/s/ Representative C. P. (Doc) Lamb
Chairman

CPL/mp

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Representative C. P. (Doc) Lamb
Chairman
Colorado Legislative Council
341 State Capitol
Denver, Colorado 80203

Dear Mr. Chairman:

Your committee appointed to study sovereign immunity in Colorado submits the accompanying report, containing a draft of suggested governmental immunity legislation.

The committee's report indicates that there is a need for legislative action to establish guidelines for the waiver of sovereign immunity in particular instances and to assure governmental entities of the opportunity to prepare for the newly imposed liability. The legislation provides for (1) procedural safeguards, (2) limitations on judgments, (3) the express enumeration of areas of liability, and (4) authority to obtain protection through insurance.

Respectfully submitted,

/s/ Senator David J. Hahn,
Chairman, Committee on
Sovereign Immunity

DJH/pw

FOREWORD

Under direction of House Joint Resolution No. 1023, 1967 regular session, the Legislative Council appointed a committee to study the problems of governmental immunity with a view toward developing comprehensive legislation to define and limit the areas of immunity and to provide procedures for compensation to those affected and to balance the public and private interests involved. The members of the committee appointed to carry out this assignment were:

Senator David Hahn, Chairman
Representative Thomas Grimshaw, Vice Chairman
Senator Allegra Saunders
Representative James Braden
Representative Ralph A. Cole
Representative Charles Edmonds
Representative Floyd Sack
Representative Hubert M. Safran

To accomplish the purposes set forth in the study resolution, the Legislative Council Committee on Sovereign Immunity held thirteen meetings from June 9, 1967 to September 19, 1968. To aid the committee in its deliberations, representatives of various departments of state government (Colorado Department of Highways, Department of Insurance, Attorney General's Office, Division of Local Government), representatives of various local governmental entities, and representatives of the insurance industry, were consulted by the committee. In addition, two questionnaires were used by the committee to obtain comments and suggestions from interested persons on the proposals the committee had under consideration.

Assisting the committee in the study were Mr. Bob Holt and and Mr. Gene Cavaliere of the Legislative Drafting Office, who provided bill drafting services, and Mr. Earl Thaxton, senior research assistant for the Legislative Council, who had primary responsibility for the staff work.

September 23, 1968

Lyle C. Kyle
Director

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COMMITTEE FINDINGS AND CONCLUSIONS

1. The legal doctrine of sovereign immunity, as it has historically developed, expresses the idea that government is immune from liability for injury or damage resulting from governmental activities, unless it consents to such liability. The doctrine that the sovereign cannot be sued or held liable without its consent continues to be the rule, not the exception, in the great majority of states.

2. The law of Colorado with respect to the sovereign immunity doctrine and the tort liability of governmental entities can be summarized generally (although in oversimplified terms) as follows: The state, counties, cities, and other subdivisions of government are deemed immune from liability for the torts committed by public employees in the performance of governmental functions, except to the extent that the immunity has been waived or judicially found to be inapplicable.

3. The doctrine of sovereign immunity has been under critical scrutiny for many years -- by legal writers and scholars, judges, attorneys, and lay people. Most agree that the grounds for exempting the state and other public entities from suit and liability are neither logical nor practical. Nearly every commentator who has considered the subject vigorously asserts that the doctrine must be abolished, because it is inherently unsound, confusing, conflicting, archaic, "an anachronism without rational basis that has existed only by force of inertia", and has produced great injustice in the courts. The committee agrees that there are many inconsistencies in the present law on the subject, thereby creating confusion and misunderstanding. The doctrine has created certain situations of injustice. Citizens have been injured in their person and property by government employees and, in many of these cases, no recourse against the government is possible. Where relief is available it is most generally granted as a matter of discretion and there is no uniformity in either method or approach among the various subdivisions of government. This results in many instances of injustice and inequity.

4. In the several states, including Colorado, consent to suit and liability has been given in many cases, and in a variety of forms. This consent has taken the form of (1) private laws enacted as a matter of legislative grace, (2) general or limited public legislation creating liability, (3) indirect liability through such means as insurance, (4) liability of governmental units under the court-made doctrine concerning proprietary and ministerial functions, and (5) judicial abrogation of the doctrine, in whole or in part, by the courts. All of these forms of assuming responsibility for governmental torts combine to support the conclusion of the committee that there is a trend toward governmental responsibility and away from governmental immunity.

5. Widespread dissatisfaction with the doctrine and judicial impatience with legislative inaction have led fourteen state courts to repudiate the doctrine in whole or in part. On the other hand, many courts, in considering whether or not to abolish the doctrine, have decided to leave the question to the legislatures. It appears that a majority of those who have considered the question, both those who favor and those who oppose judicial abrogation of the doctrine, assume that the doctrine should be abolished. The main debate is over the question whether the courts or the legislatures should do the job.

6. To date, the majority of the Supreme Court of Colorado has refused to completely repudiate the doctrine and reaffirmed the position that any change in the rule should be a legislative matter. Whether or not the Supreme Court of Colorado will refute, change or otherwise amend the rule of governmental immunity, is of course, not known. In several other states, the courts also intimated that the doctrine was a legislative matter. However, in the light of legislative inaction, these same courts subsequently concluded that the initiative had to be undertaken by court decision, and abolished the doctrine. A change in the thinking of the Colorado Supreme Court as a result of decisions in sister states, a change in the composition of the court itself, or impatience by the court for action by the legislature, could result in a change of position by the court. In any event, it was agreed by the committee that to wait for judicial action is not a proper solution to the problems of sovereign immunity. The committee concluded that a statutory solution to the problem was needed to give direction and bring some degree of consistency and uniformity to the applicable statutory and common law principles. Because the determination of public policy is particularly within the competence and experience of the legislature, and in an attempt to avoid the chaos which has resulted in other states where immunity has been abolished by the judiciary before the legislature had acted, the committee concluded that legislative action is necessary and desirable.

7. The committee concluded that any proposed legislation should eliminate the present inconsistency and arbitrary distinctions that exist in the law as it applies to the various units of government. Any proposed legislation should reflect the philosophy of the present trend to greatly restrict the doctrine of governmental immunity. More stress should be on the principle that if there is fault there should be a remedy and that economic loss resulting from the wrongful acts of government should be borne by the community as a whole rather than imposed on one individual. In addition, any proposed legislation should assure governmental entities of the opportunity to prepare for any newly imposed liability and all liability should be prudently managed and fiscally controlled by the following provisions: (1) procedural safeguards, (2) statutory limitations on judgments, (3) the areas of exposure should be expressly stated, and (4) power should be granted to obtain protection through insurance.

COMMITTEE RECOMMENDATIONS

The committee recommends favorable consideration of the "Colorado Governmental Immunity Act" included in this report. The general plan of the act is to reaffirm governmental immunity to suit and then proceed to carve out specific exceptions thereto. The committee felt that this approach would eliminate possible confusion by restating existing law in Colorado while opening up new areas of specific governmental responsibility as deemed appropriate by the committee to satisfy the demands of justice in a changing society.

The committee found that this approach would be the easiest to draft and would result in a clear, concise bill. In addition, this approach allows the most flexibility for future change. Most important, however, is that this approach provides a better basis upon which the financial burden of liability can be evaluated in terms of the potential cost of such liability. If the limits of potential liability are known, public entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance, for the risk is more clearly defined and lends itself to more accurate assessment, which should result in lower premiums for the coverage had.

The language of the bill was patterned after the California Act of 1963 (Calif. Gov't Code Ann. § 810-996.6 /Supp. 1965/), the "Utah Governmental Immunity Act" (Utah Code Ann. § 63-30-1 to 34 /Supp. 1965/), other state acts, and the Federal Tort Claims Act. The original draft of the bill has been changed and refined to comply with specific recommendations as received from committee members, and to reflect unique Colorado circumstances as revealed by committee discussion. In some cases actual language as suggested by committee members was incorporated into the bill. The major provisions of the act are discussed below.

Declaration of Policy

The bill begins with a statement of policy to the effect that the committee recognizes that the doctrine of sovereign immunity is, in some instances, an inequitable doctrine. That the doctrine has created many situations of injustice by treating governments differently than private persons is obvious. On the other hand, there are many situations in which the nature of governmental activities and functions is not comparable to private activities and responsibilities.

Public agencies necessarily engage in a broad spectrum of activities having no private counterpart, which often involve relatively high degrees of exposure to injury producing events, and which the government cannot voluntarily terminate since they are performed as a matter of public duty. Private persons and

corporations, on the other hand, are ordinarily free to withdraw from activities which entail undue risks of liability. These differences suggest that it may not be wise to treat public and private entities alike for tort liability purposes. The committee has recognized this difference by declaring that the state and its political subdivisions should not be liable for their wrongs, in every instance, in the same manner as private persons and corporations.

Definitions

Public entity. The definition of "public entity" is especially important because it determines the general reach of the bill. This definition is intended to include every kind of independent political or governmental entity in the state in order to avoid any questions as to whether certain units of government are excluded. The committee agreed that all units of government should be treated similarly, for it appears to be unjust to make an individual's right to recover damages for injury dependent on whether it was the state or some other political subdivision or governmental unit which was responsible.

Public Employee. This definition specifically recognizes the policy decision of the committee to include in the scope of the bill the officers of a public entity, whether elected or appointed. This assures that elected officials are included in the term "public employee" as used in the act. In addition, employees and servants of the public entity are included under the definition, whether or not compensated.

The terms "whether or not compensated" raised difficult questions for the committee. For example, a non-compensated employee could include county jail prisoners working on a county road and welfare people engaged in public work projects on a very temporary basis. There are also many volunteer workers who perform duties for the public entities. The question posed was whether or not a political subdivision should be liable for the tortious acts of persons over whom it has such limited and transient control. If non-compensated individuals are not covered by the bill, liability for acts or omissions while performing the non-compensated volunteer work would be upon them as individuals. This result may deter the performance of volunteer work, which is essential to some types of functions. Because no substantial effect on the lawful operation of the public entity could be demonstrated as a result of the inclusion of non-compensated persons in the definition of "public employees", the committee left the definition as it presently reads.

Injury. This definition merely defines "injury"; it does not impose liability for an injury. The standards and conditions of liability for an injury are found in other provisions of the bill. The purpose of the definition is to make clear that

public entities and public employees may be held liable only for injuries to the kind of interests that have been protected by the courts in actions between private persons.

Dangerous condition. The definition of "dangerous condition" defines the type of property conditions for which a public entity may be held liable, but does not impose liability. Liability for a dangerous condition is imposed by the provisions of Section 6. The types of property in which a dangerous condition may exist include a "public building, public hospital, jail, public highway, road or street, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility." Those are the types of property for which immunity is waived under Section 6.

When the physical condition of these facilities or the use thereof constitute a risk to the public and the physical condition is proximately caused by the negligence of the public entity in constructing or maintaining such facility, a dangerous condition exists. The risk must be known or in the exercise of reasonable care should have been known before a dangerous condition can exist. If it is established that the condition had existed for such a period of time and was of such an obvious nature that, in the exercise of due care, such condition and its dangerous character should have been discovered, then the risk will be considered to have been known.

The committee concluded that there should be an exception for the discretionary act of planning or designing. If the physical condition of a facility is inadequate in relation to its present use as a result of the planning or designing of the facility, a dangerous condition shall not be considered to exist. Thus, the exercise of discretion in designing, as distinguished from discretion in construction or maintenance, will continue to be immune from liability.

Operation. Sovereign immunity is waived in Section 6 (1) (c) of the bill with respect to the operation of a public hospital or jail and in Section 6 (1) (g) with respect to the operation of any water, gas, sanitation, electrical, power, or swimming facility. The term "operation" is defined to mean the negligence of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of the above facilities.

The term "operation" is not to be construed to include a failure to exercise or perform any powers, duties or functions not vested by law in a public entity or employee. The term "operation" also does not include a negligent or inadequate inspection, or a failure to make an inspection, of any property, except property owned or leased by the public entity, to determine whether such property constitutes a hazard to the health or safe-

ty of the public. Because of the extensive nature of the inspection activities of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this exclusion from the definition were not granted.

Availability of Insurance - Waiver to Extent of Coverage

Section 4 of the bill waives sovereign immunity to the extent of insurance coverage obtained by a public entity, whether or not the entity would otherwise be liable or immune. If a public entity obtains insurance to protect against liability for injury, then such public entity should be deemed to have waived the defense of sovereign immunity as to the particular injury or injuries insured against and to the extent of the amount of insurance. If the defense of sovereign immunity would otherwise be applicable to the entity, then the amount of recovery should be limited to the amount of recovery against the insurer.

Scope of Immunity and Liability

Effect of prior waiver of immunity. Section 5 of the bill assures that the statute shall not be construed to narrow the present common law on liability nor to expand the present common law on immunity. The statute is not to undo the present law, unless otherwise specifically so stated in the bill. The section assures that the doctrine shall not be imposed in those cases where it did not exist before, unless the bill specifically so provides.

Determination of liability when immunity waived. Where sovereign immunity is abrogated as a defense under the bill, the liability of the public entity shall be determined in the same manner as if the public entity were a private person. Public entities have all the defenses to an action at law that private persons have, except the defense of sovereign immunity when that defense is abrogated by the bill (see Section 7).

Sovereign immunity as a defense. The general rule of the bill is that sovereign immunity is retained, except as waived by the bill or other provisions of law. Thus, if sovereign immunity is not waived by statutory provision, sovereign immunity shall be available to a public entity as a defense to an action for injuries. This general rule is provided in Section 8.

Waiver of Immunity

Section 6 of the bill provides that the defense of sovereign immunity will not be available to a public entity in those areas specified. These are the general waiver provisions of the

bill, other than Section 4 which waives sovereign immunity when insurance is available. In all other cases, the defense of sovereign immunity applies. Under these waiver provisions the liability of the public entity will be determined as if the entity were a private person.

Automobile accidents. Immunity is waived for an action for damages resulting from the operation of a motor vehicle owned or leased by a public entity. There is an exception for emergency vehicles.

Hospitals and jails. Sovereign immunity is not available as a defense to injuries arising from the operation of a hospital or a jail, or a dangerous condition existing therein.

Public buildings. Sovereign immunity is not available as a defense to injuries caused by the dangerous conditions of public buildings.

Roads and highways. No public entity can avail itself of the defense of immunity with respect to injuries arising out of the dangerous condition of any paved highway or street. The present rule of liability of municipalities is extended to counties and the state. The defense of immunity will remain for injuries caused on unpaved roads and highways. The committee concluded that this distinction between paved and unpaved roads and highways is the most reasonable method of classifying them for purposes of sovereign immunity waiver.

Public parks, recreational facilities, etc. The defense of immunity is waived with respect to injuries resulting from a dangerous condition of any public facility located in parks and recreation areas and maintained by a public entity. A distinction is made between (1) injuries caused by negligence in the construction, maintenance, failure to maintain, etc. of artificial, man-made objects (swing sets, buildings, etc.) and (2) injuries caused by the natural conditions of a park (the Flat Irons in Boulder or the Red Rocks west of Denver). In other words, ordinary negligence is sufficient to impose liability for injuries caused by the dangerous condition of artificial objects. For injuries caused by natural dangerous conditions, immunity is retained.

The committee concluded that if immunity were waived with respect to injuries caused by the natural condition of any unimproved property the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. It is desirable to permit the members of the public to use public property in its natural condition. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, the committee concluded that it is not unreasonable to expect persons who vol-

untarily use unimproved property in its natural condition to assume the risk of injuries arising therefrom.

Water, sewer, trash, and other proprietary activities. Sovereign immunity will not be available as a defense to an action for injuries resulting from the operation of activities which are proprietary in nature, or a dangerous condition existing therein. The liability of an entity when engaged in these activities will be determined as if it were a private corporation. These functions include, but are not limited to, the following: water, sewer, trash and waste disposal, electric and gas utilities, swimming pools, etc.

Defense of Public Employees

Section 10 of the bill provides that a public entity is required to assume the defense costs of its employees, whether such defense is assumed by the public entity or not, when they were acting within the scope of their employment and a claim is brought against them for alleged injuries.

The public entity is also required to pay all judgments or settlements of claims against its public employees in circumstances where the defense of sovereign immunity is waived as to the public entity. The public entity, however, is not required to pay the judgment where it is not made a party defendant in an action and is not notified of the existence of the action within fifteen days after the commencement of the action.

A public entity has discretion as to whether or not it will assume the defense of its public employee. This is necessary in order to avoid a conflict of interest situation. The public entity is required, where it is made a co-defendant with its public employee, to notify such employee whether or not it will assume his defense. Where the entity is not made a co-defendant, but is notified of the existence of the action within fifteen days after it is commenced, it also has to notify the employee of its decision.

If the public entity decides to defend the employee and it is determined that the employee was acting within the scope of his employment, the entity will be liable for the judgment. If it is determined by the court that the employee was acting outside of the scope of his employment, the employee, subject to an agreement with the entity, is required to reimburse the entity for reasonable attorney's fees. In addition, the entity may not compromise or settle claims against its employees until it is established that sovereign immunity has been waived.

When the entity fails or refuses to defend, it will be liable to the employee for reasonable defense costs and/or the settlement or judgment costs if it is subsequently determined

respectively that the employee was acting within the scope of his employment and the claim arose out of circumstances wherein the defense of sovereign immunity has been waived as to the public entity. If the court determines that the employee was not within the scope of employment then the entity is neither liable for costs of defense nor costs of the judgment or settlement.

Election of remedies. Section 11 of the bill provides that any judgment against either a public entity or a public employee shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the other. However, nothing will prevent the joinder of the public entity or public employee of such public entity in the same action.

Compromise and Settlement - Payment of Judgments - Limitations on Judgments - Authority to Obtain Insurance

Compromise and settlement. The administrative officers of a public entity are vested with authority to compromise or settle claims (see Section 12).

Payment of judgments. Pursuant to Section 13, a public entity is required to pay any judgment to the extent funds are available in the fiscal year in which the judgment becomes final. The judgment may be paid out of any funds that are available to the entity from (1) a self-insurance reserve fund, (2) funds that are unappropriated for any other purpose, and (3) funds appropriated for the current fiscal year for the payment of judgments and not previously encumbered.

If the judgment cannot be paid in full in the fiscal year in which it becomes final, the public entity is required to pay the balance of the judgment in the ensuing fiscal year by levying a tax sufficient to discharge the judgment. In no event, however, should the levy exceed ten mills, exclusive of existing mill levies. The public entity is required to continue to levy such tax, not to exceed ten mills, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until the judgment is discharged.

Limitations on judgments. A limitation on the amount of recovery that may be had when there is liability is set forth in Section 14 of the bill. The state or other public entity may be liable up to the maximum amount set forth in the section. The maximum amounts that may be recovered are, for an injury to one person in any single occurrence, the sum of $100,000, and for an injury to two or more persons in any single occurrence, the sum of $3,000,000; except that in such instance, no person may recover in excess of $100,000.

The only time recovery may be had in an amount which exceeds these maximum limits is when the public entity provides

insurance coverage to insure itself or a public employee against all or any part of its or his liability, and the insurance coverage is in an amount in excess of the maximum limits set forth. In this instance, recovery may be had in an amount which exceeds the maximum limits, but the amount of recovery shall not exceed the limitations of the insurance coverage.

It is expressly provided that the limitations in the section shall not be construed to permit the recovery of damages in an amount in excess of the amounts specified in the "Wrongful Death Statute" for the types of action authorized under said statute.

The section also provides that a public entity is not to be liable for punitive or exemplary damages.

Authority to obtain insurance. Pursuant to Sections 15 and 16 all public entities are expressly authorized to insure themselves against liability. Likewise, all public entities are expressly authorized to purchase insurance to cover the liability of their officers, agents, and employees for torts committed in the scope of their public employment. All public entities, in addition to being authorized to insure against any liability, are authorized to insure against the expense of defending claims, whether or not liability exists on such claims.

Public entities may insure either by purchasing commercial liability insurance or by adopting a program of self-insurance through the establishment of financial reserves, or by any combination of the two methods.

Public entities are authorized to purchase insurance only from an insurer authorized to do business in this state and deemed by the state purchasing agent, or the appropriate governing body of the public entity, to be responsible and financially sound considering the extent of the coverage required.

The committee does not recommend at this time that all public entities, other than the state, be required to provide insurance covering their liability or the liability of their officers, agents, and employees. The state, however, is required to provide insurance.

Other Provisions

Notice - filing of claims. Under Section 9 of the bill, any person claiming to have suffered an injury by a public entity or an employee thereof is required to file a written notice with the entity within six months after the date the injury is known or should have been known by the exercise of reasonable diligence. A claim for an injury is considered to accrue on the date the injury is known or should have been known by the exercise of reasonable diligence.

The notice is to be presented to the attorney general when the claim is against the state or an employee thereof. When the claim is against any other public entity or an employee thereof, the notice is to be presented to the governing body of the public entity or the attorney representing the public entity.

Execution and attachment not to issue. Neither execution nor attachment is to issue against a public entity in any action or proceeding initiated under the provisions of the bill (see Section 17).

Statute of limitations. There is a two-year statute of limitations with respect to tort actions brought pursuant to the provisions of the bill. An action based on tort is to be commenced within two years after the accrual of such action, or be forever barred (see Section 9 (6) of the bill).

Recommended Bill to Provide For Governmental Immunity and Liability in Colorado

A BILL FOR AN ACT

RELATING TO THE IMMUNITY OF THE STATE, ITS AGENCIES AND POLITICAL SUBDIVISIONS, FROM ACTIONS AT LAW; PROVIDING EXCEPTIONS THERETO, FOR THE PAYMENT OF CLAIMS AND JUDGMENTS, AND FOR THE PURCHASE OF LIABILITY INSURANCE.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Short title. This act shall be known and may be cited as the "Colorado Governmental Immunity Act".

SECTION 2. Declaration of policy. It is recognized by the general assembly that the doctrine of sovereign immunity, whereunder the state and its political subdivisions are often immune from suit for wrongs suffered by private persons, is, in some instances, an inequitable doctrine; however, the general assembly is cognizant of the fact that the state and its political subdivisions are required to perform certain services and functions, which cannot be performed by private persons or corporations, and, therefore, the state and its political subdivisions should not be liable for their wrongs in the same manner as private persons and corporations.

SECTION 3. Definitions. (1) As used in this act, unless the context otherwise indicates:

(2) "Public entity" means the state, county, city and

county, incorporated town, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision of the state organized pursuant to law.

(3) "Public employee" means an officer, employee, servant of the public entity, whether or not compensated, elected, or appointed, but does not include an independent contractor.

(4) "Injury" means death, injury to a person, damage to or loss of property, of whatsoever kind, and which would be actionable if inflicted by a private person.

(5) (a) "Dangerous condition" means the physical condition of any public building, public hospital, jail, public highway, road or street, public facility located in any park or recreation area maintained by a public entity, or public water, gas, sanitation, electrical, power, or swimming facility, where the physical condition of such facilities or the use thereof constitute a risk, known to exist or which in the exercise of reasonable care should have been known, to the health or safety of the public and which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility. For the purposes of this paragraph (5) (a), a dangerous condition should have been known if it is established that the condition had existed for such a period of time and was of such an obvious nature that, in the exercise of due care, such condition and its dangerous character should have been discovered.

(b) A dangerous condition shall not exist where the design of any facility set forth in paragraph (a) of this sub-

section is inadequate in relation to its present use.

(6) (a) "Operation" means the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any public hospital, jail, public water, gas, sanitation, power or swimming facility.

(b) (i) The term operation shall not be construed to include: A failure to exercise or perform any powers, duties, or functions not vested by law in a public entity or employee with respect to the purposes of any public facility set forth in paragraph (a) of this subsection; or

(ii) A negligent or inadequate inspection, or a failure to make an inspection, of any property, except property owned or leased by the public entity, to determine whether such property consitutes a hazard to the health or safety of the public.

SECTION 4. Availability of insurance - effect. (1) Notwithstanding any provision of law or of this act to the contrary, if a public entity provides insurance coverage to insure itself against liability for any injury, or to insure any of its employees against his liability for any injury resulting from an act or omission by such employee acting within the scope of his employment, then such public entity shall be deemed to have waived the defense of sovereign immunity in any action for damages for any such injury insured against subject to the provisions of subsection (2) of this section.

(2) If the defense of sovereign immunity would be available to a public entity except for the provisions of subsection (1) of this section, then damages shall not be recover-

able in excess of the amount of the insurance coverage, and shall be recovered from the insurer only. The insurer shall not be named as a party defendant.

SECTION 5. Prior waiver of immunity - effect. The provisions of this act shall not be construed to make available the defense of sovereign immunity where such defense was not available prior to the effective date of this act.

SECTION 6. Immunity waived. (1) (a) Sovereign immunity shall not be asserted by a public entity as a defense in an action for damages for injuries resulting from:

(b) The operation by a public employee of a motor vehicle owned or leased by such public entity, except emergency vehicles operating within the provisions of section 13-5-4 (2) and (3), C.R.S. 1963, as amended;

(c) The operation of any public hospital or jail by such public entity, or a dangerous condition existing therein;

(d) A dangerous condition of any public building;

(e) A dangerous condition of any highway, road, or street within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system, the federal primary highway system, and any paved highway which is a part of the federal secondary highway system or any paved highway which is a part of the state highway system.

(f) A dangerous condition of any public facility, except roads and highways, located in parks or recreation areas and maintained by such public entity; but, nothing in this paragraph (f) shall be construed to prevent a public entity from asserting the defense of sovereign immunity to an injury

caused by the natural condition of any unimproved property, whether or not such property is located in a park or recreation area;

(g) The operation of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity, or a dangerous condition existing therein.

SECTION 7. Determination of liability. Where sovereign immunity is abrogated as a defense under section 6 of this act, liability of the public entity shall be determined in the same manner as if the public entity were a private person.

SECTION 8. Sovereign immunity remains a defense - when. Except as provided in sections 4 through 6 of this act, or other provision of law, sovereign immunity shall be available to a public entity as a defense to an action for injury.

SECTION 9. Notice required - contents - to whom given - limitations. (1) Any person claiming to have suffered an injury by a public entity or an employee thereof shall file a written notice as provided in this section within six months after the date the injury is known or should have been known by the exercise of reasonable diligence.

(2) (a) The notice shall contain the following:

(b) The name and address of the claimant, and the name and address of his attorney, if any;

(c) A concise statement of the basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;

(d) The name and address of any public employee in-

volved, if known;

(e) A concise statement of the nature and the extent of the injury claimed to have been suffered;

(f) A statement of the amount of monetary damages that is being requested.

(3) If the claim is against the state or an employee thereof, the notice shall be presented to the attorney general. If the claim is against any other public entity or an employee thereof, the notice shall be presented to the governing body of the public entity or the attorney representing the public entity.

(4) When the claim is one for death by wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin, of the deceased.

(5) For the purpose of this act, a claim for injury shall be considered to accrue on the date that the injury is known or should have been known by the exercise of reasonable diligence.

(6) Any action based upon tort shall be commenced within two years after the accrual of such action, or it shall be forever barred.

SECTION 10. Defense of public employees - payment of judgments or settlements against public employees. (1) (a) A public entity shall be liable for:

(b) The costs of the defense of any of its public employees, whether such defense is assumed by the public entity or not, where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the

scope of his employment; and

(c) The payment of all judgments and settlements of claims against such employee, except where the defense of sovereign immunity is available to the public entity.

(2) The provisions of subsection (1) of this section shall not apply where a public entity is not made a party defendant in an action and such public entity is not notified of the existence of such action in writing within fifteen days after the commencement of such action.

(3) (a) It shall be within the discretion of the public entity whether it shall assume the defense of its public employee, or does not assume his defense.

(b) (i) In the event that the public entity elects to assume the defense of its public employee, such defense shall be assumed subject to an agreement between the public entity and the public employee:

(ii) That such public employee shall reimburse the public entity for reasonable attorney's fees in the event that the court determines that the injuries did not arise out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment; and

(iii) That the public entity shall not compromise or settle the claim unless and until it is established that the defense of sovereign immunity is not available to the public entity.

(c) (i) In the event that the public entity elects not to assume the defense of its public employee, and the court determines:

(ii) That the injuries arose out of an act or omission of such employee during the performance of his duties and within the scope of his employment, the public entity shall be liable to such public employee for his reasonable attorney's fees in prosecuting his own defense and, where applicable, in bringing an action to establish that the injuries arose out of an act or omission of such employee during the performance of his duties and within the scope of his employment; and

(iii) That the defense of sovereign immunity is or would have been available to the public entity, the public entity shall be liable to the public employee for any judgment or settlement against such public employee.

(4) Where the public entity is made a co-defendant with its public employee, it shall notify such employee in writing within fifteen days after the commencement of such action whether it will assume the defense of such employee, and where the public entity is not made a co-defendant, within ten days after receiving written notice of the existence of such action, but in no event, later than eighteen days after the commencement of such action.

SECTION 11. Judgment against public entity or public employee - effect. (1) Any judgment against a public entity shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against any public employee whose act or omission gave rise to the claim.

(2) Any judgment against any public employee whose act or omission gave rise to the claim shall constitute a complete bar to any action by the claimant by reason of the same sub-

ject matter, against a public entity.

(3) Nothing contained in the provisions of this section shall be construed as preventing the joinder of any public entity or employee of such public entity in the same action.

SECTION 12. Compromise of claims - settlement of actions. (1) A claim against the state may be compromised or settled for and on behalf of the state by the attorney general, with the concurrence of the head of the affected department, agency, board, commission, institution, hospital, college, university, or other instrumentality thereof.

(2) Claims against public entities, other than the state, may be compromised or settled by the governing body of the public entity or in such manner as the governing body may designate.

SECTION 13. Payment of judgments. (1) A public entity or designated insurer shall pay any compromise, settlement or final judgment in the manner provided in this section, and an action pursuant to rule 106 of Colorado rules of civil procedure shall be an appropriate remedy to compel a public entity to perform an act required under this section.

(2) (a) The state and the governing body of any other public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment out of any funds to the credit of the public entity that are available from any or all of the following:

(b) A self-insurance reserve fund;

(c) Funds that are unappropriated for any other purpose unless the use of such funds is restricted by law or contract

to other purposes;

(d) Appropriated for the current fiscal year for the payment of such judgments and not previously encumbered.

(3) If a public entity is unable to pay a judgment during the fiscal year in which it becomes final because of lack of available funds, the public entity shall levy a tax, in a separate item to cover such judgment, sufficient to discharge such judgment in the next fiscal year; but in no event shall such levy exceed ten mills, exclusive of existing mill levies. The public entity shall continue to levy such tax, not to exceed ten mills, exclusive of existing mill levies, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until such judgment is discharged.

SECTION 14. Limitations on judgments. (1) (a) The maximum amount that may be recovered under this act shall be:

(b) For any injury to one person in any single occurrence, the sum of $100,000.00;

(c) For an injury to two or more persons in any single occurrence, the sum of $3,000,000.00; except that in such instance, no person may recover in excess of $100,000.00.

(2) Notwithstanding the provisions of subsection (1) of this section, if a public entity provides insurance coverage to insure itself against all or any part of its liability for any injury, or to insure a public employee acting within the scope of his employment against all or any part of his liability for injury, and the insurance coverage is in an amount in excess of the limits specified in subsection (1) of this section, then recovery may be had in an amount not to exceed the limi-

tations of insurance coverage.

(3) Nothing in this section shall be construed to permit the recovery of damages for types of actions authorized under article 1 of chapter 41, C.R.S. 1963 as amended, in an amount in excess of the amounts specified in said article.

(4) A public entity shall not be liable for punitive or exemplary damages under this act.

SECTION 15. Authority for public entities other than the state to obtain insurance. (1) (a) A public entity, other than the state, either by itself or in conjunction with any one or more public entities may:

(b) Insure against all or any part of its liability for an injury for which it might be liable under this act;

(c) Insure any public employee acting within the scope of his employment against all or any part of his liability for an injury for which he might be liable under this act;

(d) Insure against the expense of defending a claim against the public entity or its employees, whether or not liability exists on such claim.

(2) (a) The insurance authorized by subsection (1) of this section may be provided by:

(b) Self-insurance, which may be funded by appropriations to establish or maintain reserves for self-insurance purposes;

(c) An insurance company authorized to do business in this state and deemed by the state purchasing agent, or the appropriate governing body of the governmental subdivision, to be responsible and financially sound considering the extent of

the coverage required;

(d) A combination of the methods of obtaining insurance authorized in paragraphs (b) and (c) of this subsection.

(3) A public entity, other than the state, may establish and maintain an insurance reserve fund for self-insurance purposes, and may include in the annual tax levy of the public entity such amounts as are determined by its governing body to be necessary for the uses and purposes of the insurance reserve fund, not to exceed ten mills. In the event that a public entity has no annual tax levy, it may appropriate from any unexpended balance in the general fund such amounts as the governing body shall deem necessary for the purposes and uses of the insurance reserve fund. The fund established pursuant to this subsection (3) shall be kept separate and apart from all other funds, and shall be used only for the payment of claims against the public entity which have been settled or compromised or judgments rendered against the public entity for injury under the provisions of this act.

SECTION 16. State required to obtain insurance. (1) (a) The state shall obtain insurance to:

(b) Insure itself against all or any part of any liability for an injury for which it might be liable under this act;

(c) Insure any of its public employees acting within the scope of their employment against all or any part of his liability for injury for which he might be liable under this act;

(d) Insure against the expense of defending a claim against the state or its public employees, whether liability

exists on such claim.

(2) (a) The insurance required under subsection (1) of this section may be provided by:

(b) Self-insurance, which may be funded by appropriations to establish or maintain reserves for self-insurance purposes;

(c) An insurance company authorized to do business in this state and deemed by the state purchasing agent, or the appropriate governing body of the governmental subdivision, to be responsible and financially sound considering the extent of the coverage required;

(d) A combination of the methods of obtaining insurance authorized in paragraphs (b) and (c) of this subsection.

SECTION 17. Execution and attachment not to issue. Neither execution nor attachment shall issue against a public entity in any action or proceeding initiated under the provisions of this act.

SECTION 18. 3-3-1 (18), Colorado Revised Statutes 1963, is REPEALD AND RE-ENACTED, WITH AMENDMENTS, to read:

3-3-1. Division of accounts and control - controller. (18) To issue warrants for the payment of claims against the state;

SECTION 19. 24-4-2 and 24-4-3, Colorado Revised Statutes 1963, are amended to read:

24-4-2. Evacuation drill - district liability. In the event that said school district and the respective local civil defense agency or authorities desire to perform an evacuation drill for any or all school buildings, the board of education

of said school district and its officers, employees and agents participating therein shall be relieved of all liability, EXCEPT AS OTHERWISE PROVIDED BY THE "COLORADO GOVERNMENTAL IMMUNITY ACT", with regard to the accidental injury of any pupil during school hours from the time that the pupil leaves the school building until his return to the building at the conclusion of the evacuation drill.

24-4-3. Buses used. For drill or other evacuation purposes as described in this article, buses and such other modes of transport as are operated by the respective school district for the transportation of pupils may be operated by the district outside the boundaries of the district. ~~without liability, notwithstanding any other statute to the contrary.~~

SECTION 20. 29-6-4 (1), Colorado Revised Statutes 1963, is amended to read:

29-6-4. Remedy for injury by a district. (1) In case any person or public corporation, within or without any district organized under this chapter, may be injuriously affected with respect to property rights in any manner whatsoever by any act performed by any official or agent of such district, or by the execution, maintenance or operation of the official plan, and EXCEPT AS OTHERWISE PROVIDED IN THE "COLORADO GOVERNMENTAL IMMUNITY ACT", AND in case no other method of relief is offered under this chapter, the remedy shall be as follows:

SECTION 21. 36-2-4 (1) and 36-2-10 (1), Colorado Revised Statutes 1963, are amended to read:

36-2-4. Judgment against a county, how paid - tax levy. (1) When a judgment shall be given and rendered against a

county of this state in the name of its board of county commissioners, or against any county officer, in an action prosecuted by or against him in his official capacity, or name of office, when the judgment is for money, and is a lawful county charge, no execution shall issue thereon, but the same may be paid by the levy of a tax upon the taxable property of said county, and when the tax shall be collected by the county treasurer, it shall be paid over, as fast as collected by him, to the judgment creditor, or his or her assigns, upon the execution and delivery of proper voucher therefor; but nothing contained in this section shall operate to prevent the county commissioners from paying ~~all-or-any-part-of~~ any such judgment by a warrant, drawn by them upon the ordinary county fund in the county treasury. ~~provided,-that-the~~ THE power hereby conferred to pay such judgment by a special levy of such tax, shall be held to be in addition to the taxing power given and granted to such board, to levy taxes for other county purposes. ~~but-the~~ THE board of county commissioners shall levy under this law ~~only~~ such taxes as ~~they-in-their-discretion-may-deem-expedient-or-necessary;-and-all-taxes-levied-by-authority-of-this-section-shall-not-exceed-one-and-onehalf-per-centum-on-the-dollar-of-assessed-property-for-any-one-fiscal-year;-and,-provided,-further,-that-the-powers-herein-given-to-the-board-of-county-commissioners-shall-not-be-construed-as-requiring-said-board-to-levy-any-special-tax-to-pay-any-judgment-unless-in-its-discretion-the-said-board-shall-so-determine,~~ SHALL BE SUFFICIENT TO DISCHARGE SUCH JUDGMENT IN THE NEXT FISCAL YEAR; BUT IN NO EVENT SHALL SUCH LEVY EXCEED TEN MILLS, EXCLUSIVE OF MILL LEVIES

FOR OTHER COUNTY PURPOSES. THE BOARD OF COUNTY COMMISSIONERS SHALL CONTINUE TO LEVY SUCH TAXES, NOT TO EXCEED TEN MILLS, EXCLUSIVE OF MILL LEVIES FOR OTHER COUNTY PURPOSES, BUT IN NO EVENT LESS THAN TEN MILLS IF SUCH JUDGMENT WILL NOT BE DISCHARGED BY A LESSER LEVY, UNTIL SUCH JUDGMENT IS DISCHARGED.

36-2-10. Claims presented to board, when - how paid. (1) ~~All claims and demands~~ ANY CLAIM OR DEMAND held by any person against a county ~~shall~~ MAY be presented for audit and allowance to the board of county commissioners of the proper county, in due form of law, ~~before an action in any court shall be maintainable thereon;~~ and all claims, when allowed, shall be paid by a county warrant, or order, drawn by said board on the county treasury, upon the proper fund in the treasury, for the amount of such claim. Such warrant or order shall be signed by the chairman of the board, permanent or temporary, attested by the county clerk, and when presented to the county treasurer for registry, be countersigned by him; said warrant or order shall specify the amount and value of the claim or service for which it is issued, and be numbered and dated in the order in which it is issued.

SECTION 22. 72-16-4 (1) (b) and (c), Colorado Revised Statutes 1963, are REPEALED AND RE-ENACTED, WITH AMENDMENTS, to read:

72-16-4. Amount of coverage - limitations. (1) (b) For any bodily injury and property damage to one person in any single occurrence, the sum of $100,000.00;

(c) For any bodily injury and property damage to two or more persons in any single occurrence, the sume of $3,000,000.00.

SECTION 23. 77-10-1 (1) and (2), Colorado Revised Statutes 1963, are amended to read:

77-10-1. Levy to pay judgment against municipality - procedure. (1) When a judgment for the payment of money shall be given and rendered against any municipal or quasi-municipal corporation of the state, or against any officer thereof in an action prosecuted by or against him in his official capacity or name of office, such judgment being an obligation of such municipality, and when by reason of vacancy in office or for any other cause the duly constituted tax assessing and collecting officers fail or neglect to provide for the payment of such judgment or fail to make a tax levy to pay such judgment, the judgment creditor may file a transcript of such judgment with the board of county commissioners of the county and counties if more than one, in which such public corporation is situated. Thereupon the county commissioners shall levy a tax AS PROVIDED IN SUBSECTION (2) OF THIS SECTION upon all the taxable property within the limits of such public corporation for the purpose of making provision for the payment of such judgment, ~~each year after the filing of such transcript until such judgment is fully paid~~, which tax shall be collected by the county treasurer and when collected by the county treasurer, it shall be paid over, as fast as collected, by him, to the judgment creditor, or his assigns, upon the execution and delivery of proper vouchers therefor.

(2) The power hereby conferred to pay such judgment by special levy of such tax, shall be held to be in addition to the taxing power given and granted to such public corporation

to levy for other purposes. The board of county commissioners shall levy under this section only such taxes as ~~they in their discretion may deem expedient and necessary. All taxes levied by the authority of this section shall not exceed three per cent on the dollar of assessed property in such public corporations for any one fiscal year.~~ SHALL BE SUFFICIENT TO DISCHARGE SUCH JUDGMENT IN THE NEXT FISCAL YEAR; BUT IN NO EVENT SHALL SUCH LEVY EXCEED TEN MILLS, EXCLUSIVE OF MILL LEVIES FOR OTHER PURPOSES. THE BOARD OF COUNTY COMMISSIONERS SHALL CONTINUE TO LEVY SUCH TAXES, NOT TO EXCEED TEN MILLS, EXCLUSIVE OF MILL LEVIES FOR OTHER PURPOSES, BUT IN NO EVENT LESS THAN TEN MILLS IF SUCH JUDGMENT WILL NOT BE DISCHARGED BY A LESSER LEVY, UNTIL SUCH JUDGMENT IS DISCHARGED.

SECTION 24. 89-1-25 (1), Colorado Revised Statutes 1963, is amended to read:

89-1-25. Claims - payment - registry of warrants. (1) EXCEPT WITH RESPECT TO CLAIMS COMING WITHIN THE PROVISIONS OF THE "COLORADO GOVERNMENTAL IMMUNITY ACT", no claims shall be paid by the district treasurer until the same shall have been allowed by the board and only upon warrants signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes. If the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon: "Not paid for want of funds; this warrant draws interest from date at six per cent per annum", and endorse thereon the date so presented over his signature. From the time of such presentation until paid such warrant

shall draw interest at the rate of six per cent per annum. When there is the sum of one hundred dollars or more in the hands of the treasurer it shall be applied upon such warrant.

SECTION 25. 89-14-5 (4), Colorado Revised Statutes 1963, is amended to read:

89-14-5. General powers of board. (4) To sue and be sued in its corporate name. ~~provided, that this provision shall not be construed to be a waiver, express or implied, or any immunity from suit which the district may possess by virtue of its being an instrumentality, or political subdivision of the state of Colorado;~~

SECTION 26. 89-15-6 (4), Colorado Revised Statutes 1963, is amended to read:

89-15-6. Powers of the district. (4) To sue and to be sued. ~~and be a party to suits, actions and proceeding, to commence, maintain, intervene in, defend, compromise, terminate by settlement or otherwise, and otherwise participate in, and to assume the cost and expense of, any and all actions and proceedings now or hereafter begun and appertaining to the district, its board, its officers, agents or employees, or any of the district's powers, privileges, immunities, rights, liabilities, no rights, disabilities and duties, or any sewage disposal system, other property of the district or any project;~~

SECTION 27. 99-2-9, Colorado Revised Statutes 1963, is amended to read:

99-2-9. Liability of requesting jurisdiction. During the time that a policeman, deputy sheriff, or fireman of a town, city, city and county, county, or fire protection district is

assigned to temporary duty within the jurisdiction of another town, city, city and county, county, or fire protection district, as provided in sections 99-2-4 to 99-2-8, any liability which may accrue under the operation of the doctrine of respondeat superior on account of the negligent or otherwise tortious act of any such police officer, deputy sheriff, or fireman while performing such duty shall be imposed upon the requesting town, city, city and county, county, or fire protection district and not upon the assigning jurisdiction. ~~provided, that nothing contained in this section shall be construed to impose any liability upon any such requesting jurisdiction nor to waive or affect in any way the doctrine of sovereign immunity with respect to any such jurisdiction.~~

SECTION 28. 105-7-27, Colorado Revised Statutes 1963, is amended to read:

105-7-27. Escape - duty of sheriff - expenses. In case of escape of any person lawfully committed to any jail of any county in this state, it shall be the duty of the sheriff of the county where such jail is situated, to pursue and recapture such escaped person at his own expense. ~~Nothing contained in this section shall be construed to make the county wherein such jail is situated liable for or on account of the escape of any prisoner committed to such jail from another county, or by authority of the United States, or for the escape of any fugitive from justice.~~ In case of any escape without fault or negligence on the part of the keeper of the jail, or the guards under his command, the county commissioners of the county where such jail is situated may audit and allow to the sheriff the

necessary expenses incurred in such recapture, if they deem it best.

SECTION 29. 120-7-13, Colorado Revised Statutes 1963, is amended to read:

120-7-13. Obligation of state and state highway department. ~~No-liability-shall-attach,-either-to-the-state,-the-department-of-highways-or-the-individual-members-of-said-department-of-highways-by-virtue-of-the-construction,-reconstruction,-maintenance,-improvement-or-operation-of-any-turnpike-or-speedway-authorized-to-be-constructed-under-this-article,-other-than~~ IT SHALL BE the obligation of the state and the STATE department of highways to apply the net income derived from the operation of any turnpike or speedway project to the payment of the bonds authorized to be issued under this article in accordance with the resolution of the STATE department of highways authorizing their issuance.

SECTION 30. 124-2-17. Claims against university. EXCEPT WITH RESPECT TO CLAIMS COMING WITHIN THE PROVISIONS OF THE "COLORADO GOVERNMENTAL IMMUNITY ACT", the board of regents shall audit all claims against the university, and the president shall draw all warrants upon the treasurer for approved claims; but before payment such warrants shall be countersigned by the secretary, who shall keep a specific and complete record of all matters involving the expenditure of money, which record shall be submitted to the board of regents at each regular meeting of the same.

SECTION 31. 130-10-1 and 130-10-5 (1) (a), Colorado Revised Statutes 1963 (1965 Supp.), are amended to read:

130-10-1. Legislative declaration. This article shall not be construed as a waiver ~~or repudiation~~ of the doctrine of sovereign immunity, ~~firmly established in the law of this jurisdiction, by the state of Colorado, or any state agency, or any of its political subdivisions,~~ but is enacted to establish an orderly and expeditious procedure to aid the general assembly in the consideration and evaluation of THOSE tort claims against the state WHEREIN THE DOCTRINE OF SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED BY THE PROVISIONS OF THE "COLORADO GOVERNMENTAL IMMUNITY ACT", AND ~~some of~~ which the state should in equity and good conscience assume and pay. No liability for any claim shall be imposed upon the state or any state agency by a determination of the Colorado claims commission under the provisions of this article unless the general assembly shall have enacted legislation making a specific appropriation for the payment of such claim.

130-10-5. Petition for claim. (1) (a) Any person wishing to present a claim against the state UNDER THE PROVISIONS OF THIS ARTICLE shall file such claim with the chairman of the commission in the form of a petition, in triplicate, containing the following information:

SECTION 32. 139-35-1 (1), Colorado Revised Statutes 1963, is amended to read:

139-35-1. Action - notice of injury. (1) No action for the recovery of compensation for personal injury or death against any city of the first or second class or any town, on account of its negligence, shall be maintained unless written notice of the time, place and cause of injury is given to the

clerk of the city, or recorder of the town, by the person injured, or his agent or attorney, within ~~ninety-days~~ SIX MONTHS and the action is commenced within two years from the ~~occurrence-of-the-accident-causing-the-injury-or-death.~~ ACCRUAL OF SUCH ACTION. AN ACTION SHALL BE CONSIDERED TO ACCRUE ON THE DATE THAT THE INJURY OR DEATH IS KNOWN OR SHOULD HAVE BEEN KNOWN BY THE EXERCISE OF REASONABLE DILIGENCE.

SECTION 33. 150-1-25, Colorado Revised Statutes 1963, is amended to read:

150-1-25. Claims - audit - payment - financial report. EXCEPT WITH RESPECT TO CLAIMS COMING WITHIN THE PROVISIONS OF THE "COLORADO GOVERNMENTAL IMMUNITY ACT", no claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purpose. If the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon "not paid for want of funds, this warrant draws interest from date at six per cent per annum," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of six per cent per annum; provided, when there is more than the sum of one hundred dollars or more in the hands of the treasurer it shall be applied upon said warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby

authorized and empowered to administer oaths to the parties verifying said claims, the same as the county clerk or notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer, the same as county warrants.

SECTION 34. 150-2-29, Colorado Revised Statutes 1963, is amended to read:

150-2-29. Warrants - interest - call. EXCEPT WITH RESPECT TO CLAIMS COMING WITHIN THE PROVISIONS OF THE "COLORADO GOVERNMENTAL IMMUNITY ACT", no warrants shall be issued except upon a verified claim first audited and allowed by the board, and each warrant shall be signed by the president and countersigned by the secretary with the district seal thereto affixed; and if the district treasurer shall have insufficient money in the general fund to pay any warrant when presented for payment, he shall enter such warrant, with its number, amount, date, and the name and address of holder, in a register kept for that purpose, and shall indorse upon said warrant, "presented and not paid for want of funds" with the date of presentation. Such warrant shall draw interest at the rate of seven per cent per annum from such date of presentation until called for payment. When money sufficient to pay such warrant, or sufficient to allow a credit of not less than one hundred dollars

thereon shall be in the general fund, such treasurer shall mail notice thereof to the holder of record at his address of record, and interest thereon shall thereupon cease. Warrants shall be paid in the order of their presentation for payment.

SECTION 35. 150-4-37, Colorado Revised Statutes 1963, is amended to read:

150-4-37. Claims - audit - payment. EXCEPT WITH RESPECT TO CLAIMS COMING WITHIN THE PROVISIONS OF THE "COLORADO GOVERNMENTAL IMMUNITY ACT", no claim shall be paid by the district treasurer until the same shall be allowed by the board, and only upon warrants signed by the president and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes. If the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment he shall endorse thereon "Not paid for want of funds, this warrant draws interest from date at six per cent per annum," and endorse thereon the date when so presented over his signature and from the time of such presentation such warrant shall draw interest at the rate of six per cent per annum. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying the said claims, the same as the county clerk or notary public might do. The district treasurer shall keep a register in which he shall enter said warrants presented for payment, showing the date and amount of such warrants, to whom payable, the date of presentation for payment,

the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in their order of presentation for payment to the district treasurer. All warrants shall be drawn payable to bearer the same as county warrants.

SECTION 36. Repeal. Article 10 of chapter 13, 24-4-4 (2), 72-16-5, Colorado Revised Statutes 1963, and 123-30-11, Colorado Revised Statutes 1963 (1965), are repealed.

SECTION 37. Effective date. This act shall take effect on July 1, 1969.

SECTION 38. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

INTRODUCTION

What Is The Doctrine of Sovereign Immunity?

The legal doctrine of sovereign immunity. For various reasons of policy there have traditionally been a number of classes of defendants upon whom the law has conferred immunity from liability to a greater or lesser extent. Perhaps the most important and significant class of defendants upon whom the law has conferred immunity is government.[1] The legal doctrine of sovereign immunity thus expresses the idea that government is immune from liability for injury or damage resulting from governmental activities unless it consents to such liability.[2]

Application of doctrine to all governmental entities. The sovereign immunity rule has been applied not only to the federal

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1. "The immunity avoids liability under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the government; it does not deny the grounds for suit or cause of action, but only the resulting liability. Such immunity does not mean that conduct which would amount to a cause of action on the part of other defendants is not still equally a cause of action in character, but merely that for the protection of the government it is given absolution from liability." Prosser, Torts, 996 (1964).

2. Much has been written, most of it critical, on sovereign immunity. The classic study is Borchard, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924-25) and Government Responsibility in Tort, 36 Yale L.J. 1, 757, 1039 (1926-27). Other significant articles include: Blachly and Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 Law and Contemp. Prob. 181, 182-84 (1942); Fuller and Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941); Harno, Tort Immunity of Municipal Corporations, 4 Ill. L. Q. 28 (1921); Jaffe, Suits Against Governments and Officers, 77 Harv. L. Rev. 1 (1963); Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1945); Price and Smith, Municipal Tort Liability; A Continuing Enigma, 6 U. Fla. L. Rev. 330 (1953); Repko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 48 Mich. L. Rev. 41 (1949); Tooke, The Extension of Municipal Liability in Tort, 19 Va. L. Rev. 97 (1932).

government and its agencies[3] but also to the states,[4] counties,[5] municipalities,[6] and other local governments and specialized governmental agencies, such as school districts and special taxing districts.[7]

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3. Borchard, Government Liability in Tort, 34 Yale L.J. 4, 5 (1924). Under the Federal Tort Claims Act (28 U.S.C.A. §1346 (b) and related sections), the immunity of the federal government was abrogated (with certain statutory exceptions) in tort actions for injuries caused by the negligence or wrongful act or omission of any government employee acting within the scope of his employment or office. See Federal Tort Claims Act, ch. 753, title IV, 60 Stat. 842 (1946).

4. Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1945), which briefly summarizes the highlights of each state. For Colorado cases see: In re Constitutionality of Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088 (1895); State v. Colo. Postal Telegraph-Cable Co., 104 Colo. 436, 91 P.2d 481 (1939); Mitchell v. Board of Commissioners of Morgan County, 112 Colo. 582, 152 P.2d 601 (1944); State v. Griffith's Estate, 130 Colo. 312, 275 P.2d 945 (1954); People ex rel Kimball v. Crystal River Corp., 131 Colo. 163, 280 P.2d 429 (1955); Faber v. State, 143 Colo. 240, 353 P.2d 609 (1960); Berger v. Dept. of Highways, 143 Colo. 246, 353 P.2d 612 (1960); and State v. Morison, 148 Colo. 79, 365 P.2d 266 (1961). 81 C.J.S. States § 130 (1953).

5. 20 C.J.S. Counties §§ 215-221 (1940). County not liable for torts in absence of statute. Board of Commissioners of El Paso County v. Bish, 18 Colo. 474, 33 Pac. 184 (1893); Town of Fairplay v. Board of Commissioners of Park County, 29 Colo. 57, 67 Pac. 152 (1901); M & M Oil Transp., Inc. v. Board of County Commissioners for Routt County, 143 Colo. 309, 353 P.2d 613 (1960). County not liable for negligence of agents or employees in absence of statute. Board of Commissioners of Pitkin County v. Ball, 22 Colo. 125, 43 Pac. 1000, 55 Am. St. Rep. 117 (1896); Board of Commissioners of Logan County v. Adler, 69 Colo. 290, 194 Pac. 621, 20 A.L.R. 512 (1920); Richardson v. Belknap, 73 Colo. 52, 213 Pac. 335 (1923); Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960).

6. See City of Hazard v. Duff, 287 Ky. 427, 154 S.W.2d 28 (1941); Merrill v. City of Wheaton, 379 Ill. 504, 41 N.E.2d 508 (1942); City of Harlan v. Peareley, 224 Ky. 338, 6 S.W.2d 270 (1928); Wendler v. City of Great Bend, 181 Kan. 753, 316 P.2d 265 (1957); Greenwood v. City of Lincoln, 156 Neb. 142, 55 N.W.2d 343 (1952); City & County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960).

The immunity rule was applied to the state of Colorado as early as 1895 in the case of In re Constitutionality of Substitute for Senate Bill No. 83, wherein the Colorado Supreme Court declared that the state could not be sued, by saying:

> We recognize the doctrine that, without constitutional or legislative authority, the state in its sovereign capacity cannot be sued. No such authority exists in this state. This being so, no liability upon contract or tort, if any, can be enforced against the state in any of its courts.[8]

Local governmental entities have been extended the state's sovereign immunity. Although local entities of government are, in a sense, agencies of local self government, to a certain degree they are also integral parts of state government, existing to administer state policies and programs. A state normally conducts most of its government through its local governmental entities over which, in the absence of constitutional provision stipulating otherwise, it has control. Local entities are thus usually considered to be agencies of the state, deriving not only their existence and all their powers from the state, but also their immunity.[9]

Counties, in Colorado, have been traditionally thought of as political subdivisions of the state for the purpose of carrying on some of the "governmental" functions of the state. This traditional concept of county government, however, has changed somewhat over the years, and a county is now considered by many to be a separate unit of local government.[10] Thus the county has a dual

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7. See School Dist. No. 1 in City & County of Denver v. Kenney, 77 Colo. 429, 236 Pac. 1012 (1925); Newt Olson Lumber Co. v. School Dist. No. 8 in Jefferson County, 83 Colo. 272, 263 Pac. 723 (1928); School Dist. No. 28 v. Denver Pressed Brick Co., 91 Colo. 288, 14 P.2d 487 (1932); School Dist. No. 1 in City & County of Denver v. Faker, 106 Colo. 356, 105 P.2d 406 (1940); Tesone v. School Dist. No. Re-2 in Boulder County, 152 Colo. 596, 384 P.2d 82 (1963).

8. 21 Colo. 69, 39 Pac. 1088 (1895).

9. See Mower v. Leicester, 9 Mass. 247 (1812); Fuller and Casner, supra note 2, at 438.

10. See Governor's Local Affairs Study Commission, Local Government in Colorado: Findings and Recommendations, 4 (1966); citing John C. Banks, Colorado Law of Cities and Counties, 16 (Denver: Sage Books, 1959).

character. In a legal sense it is a subdivision of the state and acts as part of the state government performing functions on behalf of the state; but it is also a unit of local self government and is declared by statute to be a "body corporate."[11]

Theoretically, as arms of the state, counties are entitled to the same immunity from suit as the state, but there are various statutes (such as 36-1-1, C.R.S. 1963, providing that each county shall be empowered to sue and be sued) which might seem to abolish county immunity. However, even though county immunity from suit may be abolished by statute, county immunity from tort liability is far from abolished in the eyes of the court and counties are held to be immune when acting in a governmental capacity.[12]

Municipal bodies are also regarded as having a dual character in Colorado. On the one hand they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other hand they are corporate bodies, capable of much the same acts as private corporations. Thus a municipality is at one and the same time a corporate entity and a government.[13]

The courts have attempted to distinguish between the two functions by holding that insofar as they represent the state, in their "governmental" or "public" capacity, the municipalities share the state's immunity from tort liability.[14] The factor which determines the liability or nonliability of a municipality in cases of this nature is the character of the duty performed, rather than

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11. 36-1-1, C.R.S. 1963.

12. County Commissioners v. Bish, 18 Colo. 474, 33 Pac. 184 (1893).

13. See Governor's Local Affairs Study Commission, Local Government In Colorado: Findings and Recommendations, 23-24 (1966), citing Dillon, Municipal Corporations, sec. 237 (1911); and McQuillin, Municipal Corporations, sec. 10.03.12 (1949).

14. See City of Golden v. Western Lumber & Pole Co., 60 Colo. 382, 154 Pac. 95 (1916); Schwalk v. Connely, 116 Colo. 195, 179 P.2d 667 (1947); City of Sterling v. Commercial Sav. Bank of Sterling, 116 Colo. 369, 181 P.2d 361 (1947); Malvernia Inv. Co. v. City of Trinidad, 123 Colo. 394, 229 P.2d 945 (1951); City & County of Denver v. Austria, 136 Colo. 454, 318 P.2d 1101 (1957); Walker v. Tucker, 131 Colo. 198, 280 P.2d 649 (1955); Williams v. City of Longmont, 109 Colo. 567, 129 P.2d 110 (1942); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); City & County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960).

the department, officer or agent of the municipality by whom the duty is performed.

In the case of other political subdivisions, such as school districts and special districts, the distinction between "governmental" and "proprietary" functions is likewise applicable. For example, in School Dist. No. 28 v. Denver Pressed Brick Co., the court held that, "a school district, . . . is an involuntary corporation created by the state in furtherance of its plan of public and free education. It is a subdivision of the state, required by statute to function as an instrument of government, and like a county, in the absence of express enactment to that end, is no more liable for the omissions of its officers than the State."[15] On the other hand, the court in Cerise v. Fruitvale Water & Sanitation District[16] held that the district's operation of a sewer system involved activities carried on by the district in its proprietary capacity, and thus the district was not immune from liability.

Limitation of doctrine to tort actions. In most jurisdictions the effect of the immunity rule has been limited, by statute and/or judicial decision,[17] to tort claims against governmental entities; suits arising out of contract are usually permitted. A "tort" is a civil, as opposed to a criminal, wrong arising from an act other than a breach of contract and usually involves injury to persons or damage to property.[18]

In Colorado, whatever immunity existed as to breach of contract actions against the state was judicially abolished in Ace

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15. 91 Colo. 288, 14 P.2d 487 (1932).

16. 153 Colo. 31, 384 P.2d 462 (1963).

17. "Immunity from suit of all governmental entities is waived as to any contractual obligation." Utah Code Ann. § 63-30-5 (Supp. 1965); and see McCarthy v. State, 1 Utah 2d 205, 265 P.2d 387 (1953); Campbell v. Pack, 15 Utah 2d 161, 389 P.2d 464 (1964) (dictum).

18. "Tort is a term applied to a miscellaneous and more or less unconnected group of civil wrongs other than breach of contract for which a court of law will afford a remedy in the form of action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable." Prosser, Torts, 1 (1964).

Flying Service Inc. v. Colo. Dept. of Agriculture.[19] This approach has also been applied to suits against local governments for breach of contract, with the result that both the state and local governments are no longer immune to contract actions.[20] Thus the doctrine of sovereign immunity cannot be invoked by any governmental unit as a defense to any contract action, regardless of the type of function involved.

Governmental/proprietary distinction. The doctrine of sovereign immunity, with respect to local governmental entities, is not a hard and fast rule and it is clear that there is no absolute immunity from liability. The development of the law has been in the nature of a series of inroads creating areas in which local governments can be held liable for their negligent acts and tortious conduct. The principal limitation and first inroad to be made on the immunity doctrine was the court's attempt to distinguish between the "governmental" and "proprietary" acts of the governing entity.[21]

Under the governmental-proprietary dichotomy, the first relevant determination in the case of negligence by a local entity is a characterization as to the nature of the fundamental exercise which gives rise to the tort. In effect, this determination resolves the question of whether immunity exists, or conversely, whether liability is possible. Under this basic test, immunity is accorded where the function is governmental and liability is

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19. 136 Colo. 19, 314 P.2d 278 (1957).

20. Spaur v. City of Greeley, 150 Colo. 346, 372 P.2d 730 (1962).

21. See Antieau, The Tort Liability of American Municipalities, 40 Ky. L.J. 131 (1952); Barnett, The Foundation of the Distinction Between Public and Private Functions, 16 Ore. L. Rev. 250 (1937); Fuller and Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941); Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41 (1949). "Apparently the purpose has been to confine the protection afforded to only those activities which have traditionally been considered 'necessary' to government, and to exclude from coverage those activities which are merely conveniently carried on by government instead of by private enterprise. This nineteenth century dichotomy was the judicial compromise struck between complete protection of public funds and complete protection of individuals tortiously injured by government agents. Both the basis of the distinction and its application which has been difficult and artificial, have widely been regarded as less than satisfactory." Repko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 9 Law and Contemp. Prob. 214 (1942).

imposed where it is proprietary. No tort liability attaches with respect to the exercise of governmental functions because the city performs such functions under powers delegated by the state and under the same immunity enjoyed by the state.[22] On the other hand, in the exercise of proprietary functions or the performance of acts for the benefit of the corporation, a city stands on the same footing as any private corporation as to its liability for torts.[23]

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22. In addition to the cases cited in note 6 see Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925); Densmore v. Bermingham, 223 Ala. 210, 135 So. 320 (1931); Lambert v. New Haven, 129 Conn. 647, 30 A.2d 923 (1943); Baltimore v. State, 173 Md. 267, 195 Atl. 571 (1937). For Colorado cases see City & County of Denver v. Talarico, 99 Colo. 178, 61 P.2d 1 (1936), determining policy and character of construction work to be done under legislative authority to improve river channel; Malverina Inv. Co. v. City of Trinidad, 123 Colo. 394, 229 P.2d 945 (1951) and City & County of Denver v. Mason, 88 Colo. 294, 295 Pac. 788 (1931), adoption of drainage system; Walker v. Tucker, 131 Colo. 198, 280 P.2d 649 (1955), barricading street because it constituted hazard and enforcement of ordinance in nature of police regulation governing use of streets; Barker v. City & County of Denver, 113 Colo. 543, 160 P.2d 363 (1945), activities of fire department; Atkinson v. City & County of Denver, 118 Colo. 322, 195 P.2d 977 (1948), abatement of nuisance pursuant to ordinance; Schwalk v. Connely, 116 Colo. 195, 179 P.2d 667 (1947) and City & County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960), operation of hospital; Addington v. Town of Littleton, 50 Colo. 623, 115 Pac. 896 (1911), failure to enact or enforce ordinances or regulations; McIntosh v. City & County of Denver, 98 Colo. 403, 55 P.2d 1337 (1936); police protection activities; City & County of Denver v. Maurer, 47 Colo. 209, 106 Pac. 875 (1910), public health activities.

23. One of the leading cases holding municipal corporations liable when performing proprietary functions is Bailey v. Mayor of New York, 3 Hill 531 (N.Y. Sup. Ct. 1842). See Maffei v. Incorporated Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959); Hooton v. Burley, 70 Idaho 369, 219 P.2d 651 (1951); Perry v. Wichita, 174 Kan. 264, 255 P.2d 667 (1953); Bishop v. Meridan, 223 Miss. 703, 79 So.2d 221 (1955); Grimesland v. Washington, 234 N.C. 117, 66 S.E.2d 794 (1951); Mitchell v. Meriden, 3 Conn. Cir. 498, 217 A.2d 487 (1965); Moloney v. Columbus, 2 Ohio St.2d 213, 208 N.E.2d 141 (1965); Lane v. Tulsa, (Okla.) 402 P.2d 908 (1965). See Repko, supra note 21, at 221; McQuillin, Municipal Corporations, § 53.23 (3rd ed. 1963).

In the court's attempt to distinguish between these two functions, no precise definition or satisfactory criteria has been formulated to determine into which category a particular tort will fall.[24] Most jurisdictions have, however, set up some rather vague general guidelines. It is generally thought that a governmental function is one vested for the administration of the general laws of the state. Another interpretation is that an activity is governmental if it benefits society as a whole and cannot be done by other segments of society.[25] Under this test, an inquiry is made to determine whether the entity was acting as the agent of the state in furthering the state policy, or whether it was acting primarily on behalf of the citizens of the community. Usually, activities in the area of fire protection, law enforcement, education, health and general government, are governmental.[26]

Proprietary functions are usually thought of as those which are carried out in a corporate or private capacity. Other tests of a proprietary activity are whether it could be done in competition with a private activity, whether it is operated for profit, or whether benefit accrues to something less than the whole of society.[27] Public utilities, streets, sidewalks, bridges, sewers and drains, park and recreation activities and dumps are usually proprietary,[28] but are governmental in some jurisdictions.[29]

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24. 3 Davis, Administrative Law § 25.07 (1958); McQuillan, Municipal Corporations § 53.24 (3rd ed. 1963).

25. See Parker v. Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966); Irvine v. Montgomery County, 239 Md. 113, 210 A.2d 359 (1965); Gossler v. Manchester, 107 H.H. 310, 221 A.2d 242 (1966); Reeder v. Brigham City, 17 Utah 2d 398, 413 P.2d 300 (1966).

26. See Banks, Colorado Law of Cities and Counties, 265 (1959), for an extensive citation of Colorado cases holding that entities are immune from liability for the performance of "governmental" activities.

27. See Davis, supra, note 24; McQuillan, Municipal Corporations § 53.23 (3rd ed. 1963).

28. See Banks, Colorado Law of Cities and Counties, 265 (1959), for an extensive citation of Colorado cases holding that entities are liable in the performance of "proprietary" activities.

29. 63 C.J.S., Mun. Corp. §§ 873 to 877. 28 Am. Jur., Mun. Corp., §§ 571 to 667. The difficulty of the classification is increased when proprietary or governmental characteristics of an activity are mixed and the confusion is multiplied many

Needless to say, the courts have experienced great difficulty in distinguishing between the two functions, and at times have probably been arbitrary in the manner of making the distinction. This distinction has been severely criticized by legal writers.[30] In addition, several jurisdictions have recognized

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times by the plurality of cases in each state and by the plurality of states. For annotations on a public entities' liability or immunity with respect to torts in connection with the operation of an airport, 66 A.L.R. 2d 634; tortious injury in or about a building which is used for a governmental or proprietary function, 64 A.L.R. 1545; for performing an autopsy, 83 A.L.R.2d 970; for damages in tort in operating a hospital, 25 A.L.R.2d 203; for negligence in insect or vermin eradication operations, 25 A.L.R.2d 1057; damages caused by burning from hot ashes, cinders, or other hot waste material in public park, 42 A.L.R.2d 947; liability for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary functions, 101 A.L.R. 1166, A.L.R.2d 1079; liability for drowning on public premises, 8 A.L.R.2d 1254; liability insurance as affecting immunity from tort liability of governmental units, 68 A.L.R.2d 1437; maintenance of auditorium, community recreational center building, or the like, by public entity as governmental or proprietary function, 47 A.L.R.2d 544; damages for carrying out construction or repair of sewers or drains, 61 A.L.R. 2d 874; operation of bathing beach or swimming pool as governmental or proprietary function, 55 A.L.R.2d 1434; operation of sewage disposal plant as governmental or proprietary function, 57 A.L.R.2d 1336; operation of fire department vehicle, 82 A.L.R.2d 312; operation of garage for maintenance and repair of government vehicles as governmental function, 26 A.L.R.2d 944; injury or death as result of nuisance created or maintained by public entity in governmental capacity, 56 A.L.R.2d 1424; snow removal operations as governmental operations, 92 A.L.R.2d 796; state's immunity from tort liability as dependent on governmental or proprietary nature of function, 40 A.L.R.2d 927; liability in connection with the destruction of weeds and the like, 34 A.L.R.2d 1210; constitutionality of statute which relieves public entity from liability for torts, 124 A.L.R. 350; abrogation of state's immunity from liability or suit as affecting immunity of public entities, 161 A.L.R. 367.

30. "Manifestly, the distinction was unsatisfactory. It offered no solid grounds for prediction, invited test litigation, operated in a fortuitous and erratic fashion, and had little relevance to either the social need for risk distribution or the economic feasibility of shifting from the injured individ-

the inherent unsoundness of this distinction and have discarded it,[31] or have abolished the distinction in the process of abrogating immunity for governmental functions,[32] while several states have accomplished the same by statute.[33]

Typical of court decisions across the country, Colorado cases are lacking in clear and well defined guidelines.[34] In general, it can be said that an increasing number of governmental entity activities are being classified as proprietary in nature and therefore subject to tort liability.[35] In addition, the traditional immunity of many governmental activities has been partially waived by statute, such as the 1949 statute which subjects the state and its political subdivisions to liability for any injury or damage caused by the tortious operation of a government-owned motor vehicle.[36]

Ministerial/discretionary distinction. A branch of the rule of nonliability of public entities for torts in connection with the exercise of governmental functions is the rule which distinguishes (1) ministerial duties from (2) legislative, judicial

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ual to the public treasury losses due to serious injury." Van Alstyne, California Government Tort Liability § 1.17, at 19 (1964). In addition to the law review articles cited in note 2, supra, see Seasongood, Municipal Corporations: Objection to the Governmental or Proprietary Test, 22 Va. L. Rev. 910 (1936); Warp, The Law and Administration of Municipal Tort Liability, 28 Va. L. Rev. 630 (1942); Green, Municipal Liability for Torts, 38 Ill. L. Rev. 355 (1944); Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41 (1949); James, Tort Liability of Governmental Units and their Officers, 22 Univ. of Chi. L. Rev. 610 (1955).

31. See Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P. 2d 107 (1963); Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911).

32. See Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Holtz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

33. Cal. Govt. Code § 815 (Supp. 1965); Minn. Stat. Ann. § 466.02 (1963); Mich. Comp. Laws § 691.1401-.1415 (1964).

34. Banks, Colorado Law of Cities and Counties, 264 (1959).

35. Boulder v. Burns, 135 Colo. 561, 313 P.2d 712 (1957).

36. 13-10-1, C.R.S. 1963.

and discretionary functions. This distinction is important because the rule has developed that where a governmental duty or function is ministerial, as distinguished from discretionary, the public entity is liable for damages arising because of omission to perform it, or for negligence in its execution.[37]

Although a comprehensive definition of the terms is difficult to state, ministerial acts are considered to be those performed on an operational level as opposed to discretionary acts which are performed on a planning level.[38] For an act to be discretionary there must be an affirmative decision to act or not to act rather than the negligent performance of a course of action already decided upon; discretionary acts involve a final determination of governmental policy or action, and are those acts in which a public official has discretionary latitude and which acts require personal deliberation, decision and judgment.[39] Ministerial acts, on the other hand, amount to an obedience to orders or the performance of a duty in which the officer or employee is left no choice of his own; acts which are purely administrative and which do not involve the exercise of discretion.[40]

Thus, neither a government entity nor an employee thereof is liable for the consequences of an affirmative decision made at the planning level in the absence of a previously set course of action.[41] The general rule is that a public entity may be liable for its negligence in performing ministerial acts and the test of liability does not depend upon the governmental-proprietary distinction because the government may be liable for negligence at the ministerial or operational level, even if the function performed is governmental. Ministerial acts also may give rise to

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37. McQuillin, Municipal Corporations § 53.33 (3rd ed. 1963).

38. Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953); Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); Rayonier v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957); Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966).

39. Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (1965).

40. Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966), and see Prosser, Torts 780-781 (1964).

41. For an exhaustive review of modern cases holding an employee immune from liability for his torts resulting from the execution of discretionary power, see 3 Davis, Administrative Law § 26.01 (Supp. 1965).

personal liability of the public employees.[42] Colorado cases have generally followed these distinctions in the imposition of governmental tort liability.[43]

The discretionary immunity rule and the grounds upon which it is defended has been criticized.[44] The Federal Tort Claims Act contains provisions excepting the government from liability for injuries arising from discretionary acts,[45] which provisions have been narrowly construed, thereby broadening the government's liability.[46] In light of the trend to abolish immunity and grant redress from injuries arising out of the culpable acts of governmental entities, it has been suggested that the state courts should follow the federal interpretation of the discretionary immunity provision. Some have even suggested that there appears to be merit in eliminating discretionary immunity in most cases, because "the reasons for employee immunity for discretionary acts are unconvincing when such statutory innovations as indemnification and limited liability are available to insulate employees from personal risk. The pecuniary risks to governmental entities are also reduced by the availability of insurance, the fact that relief is often afforded by legislatures in spite of immunity, and the trend toward spreading liability among those best able to bear it."[47]

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42. See, e.g., Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960). For a discussion of the liability of public employees for ministerial acts, see 3 Davis, supra, at § 26.02.

43. Schwalk v. Connely, 116 Colo. 195, 179 P.2d 667 (1947). The Colorado Claims Commission statute (130-10-1 et seq, C.R.S. 1963, as amended) was amended by Chapter 280, 1967 Session Laws, to expressly provide for the recognition of the discretionary immunity rule.

44. Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 223 (1963); James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 654-55 (1955); 3 Davis, Administrative Law § 25.13 (Supp. 1965); Note, the Discretionary Immunity Doctrine in California, 19 Hastings L. J. 561 (1968).

45. Federal Tort Claims Act, 28 U.S.C. § 2680 (a).

46. See American Exch. Bank v. United States, 257 F.2d 938 (7th Cir. 1958) (planning level discretion ends with initial decision to act); Cohen v. United States, supra, note 40 (failure to follow recommendations to confine prisoner not discretionary); Jemison v. Dredge Duplex, 163 F. Supp. 947 (S.D. Ala. 1958) (planning and construction of canal not discretionary).

47. Note, The Utah Governmental Immunity Act: An Analysis, 120 Utah L. Rev. 136 (1967).

Nuisance exception. Another important rule that has developed in relation to the sovereign immunity doctrine is that a person injured as a consequence of governmental activity can recover in tort, notwithstanding the immunity doctrine, if the injury resulted from a nuisance. The rule is generally recognized that a municipality or other public entity is liable to the same extent as a private corporation for injuries resulting from the creation or maintenance of a nuisance.[48] Many ordinary negligent torts, for which sovereign immunity would otherwise be a complete defense, may be found to be within the scope of a nuisance.

Many cases have distinguished between nuisances which cause property damage and those causing personal injury.[49] But ordinarily, nuisance liability for personal injury occurs in the same manner as for property injuries.[50] If a municipality invades private property and creates a nuisance there, it may be liable for maintaining a nuisance on the theory that it is a taking of property without just compensation. Thus, the nuisance doctrine has been used as an auxiliary remedy where the doctrine of inverse condemnation is insufficient to supply complete relief.[51]

In Colorado, it has been held that a municipality is liable for damages for unlawful abatement of a public nuisance.[52] Unlawful abatement occurs when in fact there is no nuisance or when the method of abatement is excessive. Likewise, municipal officials have been held liable in damages for wrongful abatement of an alleged nuisance.[53] Sovereign immunity is no defense in a damage suit against a municipality for wrongful abatement of an alleged nuisance. Where property abated by a municipality is not in fact a nuisance, a municipality is liable on the theory that it must

48. Cal. Law Revision Comm'n, A Study Relating to Sovereign Immunity 225 (1963); Kentucky Legislative Research Comm'n, Governmental Immunity, Research Report No. 30, p. 28 (1965); McQuillin, Municipal Corporations §§ 52.13, 53.49 (3rd ed. 1963).

49. See cases collected in 56 A.L.R. 2d 1409, 1419 (1957).

50. Rhyme, Municipal Law (Wash. D.C.: Nat. Institute of Municipal Law Officers, 1957), p. 741.

51. Cal. Law Revision Comm'n, supra note 48, at 230.

52. McMahon v. City of Telluride, 79 colo. 281, 244 Pac. 1017 (1926).

53. Houston v. Walton, 23 Colo. App. 282, 129 Pac. 263 (1912); Gaskin v. People, 84 Colo. 582, 272 Pac. 662 (1928).

grant compensation for private property that it has taken for public use.[54] The issue has arisen as to the possible liability of a municipality for failing to exercise its power to abate a public nuisance. The Colorado Supreme Court has generally refused to hold a municipality liable for its refusal to abate an alleged public nuisance.[55]

In these cases, in other words, the courts have employed the nuisance rationale as a technique for retreating from governmental nonliability for negligence.[56] The practical consequence of the development of the "nuisance exception" has been to cut down the area of governmental immunity. This technique has been criticized as introducing a substantial degree of uncertainty and confusion into the law, thereby tending to invite unnecessary litigation.

Intentional torts. A voluntary act which willfully harms another or an injury substantially certain to follow from a voluntary act will constitute an intentional tort. Generally there is a definite tendency to impose greater responsibility upon one whose conduct was intended to do harm. Apart from the "nuisance exception", it appears to be the settled law in most states that the doctrine of sovereign immunity extends to intentional torts as well as those involving negligence, and that a governmental agency is not liable for the wilful torts of its employees and officers.[57] The governmental-proprietary distinction has been applied in this area and most public entities are usually liable for intentional torts of their employees when acting in the course and scope of proprietary activities. In their governmental capacity, however, public entities have generally been declared immune from liability for injuries sustained as a consequence of intentional torts, such as wrongful arrest, false imprisonment, assault and battery, malicious prosecution, wrongful destruction of personal property, and other types of intentional torts.[58]

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54. See note 52, supra.

55. Luxford v. City and County of Denver, 65 Colo. 355, 176 Pac. 833 (1918); Addington v. Town of Littleton, 50 Colo. 623, 115 Pac. 896 (1911); City and County of Denver v. Ristau, 95 Colo. 118, 33 P.2d 387 (1934). For a general discussion of the liability of municipalities for nuisances, see Nuisance Control in Colorado Municipalities, Colorado Municipal League (Sept. 1966), p. 8.

56. Prosser, Torts 779 (2nd ed. 1955).

57. Cal. Law Revision Comm'n, A Study Relating to Sovereign Immunity, p. 231 (1963).

58. Ibid.

Several states have abrogated the doctrine of sovereign immunity with reference to both intentional and negligent torts,[59] and any exception thereto must be founded either upon statute or compelling considerations of public policy. It may be noted that this rule is somewhat at variance with the general trend of legislative policy which has not relaxed the principle of sovereign immunity as to intentional torts.[60] The usual legislative approach has generally reflected the view that the public officer or employee who commits an intentional wrong should be solely liable for his misconduct, and his employer should be immune.[61]

In drafting legislation which waives tort immunity, there always exists a problem of whether the government should accept responsibility for the "intentional" torts of its employees. As indicated above, the usual legislative approach is to maintain immunity for injuries from the intentional torts of officers and employees. However, an officer charged with false imprisonment or wrongful arrest or other intentional torts is usually only performing the duties of his job. If he exceeds the ordinary bounds of negligence, subjectively going a degree further, the governmental unit may be relieved of liability and the officer held answerable; or if there has been no acceptance of liability for general negligence by the entity, a sympathetic court might become more inclined to find an intentional tort. In the exercise of the vast powers of government by fallible individual officers and employees, unusual risks of harm to private interests will inevitably result. Whether the risks are characterized by "negligence" or "intent" is, in this context, only one among many factors which require appraisal in deciding the ultimate issues. Those issues are fundamentally pol-

59. Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

60. E.g., it is provided that the jurisdiction of the Colorado Claims Commission shall not extend to claims "arising out of alleged assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel or slander, misrepresentation, deceit, fraud, interference with contractual rights, or invasion of the right of privacy." 130-10-1 et seq., C.R.S. 1963, as amended.

61. This approach is reflected in the Federal Tort Claims Act, 28 U.S.C. § 2680 (h), which provides that the provisions of the act shall not apply to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." See also Utah Governmental Immunity Act, Utah Code Ann. § 63-30-11 (2) (Supp. 1967), for similar provisions.

icy questions as to who should properly bear the loss -- the injured person, the public officer or employee, or the taxpayers as a whole.[62]

Bases for nonliability other than sovereign immunity. The common law has articulated other theoretical grounds for nonliability of public entities, which may simply be corollaries to or hybrid forms of the immunity doctrine or may be independent of the doctrine. The existence of these grounds of nonliability thus deserve consideration in the development of a legislative program relating to sovereign immunity, so that whatever expressions of legislative policy emerge will take them into account.

The common law bases for nonliability other than sovereign immunity are twofold: (1) the inapplicability of the doctrine of respondeat superior to torts of a public officer who is acting as a servant of the law; and (2) the inapplicability of respondeat superior to torts of public employees who are acting ultra vires.[63] Each of these two lines of common law development will be discussed separately and in connection with each other.

Public entities generally fall within the ordinary rule that the superior or employer must answer for the negligence of his agent or servant in the course of his employment. In order to hold a public entity liable in damages because of the tort of one alleged to be its servant, it must appear that the latter was a servant of the public entity at the time of the alleged tort.[64] An exception to this general rule has developed which holds that the relation of master and servant does not exist so as to render

62. Kentucky Legislative Research Comm'n, Governmental Immunity, Res. Report No. 30 (1965), p. 27, citing Cal. Law Revision Comm'n, supra note 57, at p. 236.

63. Cal. Law Revision Comm'n, A Study Relating to Sovereign Immunity, p. 273 (Jan. 1963).

64. McQuillin, Municipal Corporations, § 53.66 (3rd ed. 1963), The rule has been stated in this manner: The common law rule that the master is liable for wrongful injury inflicted by his servant acting within the scope of his employment is generally applied in imposing tort liability upon municipalities. Thus tort liability may be imposed upon the municipality if it and the tortfeasor . . . occupy a master-servant relationship; if the wrongful act causing the injury is within the scope of the tortfeasor's scope of authority and employment; and if the wrongful act was committed in connection with a proprietary function or other municipal function which under applicable principles of municipal tort law does not immunize the municipality from tort liability. Rhyne , Municipal Law §§ 30-11 (1957).

the public entity liable, if the tortfeasor is an officer or employee of the state, or one whose office and duty was created and declared by public law, since in carrying out his responsibility, he was acting as an agent and servant of the law rather than of the public entity. For their torts, such officials are personally liable, but the employing entity is not.[65] Thus a public entity is not liable for the acts of its personnel performed as servants of the law.[66]

No precise rule has been laid down as a test to determine whether persons are, as a matter of fact, the agents or servants of the public entity, or servants of the law. The general test concerns the power to control. The right to control the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the alleged wrong sprung, which is the general test of the relationship of master and servant, governs, at least to some extent, in determining whether a public entity is liable under the rule of respondeat superior. The right to discharge or terminate the relationship is also important.[67]

The problem of determining who is a servant of the entity and who is a servant of the law has practical relevance since it directs attention to the somewhat unique nature of certain types of public employment. Today certain public officers and employees hold their positions pursuant to direct statutory authority, and exercise duties which are prescribed and limited almost exclusively by statute. Although the entity in and for which they function may pay their compensation and provide the physical facilities essential to carry out their responsibilities, they sometimes are wholly or partially independent of control and direction by the governing body of the entity. In certain instances, therefore, unusually difficult questions may arise in attempting to identify a particular public entity as the responsible employer for the purpose of applying the doctrine of respondeat superior.

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65. See Meek v. City of Loveland, 85 Colo. 346, 276 Pac. 30 (1929); City of Denver v. Peterson, 5 Colo. App. 41, 36 Pac. 1111 (1894). Note that officers of the city are agents of the state when performing governmental functions and hence the doctrine of respondeat superior does not apply.

66. The officer in turn is not liable for the acts or omissions of subordinates, whether appointed by him or not, unless he, having the power of selection has failed to use ordinary care therein, or unless he has been negligent, or has directed or authorized the wrong. See Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960).

67. McQuillin, op. cit. supra note 64, § 53.66.

Another continuing limitation upon the tort liability of public entities, outside of and separate from the sovereign immunity doctrine, which must be taken into account, is the doctrine of ultra vires, which is the principle that a public entity shall not be liable for the torts of its employees or officers committed outside the scope of their authority, or for its own torts in connection with an act which is wholly beyond the scope of the power of the public entity.[68] Ultra vires as a defense is apparently in full force in Colorado.[69]

When the doctrine of ultra vires and the doctrine of respondeat superior are considered together, it is often necessary to determine whether the act in question by an officer is within the scope of the officer's power and is not ultra vires. Conceivably, every unauthorized act by an officer could be classified as ultra vires, thus relieving the entity of liability. Therefore, the courts have held that even if the act is unauthorized, if it is within the broad scope of the employment and authority of the tortfeasor, the city is liable.[70] If the act is entirely beyond his scope of authority, the city is not liable, and the plaintiff's only remedy is the personal liability of the officer involved.[71]

History Of The Sovereign Immunity Doctrine

"The King can do no wrong." Although modern scholars are not in unanimous agreement on the exact origin and meaning of the sovereign immunity doctrine, it is generally agreed that in western political theory the doctrine began as an outgrowth of the common law theory, allied with the divine right of kings, that "the King can do no wrong," together with a feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued as of right in his own courts. Since the King was divine it was impossible for him to commit a tort; hence, if there was error, it was obviously fault on the part of the King's agents, but

68. McQuillin, op. cit. supra note 67, § 53.60; Cal. Law Revision Comm'n, op. cit. supra note 63, at 242; Note, Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation, 35 U. Colo. L. Rev. 541 (1963).

69. Town of Idaho Springs v. Filteau, 10 Colo. 105, 14 Pac. 48 (1887).

70. See Norton v. City of New Bedford, 166 Mass. 48, 43 N.E. 1034 (1896).

71. See Doyle v. City of Sandpoint, 18 Idaho 654, 112 Pac. 204 (1910).

never the King himself. Consequently, the King was immune from suit and the torts of his inferiors could not be imputed to him.[72]

Origin of sovereign immunity in the United States. The basis of the legal concept of sovereign immunity in the United States has been traced by most legal scholars and courts to the English case of Russell v. The Men of Devon.[73] In that case an unincorporated county was relieved of liability for damages which were occasioned by the disrepair of a bridge. Several basic arguments were advanced in support of the decision: (1) to allow the suit would lead to "an infinity of actions"; (2) there was no precedent for such suit; (3) only the legislative body should impose liability on government; (4) the community was unincorporated and thus did not have funds out of which to pay for the damages; and (5) although there should be a remedy for every wrong, a more applicable rule is that "It is better that an individual should sustain an injury than that the public should suffer an inconvenience."[74]

The first case in the United States which adopted the doctrine of the Russell case was the Massachusetts case of Mower v. Inhabitants of Liecester,[75] in which immunity was granted even though the county involved was incorporated and did have funds

72. For an historical consideration of immunity in the United States, see Blachly & Oatmen, Approaches to Governmental Liability in Tort: A comparative Survey, 9 Law & Contemp. Prob. 181, 182-96 (1942). "The maxim that 'the King can do no wrong' became fully developed by this time, and has since continued in force. . . . Not only can the King do no wrong, but he cannot authorize a wrong, since a wrongful act is regarded by law as the act of the one who authorized it." Id. at 183-84. For a reevaluation of the basis of tort immunity, see Jaffe, Suits Against Governments & Officers, 77 Harv. L. Rev. 1 (sovereign immunity), 209 (damage actions) (1963).

73. 2 T. R. 667, 100 Eng. Rep. 359 (1788).

74. Id. at 673, 100 Eng. Rep. at 362. For an analysis and evaluation of the Russell case, see Maffei v. Incorp. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959); Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457 (1961); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962). These reasons as a justification for the existence of the doctrine are disparaged in Borchard, Governmental Responsibility in Tort, 36 Yale L. J. 1 (1926).

75. 9 Mass. 247 (1812).

available to pay damages. Following the Mower decision, the rule of local governmental immunity eventually became established in nearly all states.[76] The immunity doctrine was applied to the United States in the case of Cohens v. Virginia,[77] wherein Chief Justice Marshall made his authoritative pronouncement that "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; . . ."[78]

There have been several justifications for the doctrine's existence in the United States. One is that the King (now the state) can do no wrong and is thus not responsible for his torts.[79] Another, attributable mainly to Mr. Justice Holmes, who was perhaps the chief philosophical proponent of the doctrine in modern times, speaking in the case of Kawananakoa v. Polyblank, is that "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[80] State courts have based immunity on the rationale that either the legislature had been substituted for the king or on grounds of public policy, and these justifications have been reaffirmed by both the federal and state courts.

Regardless of what may have been the historical origin of the sovereign immunity doctrine, there now exists, and has existed, a strong public sentiment against the policy of permitting an individual to sue a state without its consent. This sentiment is, of course, reflected in the eleventh amendment to the United States Constitution, adopted in 1798, which forbids to an individual the use of the federal judicial process to sue a state. Alexander Hamilton, speaking of the state's sovereign immunity in Number 81 of the Federalist said, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union." Similarly, Chief Justice Taney in the 1857 case of Beers

76. Vanlandingham, Local Governmental Immunity Re-examined, 61 N.W.U.L. Rev. 246 (1966). For a summary of the law in each state, see Leflar and Kantrowitz, Tort Liability of the States, 20 N.Y.U.L. Rev. 1363 (1954).

77. 19 U.S. (6 Wheat.) 264 (1821).

78. Ibid.

79. Russell v. Men of Devon, supra note 73.

80. 205 U.S. 349, 27 S.Ct. 526, 51 L.Ed. 834 (1907).

v. Arkansas,[81] said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission."[82]

There was one abortive attempt to change the rule when the question of a state's immunity from suit came before the United States Supreme Court a few years after the ratification of the Constitution in the case of Chisholm v. Georgia.[83] The Supreme Court held that a state might, without its consent, be made a defendant in a suit in a federal court brought by a citizen of another state. The result of this decision was a clamor by the several states for an immediate amendment to the Constitution to assure the states their sovereign immunity. The result was the adoption of the Eleventh Amendment to the Constitution which removed any doubt as to the right of a private person to sue a state in the federal courts by providing that, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Later, the prohibition of the Eleventh Amendment was extended by interpretation to include suits brought by a citizen against his own state. Thus the Eleventh Amendment has in effect given states immunity against suit by all individuals in the federal courts. Suits against state officials based on acts in excess of their authority,[84] and acts in pursuance of an unconstitutional statute,[85] are suits against the officer in his individual capacity and are thus not prohibited by the Amendment. But if the state is the real party in interest when suit is brought against the officer, then there is immunity. Of course, the state can always waive immunity and voluntarily submit to suit.

Origin of sovereign immunity in Colorado. As early as 1875 the Colorado Supreme Court had held that a municipality was immune from tort liability for its acts or omissions and/or the acts or omissions of its employees or officers.[86] Counties in Colorado

81. 20 How. (61 U.S.) 527 (1857).

82. Id. at 529.

83. 2 U.W. (2 Dall.) 419, 1 L.Ed. 440 (1793).

84. Pennoyer v. McConnaughy, 140 U.S. 1 (1891).

85. Osborn v. Bank of the United States, 22 U.S. 738 (1824).

86. Daniels v. City of Denver, 2 Colo. 669 (1875).

had been held immune in 1893.[87] The doctrine of sovereign immunity for the state, that the state cannot be sued without its consent, was the rule adopted in 1895.[88] School districts and other special districts have been held to be immune when acting in a governmental manner.[89] The present status of the doctrine with respect to the governmental entities in Colorado will be examined in more detail later in this report.[90] It is sufficient to say, however, that the doctrine has become firmly established in Colorado law, except in certain situations where specific statutory waiver of immunity has been made,[91] or where a court has determined that the entity was acting in a proprietary rather than a governmental capacity and thus was subject to liability.[92]

Criticism of the doctrine. Despite its medieval origins,[93] and notwithstanding the fact that the doctrine had rather unstable beginnings, the doctrine became firmly established both in the common law of the country,[94] and in the statutes of the several states.[95] Today most legal writers and scholars agree that the stated grounds for exempting the state and other public entities from suit and liability are neither logical nor practical.[96] Nearly every commentator who has considered the subject vigorously asserts that the doctrine must go.[97] Nevertheless, sovereign immunity continues to be the rule, not the exception. However, in nearly all of the states, consent has been given, to a greater or

87. County Comm'rs v. Bish, 18 Colo. 474, 33 Pac. 184 (1893).

88. In re Constitutionality of Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088 (1895).

89. School Dist. No. 28 v. Denver Pressed Brick Co., 91 Colo. 288, 14 P.2d 487 (1932).

90. See notes 101-189, infra, and related discussion in text.

91. See notes 147-189, infra, and related discussion in text.

92. See notes 120-146, infra, and related discussion in text.

93. See note 72, supra, and related discussion in text.

94. See note 190, infra, and related discussion in text.

95. See notes 191-229, infra, and related discussion in text.

96. See note 2, supra.

97. See Davis, Administrative Law § 25.01 (3rd ed. 1958).

lesser extent, and in a variety of forms.[98] In addition, there now appears to be a trend toward judicial abrogation of the doctrine in the state courts.[99] In view of this trend, state legislatures are beginning to formulate legislation to deal with the problems of sovereign immunity.[100]

98. See notes 191-229, infra, and related discussion in text.

99. See notes 317-342, infra, and related discussion in text.

100. See notes 295-310, infra, and related discussion in text.

PRESENT STATUS OF GOVERNMENTAL IMMUNITY AND LIABILITY IN COLORADO -- PROCEDURE FOR HANDLING CLAIMS

The Common Law in Colorado

The state. Colorado, unlike many states, has no constitutional provision prohibiting suit against the state. However, the common law rule that the state cannot be sued was adopted by the Colorado Supreme Court as the general rule in Colorado in the first and leading case of In re Constitutionality of Substitute for Senate Bill No. 83, generally known as the Benedictine Sisters case.[101]

Most cases dealing with state immunity are understandably based on tort actions. But presumably the doctrine of immunity was in force in Colorado as to both tort and contract claims against the state when Ace Flying Serv. Inc. v. Colo. Department of Agriculture,[102] was decided. In that case the court abolished whatever immunity existed as to breach of contract actions against the state and the case is generally recognized as a judicial abrogation of sovereign immunity in Colorado with respect to contracts to which the state is a party. On the heel of the Ace Flying case came Colorado Racing Commission v. Brush Racing Association,[103] which was an action against the Racing Commission for refund of breakage. The suit was allowed, the court saying that "In Colorado 'sovereign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this court."[104] This language suggests a complete judicial abrogation of the doctrine in Colorado, but as will be seen later, this language was meant to apply only to contract actions, not tort actions.[105]

101. 21 Colo. 69, 39 Pac. 1088 (1895).

102. 136 Colo. 19, 314 P.2d 278 (1957).

103. 136 Colo. 279, 316 P.2d 582 (1957).

104. Id. at 284, 316 P.2d at 585.

105. For a general discussion of the immunity and liability of the state of Colorado under the sovereign immunity doctrine, see Note, Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation, 35 U. of Colo. L. Rev. 531 (1963).

Due to the fact that the state cannot be sued, much litigation has involved the question of whether the suit was against the state, or was actually against some other entity or department. In Alfred v. Esser,[106] the plaintiff sued members of the state board of stock inspection for conversion of plaintiff's cattle. The court held that the action was not a claim against the state and was proper. But in Parry v. Colo. Board of Corrections,[107] the court disallowed a garnishment action under an execution of a judgment against the board, finding it to be a claim against the state.[108]

There is no positive way to prognosticate whether the court will invoke immunity when suit is against a state department. The statutes sometimes provide a starting point, however. For example, 120-7-13, C.R.S. 1963, which refers to the State Highway Department, states that "No liability shall attach, either to the state, the department of highways, or the individual members of said department of highways by virtue of the construction, reconstruction, maintenance, improvement or operation of any turnpike or speedway authorized to be constructed under this article..."[109] In Mitchell v. Board of County Commissioners,[110] the court cited section 1 of article VIII of the Colorado constitution, which provides for the establishment of state institutions, and said that it applied to the highway department, finding the department to be an agency of the state. The implication seems to be that all agencies created under the authority of this section of the constitution are immune, absent consent to suit.

106. 91 Colo. 466, 15 P.2d 714 (1932).

107. 93 Colo. 589, 28 P.2d 251 (1933).

108. Claims such as this of the architects are claims against the state. They can only be paid by legislative appropriation, and a suit to force their collection otherwise be the nominal defendants who they may, is in fact a suit against the state which is the real party in interest....
No statute authorizes such an action as this against either the state or the board. It is suggested that a legislative appropriation has been made to pay this claim.... We fail to find it.... Id. at 592, 28 P.2d at 252.

109. See Mitchell v. Bd. of County Comm'rs, 112 Colo. 582, 152 P. 2d 601 (1944), where the court said, "Clearly the highway department is nothing more than an agency of the state and as to actions against it stands in the state's shoes."

110. Ibid. For additional cases upholding the doctrine that no liability attaches in tort actions for injuries sustained by plaintiff which are proximately caused by the negligence of servants of the state or its agencies, see Faber v. State of Colo., 353 P.2d 609 (1960), and Berger v. Department of Highways, 353 P.2d 613 (1960).

In State v. Colorado Postal Tel.-Cable Co.,[111] plaintiff sued for consequential damages suffered when the state made certain improvements to the physical plant of the state hospital. The court first held that section 15 of article II of the Colorado constitution (taking property without just compensation) did not apply, as it was applicable only in eminent domain proceedings. The court then referred to Board of County Comm'rs v. Adler,[112] in which it was held that a county was liable under similar circumstances. But the court in Colorado Postal refused to allow the suit against the state because in the Adler case a statute allowed the suit against the county and the only question there was liability, whereas here, no consent by the state to be sued was shown. "Read in the light of its facts the Adler case is authority for the proposition that liability on the part of the state in the instant case exists; but it is not authority for the proposition that the state can be sued to enforce its liability."[113] Thus the wierd circumstance has developed of the defendant being found liable, but the court denying recovery because the plaintiff cannot sue.

The injustice of the above rule has apparently been recognized by the court, for it has subsequently allowed recovery in particular circumstances. In Boxberger v. State Highway Department.,[114] which involved an action against the state to rescind a deed transferred by the plaintiff to the state, the court allowed recovery, basing its decision on section 15 of article II of the Colorado constitution. The injustice of a holding for the department must have prompted the court to state:

> The rights of a citizen remain the same whether they collide with an individual or the government, and judicial tribunals were wisely established to correct such matters without the individual being relegated to the position of no other remedy except to appeal to a legislature, maybe to no avail, as all the people, or the citizens, are, in fact, the sovereign under our desirable form of government.[115]

111. 104 Colo. 436, 91 P.2d 481 (1939).

112. 69 Colo. 290, 194 Pac. 621 (1920).

113. State v. Colo. Postal Tel.-Cable Co., 104 Colo. 436, 444, 91 P.2d 481, 484 (1939).

114. 126 Colo. 438, 250 P.2d 1007 (1952).

115. Id. at 441, 250 P.2d at 1008-09.

The limitation of the Boxberger case comes from the language, "This is not an action in tort, nor is it one to impose liability upon the state, nor for the recovery of money that would finally come from the funds of the state treasure. . . ."[116] This language suggests or implies that the court will approach the immunity problem differently where there is a possibility of a burden being cast upon the funds of the state. The court's concern for state funds was later borne out by State Highway Department v. Dawson.[117] In Dawson, the court allowed recovery of an agreed price for gravel taken from lands of the plaintiff over a plea of sovereign immunity by the department, saying that since funds had been ear-marked and set aside, no additional burdens would be cast on the funds of the state.[118]

A discussion of immunity as applied to suits against the state or its departments leaves one with the feeling that the court is striving to achieve some judicial abrogation of the doctrine. The trend appears to be to limit immunity whenever possible, to deal with the problem on a case-by-case basis, and yet not to say "the doctrine of sovereign immunity is hereby abolished."[119]

The counties. Theoretically, as arms of the state, counties are entitled to the same immunity from suit as is the state. But Colorado Revised Statutes § 36-1-1 (1) (b) (1963) provides that each county shall be empowered to sue and be sued, seemingly abolishing any county immunity by statute.[120] However, county immunity from suit is far from abolished in the eyes of the court.

116. Id. at 440, 250 P.2d at 1008.

117. 126 Colo. 490, 253 P.2d 593 (1952).

118. Distinguishing the case of Mitchell v. Bd. of County Comm'rs, 112 Colo. 582, 152 P.2d 601 (1944), which was relied on by the defendant. In Mitchell, an action brought by a landowner against the highway department, the court denied recovery because any judgment would have to be satisfied from the funds of the department, thus creating an additional burden.

119. Note, Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation, 35 U. of Colo. L. Rev. 536 (1963).

120. But see County Comm'rs v. City of Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919). See also § 36-2-4, C.R.S. 1963, which provides that when there is a judgment against a county, no execution shall issue, but it is to be paid by levy of a tax on the taxable property of the county; § 13-10-1, C.R.S. 1963, which provides for liability for tortious operation of vehicles by employees of the state, county or city; § 13-10-2, C.R.S. 1963, which provides a dollar limit on liability; § 13-10-3, C.R.S. 1963, which provides for acquisition of insurance to cover liability.

The first Colorado case to recognize and follow the general rule of immunity for counties was County Comm'rs v. Bish.[121] In that case the court said that "The rule that counties are not liable for torts in the absence of statute, is universally recognized. And the great weight of authority is in favor of the conclusion that when a duty is imposed by statute, the county is not liable for failure to perform it, in the absence of express provision, creating such liability."[122] The holding of the Bish case has subsequently been upheld and relied upon.[123]

As the Bish case and subsequent cases have pointed out, counties are immune from liability for the torts of their employees. But are the officers and employees individually liable for their torts? The general rule in the United States is that officers who exercise discretionary functions are immune from liability for their negligence or other unintentional torts, but are liable for the breach of performance of mere ministerial duties.[124] It appears that Colorado follows the general rules as to individual liability of county or other public officials.

In the Miller case,[125] the plaintiff sought to hold the county and its officers individually liable for the death of her son in a fire in the county jail. It was held that a county commissioner was not individually liable for failing to make a per-

121. 18 Colo. 474, 33 Pac. 184 (1893).

122. Id. at 475, 33 Pac. at 184.

123. See Board of Comm'rs of Pitkin County v. Ball, 22 Colo. 125, 43 Pac. 1000, 55 Am. St. Rep. 117 (1896); Town of Fairplay v. Board of Comm'rs of Park County, 29 Colo. 57, 62 Pac. 152 (1901); Miller v. Ouray Electric Power and Light Co., 18 Colo. App. 131, 70 Pac. 447 (1901); Board of Comm'rs of Logan County v. Adler, 69 Colo. 290, 194 Pac. 621, 20 A.L.R. 512 (1920); Richardson v. Belknap, 73 Colo. 52, 213 Pac. 335 (1923); Newt Olson Lumber Co. v. School Dist., 83 Colo. 272, 263 Pac. 723 (1928); School Dist. No. 28 v. Denver Pressed Brick Co., 91 Colo. 288, 14 P.2d 487 (1932); and Schwalk v. Connely, 116 Colo. 195, 179 P.2d 667 (1947).

124. See David, The Tort Liability of Public Officers, 12 So. Cal. L. Rev. 260, 368 (1939); Davis, Administrative Officers' Tort Liability, 55 Mich. L. Rev. 201 (1956); Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263 (1937); Keefe, Personal Tort Liability of Administrative Officials, 12 Fordham L. Rev. 130 (1943).

125. Miller v. Ouray Electric Power & Light Co., 18 Colo. App. 131, 70 Pac. 447 (1902).

sonal examination of the county jail, although a statute expressly provided that he do so, because the duty was owed to the public at large and not to any particular individual. The court there said, "If the contention of the plaintiff be the law, then each individual commissioner would be liable in like actions to this because of damages suffered by an individual by reason of alleged defects in a public highway or in a county bridge, or in any public building, or in the public grounds in which it might be situate. To so hold would tend in the large counties of the State . . . to bring about . . . the literal abrogation of the office of County Commissioner, for no sane man would assume the position with such a liability attached."[126] The court was asked to overrule this decision in the Belknap case,[127] involving a suit against the county commissioners for failure to construct guard rails. However, the court adhered to the rule laid down in the Miller and Bish cases, and said, "It would be inconsistent to relieve counties from liability and yet hold the officers liable."[128]

Limitations were placed on the Miller and Belknap rule in the case of Schwalk v. Connely.[129] There the court said, "The doctrine of respondeat superior, applicable to the relation of master and servant, does not apply to a public officer as to render him responsible for the acts or omissions of subordinates, whether appointed by him or not, unless he, having the power of selection has failed to use ordinary care therein, or unless he has been negligent, or has directed or authorized the wrong."[130] However, the plaintiffs or employees in the Schwalk case did not fall within the exceptions.

This was the status of the law when Liber v. Flor[131] was decided. The court, in Liber, adhered to the rule laid down in the Schwalk case, and held that while the county itself could not be held liable in tort for the alleged negligence of its agents, the individual defendants, though concededly members of the board of county commissioners, might be liable if they were the actual tort-feasors or if they had been negligent in supervising acts of subordinates or had directed or authorized the wrong. Thus, if the individual defendants were the actual tort-feasors or if the

126. Ibid.

127. Richardson v. Belknap, 73 Colo. 52, 213 Pac. 335 (1923).

128. Ibid.

129. 116 Colo. 195, 179 P.2d 667 (1947).

130. Ibid.

131. 143 Colo. 205, 353 P.2d 590 (1960).

evidence is such as to bring their acts within the Schwalk rule, the plaintiff would be entitled to recover. This rule has been severely criticized and it is claimed that "There is no valid reason why a county should not be responsible under the doctrine of respondeat superior for the acts of its agents. To say that the county is not liable because the state is not liable is absurd and unreal . . . ."[132]

The traditional common law distinction between governmental and proprietary functions has been applied to counties in Colorado. Thus a county will be liable for an injury occasioned by the exercise of a proprietary function and immune when the activity is governmental in nature.[133]

The municipalities. Municipalities, like the counties, have also been held to be immune when acting in a governmental capacity and liable when acting in a proprietary capacity.[134] The first case holding that a municipality is immune from liability was Daniels v. City of Denver.[135] An inroad on municipal immunity was made in Spaur v. City of Greeley,[136] a case involving a contract of bailment which the city breached. The court held that since Ace Flying Serv. Inc.[137] had held that the state is no longer immune to contract actions, the local government units are not immune either. Thus the doctrine of sovereign immunity cannot be invoked as a defense to any contract action by any governmental unit, regardless of the type of function involved. Yet the court

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132. Note, Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation, 35 U. of Colo. L. Rev. 540 (1963).

133. See Banks, Colorado Law of Cities and Counties, 265 (1959).

134. See note 14, supra; Banks, Municipal Tort Liability in Colorado, 6-13 (1961). The following activities have been held to be proprietary functions in Colorado: nonfeasance or misfeasance in the construction, maintenance or repair of streets or sidewalks; construction and maintenance of sewers and drains; operation of parks and recreational facilities; operation of a cemetery; trash collecting; operation of a dumping ground; decorating a municipal building for Christmas; maintenance of a municipal building. The following have been held to be governmental functions for which no liability lies: operation of the health, police and fire departments; failure to adopt or enforce an ordinance; issuance of bonds; abatement of a nuisance; installation of traffic zone markers.

135. 2 Colo. 669 (1875).

136. 150 Colo. 346, 372 P.2d 730 (1962).

137. 136 Colo. 19, 314 P.2d 278 (1957).

has refused to abolish tort immunity. In City and County of Denver v. Madison,[138] the court distinguished those cases which repudiated immunity as to contract actions, and stated that if immunity as to tort actions was to be abolished, it had to be done by the legislature.

School districts and special districts. The governmental and proprietary functions are applicable to the law of immunity from liability with respect to special districts and school districts.[139] For example, for proprietary activities see Cerise v. Fruitvale Water & Sanitation Dist.,[140] and for governmental activities see School Dist. No. 28 v. Denver Pressed Brick Co.[141] In the recent case of Tesone v. School Dist. No. RE 2,[142] the trial court dismissed the complaint, ruling that the defendant school district, as a subdivision of the State of Colorado, is immune from liability under the previous court pronouncements in the Madison case[143] and in Liber v. Flor.[144] The plaintiff in error admitted that such holdings constituted the law in Colorado, but urged that these cases be overruled. This the court refused to do and affirmed the judgment, citing the Madison case, wherein it was said, "It is not within the province of the judicial branch of government thus to change long established principles of law. This is the function of the legislature."[145] The court declared that "In no opinion of this court has it ever been held that the rule on nonliability of a government agency for the negligent acts of its servants in the performance of governmental duties, has in any degree whatever been modified, discarded or minimized."[146]

Summary. The present general rule in Colorado with respect to the sovereign immunity doctrine, as developed in the common law through judicial interpretation and application, is that the state, counties, cities and other political subdivisions of government are deemed immune from liability for the torts committed by pub-

138. 142 Colo. 1, 351 P.2d 826 (1960).

139. See note 7, supra.

140. 153 Colo. 31, 384 P.2d 462 (1963).

141. 91 Colo. 288, 14 P.2d 487 (1932).

142. 152 Colo. 596, 384, P.2d 82 (1963).

143. 142 Colo. 1, 351, P.2d 826 (1960).

144. 143 Colo. 205, 353 P.2d 590 (1960).

145. 142 Colo. 1, 351 P.2d 826 (1960).

146. 152 Colo. 596, 384 P.2d 82 (1963).

lic employees in the performance of their duties, except to the extent that the immunity has been judicially found to be inapplicable, i.e., the entity was engaged in the performance of a proprietary activity. In effect, this means that tort actions can be successfully prosecuted against governmental entities only if the injury complained of arose out of the performance of a "proprietary" activity as distinguished from a "governmental" one.

The Statutory Law in Colorado

In addition to being liable for injuries arising out of "proprietary" activities, the governmental entities in Colorado are also liable to the extent that the immunity has been waived by statute or consent to suit and liability is granted by the General Assembly. To correctly ascertain the status of the present Colorado law on the doctrine it is necessary, in addition to determining what the common law rule is (as discussed above), to determine whether any statutes exist which waive immunity and impose liability on the public entities or otherwise modify or reaffirm the common law rules.

Accordingly the Colorado statutes were surveyed with a view to determining (1) the extent to which the statutory law provides for liability of the public entities (see Table II), and (2) the extent to which the statutory law provides immunity for the public entities (see Table III). Although some relevant statutes may have been overlooked, the survey presents a fair picture of the extent to which the Colorado General Assembly has provided for liability and immunity of public entities.

Statutory consent to suit. The Colorado statutes contain many provisions which purport to subject various agencies of the state as well as various political subdivisions to suit in the courts. In most cases the statutory language indicates simply that the particular entity "may sue and be sued." A list of sections so providing and the particular entities to which they apply is found in Table I.

If the doctrine of sovereign immunity were deemed to be based solely on the absence of a remedy against the state, statutory consent to suit would appear to connote a waiver of immunity. However, the issue of liability is distinguishable from that of the remedial devices available to an injured person. Most courts have not found in such language a substantive right implying a correlative liability on the part of the particular public entity. The granting of consent to the bringing of an action against the public entity is regarded not as a waiver of substantive immunity but simply as a remedial technique for administering such liability as might exist under the law. Thus while such a statute may

subject the entity to the process of the courts, it does not in itself make the entity liable for its wrongs.[147]

If the entity is legally liable, such consent implies that judgment may be entered against it; but if it is not, the implication is equally clear that judgment will be entered in the entity's favor. Permission to sue simply constitutes a procedural remedy; it does not determine the substantive result. This conclusion is made clear by the express provisions in 3-2-7, C.R.S. 1963, which state that language granting state agencies the power to sue and be sued ". . . shall be construed as procedural and remedial and shall not be construed as extending, conferring, or granting such agencies any substantive powers, duties, or functions, nor . . . be construed as granting permission to sue the sovereign state of Colorado or any agency thereof."

From this analysis, it would appear that without a consent statute, an injured person might not have a remedy even if the entity were otherwise liable pursuant to a legislative enactment. Indeed, some acts relating to public entities contain no statutory language, expressly or impliedly, consenting to suit against the entity. If it is assumed that such absence of consent to suit precludes enforcement of tort liability which exists pursuant to statute or common law, situations could arise in which liability may exist without a judicial remedy.[148] The implication is that an injured person seeking redress against a public entity by means of a civil tort action must be prepared to establish, not only that liability exists on the part of the entity, but also that consent to suit against the entity has been granted.

If it is assumed, on the other hand, that the courts will hold public entities subject to suit in tort despite the absence of any statutory consent, the only question then presented is whether the entity is otherwise liable. Many courts could reach this conclusion by viewing an omission of this type, when viewed against a background of consistent legislative policy of granting the procedural and remedial right to sue, as the product of legislative inadvertance and hence disregarded in favor of applying the general legislative policy.

The approach of the General Assembly in granting to particular entities the power to sue and be sued and not granting this power to other and similar entities, and the various approaches which may be taken by the courts in applying these consent statutes or the absence thereof, leaves this area of the law sufficiently doubtful and uncertain to suggest the desirability that such doubts be eliminated and clarified by appropriate legislation.

147. Report of the Governmental Immunity Committee, Utah Legislative Council, p. 21 (Dec. 1964).
148. State v. Colo. Postal Tel.-Cable Co., 104 Colo. 436, 91 P.2d 481 (1939).

TABLE I

Statutory Provisions Authorizing That Governmental Entities "May Sue and Be Sued"

Colo. Rev. Stat. 1963	Governmental Entity
3-2-4 to 3-2-7	State agencies -- provisions are procedural and remedial and not construed as granting permission to sue sovereign.
5-5-6	Airport authority
16-1-3	Colorado School for Deaf and Blind
36-1-1 (1) (b)	Counties
36-16-4	Cemetery districts
47-2-8	Drainage district
47-12-28	Grand Junction drainage district
80-1-6	Industrial Commission
89-1-11 & 15	Waterworks district
89-3-14 (3)	Metropolitan district
89-4-11 (3)	Improvement district in cities and towns
89-5-12 (3)	Water and Sanitation district
89-6-14 (3)	Fire Protection district
89-12-14 (3)	Metropolitan Recreation district
89-13-6 (3)	Metropolitan Water district
89-14-5 (4)	Hospital district -- expressly maintains immunity
89-15-6 (4)	Metropolitan Sewage Disposal district
92-28-10	Mine Drainage district
100-6-5	Oil and Gas Conservation district
123-25-24	School district
123-30-1	School district

TABLE I
(Continued)

Colo. Rev. Stat. 1963	Governmental Entity
124-5-1	Trustees of the state colleges
124-9-1	Colorado School of Mines
124-11-2	State Board of Agriculture
124-20-4 (e)	Colorado Higher Education Assistance Authority
128-1-8 (11)	Soil Conservation district
139-31-1	Cities and towns
139-62-5	Urban Renewal Authority
150-1-13	Irrigation Districts of 1905
150-2-13	Irrigation Districts of 1921
150-4-9	Internal Improvement District
150-5-13	Water Conservancy District
150-7-5	Colorado River Conservation District
150-8-5	Southwestern Water Conservation District
150-10-5	Rio Grande Water Conservation District
Ch. 36, Sec. 21 (5), 1966 Session Laws	Metropolitan Stadium District

Statutory immunities and liabilities of the state. The state is specifically made liable for injuries caused by the negligent operation of government-owned vehicles to the extent of the limitations provided for in the statute as follows: bodily injury liability limited to $10,000 for each person and $20,000 for each accident; and property damage liability limited to $5,000 for each accident.[149]

149. 13-10-1 et seq., C.R.S. 1963.

The state is made liable for all personal and property damage caused by acts done, or attempted, under color of the civil defense act of Colorado with procedures for the presentation of claims and methods of providing compensation set forth.[150] However, the state is apparently liable only to the extent of the compensation provided for in the statute.[151] The state is also made liable for any or all property damage caused by wild game protected by the game and fish laws of the state.[152] Procedures for the handling of these claims are established in § 62-2-31, C.R.S. 1963.

The state department of public health, its officers and employees are specifically declared to be immune from liability for any injuries occasioned by the administration of its duties under the provisions of the statute on rabies control.[153] In addition, no person, acting in good faith under any order of court directing that a person be held in custody or be held for confinement, examination, diagnosis, observation, or treatment, and not acting in violation or abuse thereof, shall be liable for such action.[154]

Officers of the military forces, when exercising discretion or when following lawful orders and in the performance of a duty, and who are engaged in mob control shall not be liable for any act done while on such duty.[155] The state, the state department of highways, its officers and employees shall not be liable for injuries occasioned by the construction, reconstruction, maintenance, improvement, or operation of any turnpike or speedway authorized to be constructed.[156]

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150. 24-3-1, C.R.S. 1963.

151. 24-1-10, C.R.S. 1963.

152. 62-2-31 et seq., C.R.S. 1963; see Colo. Legislative Council Committee on Game, Fish and Parks, Memo. No. 3, Game Damage Claims, Awards, Arbitration, and Control (Sept. 20, 1967); Colo. Game, Fish & Parks Department, Instructions and Procedures for Reporting Game Damage and Filing Game Damage Claims; Attorney General, State of Colorado, Opinion No. 66-4015, Sept. 12, 1966.

153. 66-23-13, C.R.S. 1963.

154. 71-1-24, C.R.S. 1963.

155. 94-1-45, C.R.S. 1963.

156. 120-7-13, C.R.S. 1963.

Statutory immunities and liabilities of cities and counties. Cities and counties, like the state, are liable for injuries caused by the negligent operation of government-owned motor vehicles.[157] The county, its officers and employees are specifically held to be immune from liability for any injuries in connection with the administration of a county dog licensing law,[158] for injuries caused by civil defense activities, except to the extent of compensation provided for in the statute,[159] and for or on account of the escape of any prisoner from the county jail.[160] The operation of a city or county airport is declared to be a governmental function and it is implied that cities and counties will be immune from liability for its operation.[161] Finally, it is declared that the town treasurer or a city council member shall not be liable for loss of public funds by reason of the default or insolvency of the depository.[162]

Denver charter amendment (1967). Pursuant to Section 1 of Article XX of the Colorado Constitution, the City and County of Denver was created as a home rule city. Under the constitutional provision, the City and County of Denver may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings. However, prior to 1967, the City and County of Denver applied the common law doctrine of sovereign immunity under which it could not be held liable for injuries sustained as a result of the performance of governmental activities. On February 7, 1967, the voters of the City and County of Denver adopted an amendment to Denver's Charter which effectively waived the defense of sovereign immunity. The amendment reads as follows:

> Denver Charter - Article IX, Section C6.8-1. In all suits or actions brought against the City and County of Denver jointly with any of its officers or employees charging tortious acts of said officers and employees committed in the regular course of their employment, the City and County of Denver shall not avail itself

157. 13-10-1, C.R.S. 1963.

158. 36-12-4, C.R.S. 1963, as amended.

159. 24-1-10, C.R.S. 1963.

160. 105-7-27, C.R.S. 1963.

161. 5-4-1, C.R.S. 1963; 5-5-7, C.R.S. 1963.

162. 139-39-7 (5), C.R.S. 1963.

> of the defense of governmental immunity and shall be liable in the same manner and to the same extent as a private employer under like circumstances and pay all final judgments rendered against the said City and County of Denver.
>
> Denver Charter - Article IX, Section A9.4-2. The City and County of Denver shall be liable for the acts or omissions of the members of the classified service of the police department within the scope of their respective offices, in tort, in the same manner and to the same extent as a private employer under like circumstances, and said city and county shall pay or indemnify such member for the payment of any final judgment rendered in any such suit or action wherein said city and county is a defendant or third party defendant, and wherein it is found by the court or jury that the act or omission complained of was within the scope of the office of said member. No notice of injury or claim shall be required in actions brought against said city and county under the provisions of this section.

Statutory immunities and liabilities of districts. It is declared that a school district shall not be liable for injuries caused by school evacuation drills or by the use of buses in the exercise of civil defense activities.[163] The statutes also provide for a remedy for the recovery of damages to property caused by acts done by a conservancy district.[164]

163. 24-4-2, 3, C.R.S. 1963.

164. 29-6-4, C.R.S. 1963.

TABLE II

Statutes Providing For Liability
Of Governmental Entities

C.R.S. 1963

13-10-1	Liability for injuries caused by the negligent operation of government vehicles. Bodily injury liability limited to $10,000 for each person and $20,000 for each accident. Property damage liability limited to $5,000 for each accident.
24-3-1	The State is liable for all personal and property damage caused by acts done, or attempted, under color of the civil defense act of Colorado, unless there is wilfull misconduct, gross negligence, or bad faith on the part of any agent of civilian defense.
29-6-4	Provides remedy for the recovery of damages to property caused by acts done by conservancy districts.
35-5-8	Sheriff is subject to action for damages to party aggrieved by his neglect to make due return of any writ or process delivered to him to be executed.
62-2-31	The State is liable for all or any damages done to the real or personal property of any person by any wild animal protected by game and fish laws, such damages to be determined and paid as provided in sections 62-2-31 to 62-2-38.
99-2-9	During the time that a policeman, deputy sheriff, or fireman of a town, city, city and county, county, or fire protection district is assigned to temporary duty within the jurisdiction of another town, city, city and county, county, or fire protection district, any liability which may accrue under the operation of the doctrine of respondeat superior on account of the negligent act of any such police officer, deputy sheriff, or fireman while performing such duty shall be imposed upon the requesting town, city, city and county, county, or fire protection district and not upon the assigning jurisdiction; provided that nothing in this section shall be construed to impose any liability upon any such requesting jurisdiction nor to waive or affect in any way the doctrine of sovereign immunity with respect to any such jurisdiction.

TABLE III

Statutes Providing For Immunity
Of Governmental Entities

C.R.S. 1963

36-12-4	The county commissioners, county employees, or any person enforcing the provisions of county dog licensing laws shall not be held responsible for any accident or subsequent disease that may occur in connection with the administration of a dog licensing law.
66-23-13	The health departments, their assistants and employees, the state department of public health, health officer, or anyone enforcing the provisions of the statute on rabies control shall not be held responsible for any accident or subsequent disease that may occur in connection with the administration of the provisions of the statute on rabies control.
5-4-1	Operation of airport or other air navigation facility declared to be a governmental function, exercised for a public purpose and matters of public necessity.
5-5-7	Airport authority declared to be a political subdivision of the state, exercising essential governmental powers for a public purpose.
24-1-10	State and political subdivision declared to be immune from liability for injuries caused by civil defense activities, except to extent of compensation provided for in the statute.
24-4-2	School district not liable for injuries caused by school evacuation drills in exercise of civil defense activities.
24-4-3	School district not liable for injuries caused by the use of busses in the exercise of civil defense activities.
71-1-24	No person, acting in good faith under any order of court directing that a person be held in custody or be held for confinement, examination, diagnosis, observation, or treatment, and not acting in violation or abuse thereof, shall be liable for such action. No action for false arrest or false imprisonment shall be brought against any

TABLE III
(Continued)

	peace officer or sheriff who, in good faith, takes a person into protective custody under section 71-1-3. No action based on the fact or act of filing a petition shall be brought against a person who, in good faith, files a petition or otherwise acts under section 71-1-4 or section 71-1-5; but a person who wilfully causes, or who conspires with or assists another to cause, unwarranted hospitalization or confinement under the provisions of this article shall be liable in damages to the person so hospitalized or confined.
82-7-6	Benefits of unemployment compensation shall be deemed to be due and payable only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the unemployed compensation fund, and neither the state nor the department shall be liable for any amount in excess of such sums.
94-1-45	The commanding officer of any of the military forces, engaged in the suppression of an insurrection, the dispersion of a mob or the enforcement of the laws shall exercise his discretion as to the propriety of firing upon or otherwise attacking any mob or other unlawful assembly; and, if he exercises his honest judgment thereon, he shall not be liable in either a civil or a criminal action for any act done while on such duty. No officer or enlisted man shall be held liable in either a civil or criminal action for any act done under lawful orders and in the performance of his duty.
105-7-27	County not liable for or on account of the escape of any prisoner from the county jail.
112-2-16	State not liable to settlers of desert land for failure of contractors to complete work according to construction contract with the state.
120-7-13	No liability shall attach, either to the state, the department of highways or the individual members of the said department of highways by virtue of the construction, reconstruction, maintenance, improvement, or operation of any turnpike or speedway authorized to be constructed.

TABLE III
(Continued)

139-39-7 (5)	No liability of town treasurer or city council member for loss of public funds by reason of the default or insolvency of depository.

Claims Procedure in Colorado

Colorado claims commission. The Colorado Claims Commission was established by 130-10-1 et seq., C.R.S. 1963 (1965 Supp.), as amended. This statute was adopted in 1965 and took effect on July 1, 1965, and applies only to claims occurring after July 1, 1963. The statute was amended in 1967 by chapter 280, 1967 Session Laws. The commission is composed of John P. Proctor, CPA, State Auditor, chairman; Con F. Shea, State Controller; and Robert Bronstein, State Budget Director. The commission was established to create an orderly and expeditious procedure to aid the General Assembly in the consideration and evaluation of tort claims against the state.[165] It is declared that the article shall not be construed as a waiver or repudiation of the doctrine of sovereign immunity, firmly established in the law of Colorado, by the state of Colorado, or any state agency, or any of its political subdivisions.[166]

The statute, in essence, provides that any person claiming injury to his person or property or loss of life caused by the negligent or wrongful act or omission of a state agency, or of a state employee while acting within the scope of his office or employment, may (except as to claims specifically excluded) file his claim with the commission which shall consider each claim, and make findings of fact and recommendations for the disposition thereof. Within five days after the convening of the next regular session of the General Assembly the commission shall make its report by filing its records, findings and recommendations with the chairman of the House Appropriations Committee and the chairman of the Senate Finance Committee. Either committee of the General Assembly may: (1) approve the claim as recommended or modify the claim and present it to the General Assembly in the form of an appropriation bill; or (2) present a bill authorizing the claimant to sue the state; or (3) deny the claim and take no action at all.[167]

165. 130-10-1, C.R.S. 1963 (1965 Supp.), as amended.

166. Ibid.

167. 130-10-5, 7, 8, C.R.S. 1963 (1965 Supp.), as amended.

The jurisdiction of the commission does not extend to claims:

> (b) Based upon an act or omission of a state employee exercising reasonable care in the execution of a statute or regulation, whether or not such statute or regulation be valid; or based upon the exercise or performance or failure to exercise or perform a discretionary function or duty involving the determination of policy for a state agency on the part of a state employee or state agency, whether or not the discretion involved be abused;
>
> (c) Based upon an act or omission of a state employee for which insurance coverage is provided under the provisions of article 16 of chapter 72, C.R.S. 1963, or under any other statutory provision;
>
> (d) For injury to or death of an inmate of a state penal institution;
>
> (e) Arising out of the care or treatment of a person in a state institution;
>
> (f) For damages caused by the imposition of a quarantine by the State;
>
> (g) Arising out of alleged assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel or slander, misrepresentation, deceit, fraud, interference with contractual rights, or invasion of the right of privacy;
>
> (h) For which a remedy is provided or which is governed specifically by other statutory enactment, or for which an administrative hearing procedure is otherwise established by law.[168]

Claims experience. From the effective date of the statute to January 9, 1967, a total of 21 claims amounting to $1,111,019.49 had been filed with the commission, as detailed in Table IV of this report. Of the 21 claims filed, 11 claims totaling $1,031,428.52 were filed alleging damages as a result of the destruction of prop-

168. 130-10-4 (2), C.R.S. 1963 (1965 Supp.), as amended.

erty by the flood of June 17 and 18, 1965, occasioned by the destruction of Clay Creek Dam and Reservoir in Prowers County, which was constructed by the Department of Game, Fish and Parks.[169]

The results of the commission activities for 1966 are summarized as follows:[170]

I. Claims Pending - awaiting hearings or additional information:

1. 66-10 Arapahoe Basin, Inc.
2. 66-12 E. B. Ketchum, d/b/a Canon Vegetable Growers
3. 66-15 Elnora Z. Steele
4. 66-16 George and Georgia Hoopes
5. 66-19 Alexander Thiele
6. 66-20 Earl Sanders

II. Claims rejected by the Commission for lack of jurisdiction:

1. 66-1 Ralph E. Doney
2. 66-14 William H. Dawson

III. Claims on which the Commission hereby submits recommendations to the General Assembly:

1. That the General Assembly pass appropriate relief bills for;

   a) 66-2 - Janet R. Meneley - a bill in the amount of $20,000.00 to compensate for the death of her husband in a highway accident.

   b) 66-21 - Jerald C. Rich - a bill in the amount of $174.19 to compensate for the loss of items in his automobile stolen by "trustees" of the Buckley Field Honor Camp of the Colorado State Reformatory.

2. That the General Assembly pass appropriate bills waiving the defense of sovereign immunity and permitting the following claimants to sue for damages alleged to have been suffered as a result of the failure of the Clay Creek Dam in Prowers County;

169. Report of the Colorado Claims Commission, January 7, 1967.

170. Ibid.

66-3 Darrel E. and Ruth B. Sawyer
66-4 James M. Smith
66-5 Carrie F. Hall
66-6 Atchison, Topeka and Santa Fe Railway Co.
66-7 Lamar Farms (a partnership) and Brent and Gary Hofmeister, (Minors)
66-8 William Walker
66-9 Richard I. and Bertha I. Moss
66-11 Lamar Canal and Irrigation Company
66-13 Wesley Sage, d/b/a Plains Outdoor Advertising Company
66-17 Cecile and Amelia Thombleson
66-18 Fort Bent Ditch Company

TABLE IV

Claims Filed With Colorado Claims Commission - July 1, 1965 to December 31, 1966*

Docket Number	Amount	Claimant	Date Filed	Nature of Claim	Disposition
66-1	$ 19,941.85	Ralph E. Doney	7-28-65	Airplane destroyed	Jurisdiction denied
66-2	26,200.00	Janet R. Meneley	10-11-65	Fatal automobile accident	Recommend $20,000 Relief Bill
66-3	85,274.69	Darrel and Ruth Sawyer	12-3-65	Damages - Clay Creek Dam	Recommend suit be allowed
66-4	796.00	James M. Smith	12-3-65	Damages - Clay Creek Dam	Recommend suit be allowed
66-5	15,200.00	Carrie F. Hall	12-13-65	Damages - Clay Creek Dam	Recommend suit be allowed
66-6	225,597.00	A.T. & S.F. Railway Company	12-14-65	Damages - Clay Creek Dam	Recommend suit be allowed
66-7	594,858.00	Lamar Farms (a partnership) and Brent and Gary Hofmeister (Minors)	12-14-65	Damages - Clay Creek Dam	Recommend suit be allowed
66-8	14,000.00	William Walker	12-28-65	Damages - Clay Creek Dam	Recommend suit be allowed
66-9	37,257.83	Richard I. and Bertha I. Moss	1-17-66	Damages - Clay Creek Dam	Recommend suit be allowed
66-10	1,500.00	Arapahoe Basin, Inc.	3-24-66	Damages from "shooting" slide	Hearing pending
66-11	10,790.00	Lamar Canal and Irrigation Company	4-20-66	Damages - Clay Creek Dam	Recommend suit be allowed
66-12	2,004.93	E.B. Ketchum, d/b/a Canon Vegetable Growers	4-21-66	Trailer did not clear underpass	Hearing pending
66-13	900.00	Wesley Sage, d/b/a Plains Outdoor Advertising Company	4-27-66	Damages - Clay Creek Dam	Recommend suit be allowed
66-14	1,250.00	William H. Dawson	5-26-66	Bidding specifications changed without notice	Jurisdiction denied
66-15	25,000.00	Elnora Z. Steele	6-30-66	Fatal automobile accident	Hearing pending
66-16	2,020.00	George and Georgia Hoopes	6-29-66	Automobile accident	Hearing pending
66-17	15,660.00	Cecil and Amelia Thombleson	7-5-66	Damages - Clay Creek Dam	Recommend suit be allowed
66-18	31,095.00	Fort Bent Ditch Company	7-5-66	Damages - Clay Creek Dam	Recommend suit be allowed
66-19	(not alleged)	Alexander Thiele	9-12-66	Injured when State Patrolman's gun discharged	Hearing pending
66-20	1,500.00	Earl Sanders	11-8-66	Property along highway destroyed	Hearing pending
66-21	174.19	Jerald C. Rich	10-11-66	Auto stolen by Reformatory "trustees"	Recommend $174.19 Relief Bill
	$1,111,019.49	TOTAL AMOUNT OF CLAIMS FILED			

* Source: Report of the Colorado Claims Commission, January 7, 1967.

Claims filed with the commission in 1967 are listed in Table V below.

TABLE V

Claims Filed with Colorado Claims Commission - January 1, 1967 to October, 1967

Docket Number	Amount	Claimant	Date Filed	Nature of Claim
67-1	$ 1,000.00	Donna Manley - a minor by mother - Barbara L. Davis	1-5-67	Injured in collision with station wagon of Childrens' Home - no Colorado drivers license.
67-2	115.54	Edith Crusick	1-10-67	Windshield of auto broken by State Hospital patient
67-3	26,753.05	Virgil R. Madsen, by parents Virgil R. Madsen and Nina Madsen	1-25-67	Four year old claimant burned while playing on Highway Dep't aggregate pile which was on fire.
67-4	15,000.00	Golden Key Manor Homes, Inc. and Mi-arv Investments, Inc.	3-21-67	City of Denver has sued petitioners for discharging water into Highline Canal - petitioners hold state should indemnify.
67-5	208.30	William R. Mackie	4-24-67	X-ray unit damaged - alleged due to negligence in inspection.
67-6	161.03	Stanley Haynes	6-14-67	Hit boulder in center of Highway 40 on Berthoud Pass - alleged negligence of grader.
67-7	90.00	Floyd Ellis Leopold	7-25-67	State patrolman ran into claimants parked car.

TABLE V
(Continued)

Docket Number	Amount	Claimant	Date Filed	Nature of Claim
67-8	$45,166.17	Rep. George Fentress - for approximately 24 claimants	9-5-67	Residences damaged by flooding due to inadequate drainage of Highway.

During the 1967 session, the General Assembly adopted H.B. No. 1127, which granted to persons who sustained injury by the diversion of Clay Creek flood water by Clay Creek dam in June, 1965, the right to initiate a civil action against the state to recover damages. The General Assembly in 1967 also passed H.B. No. 1114 which granted $20,000 to Mrs. Janet R. Meneley for damages sustained when her husband was killed as a result of negligent repairs of a state highway.

Other claims against the state. The division of accounts and control is authorized to receive, hear and settle all claims against the state and issue warrants for payment thereof from the treasury.171 Warrants for the payment of duly audited and approved claims shall be prepared, signed and transmitted to the state treasurer by the controller or his authorized agent.172 It is also provided that "The attorney general shall be the legal advisor of the controller and the division of accounts and control and to him shall be referred any question concerning the legality of any obligation by or claim against the state."173 Whether these provisions relate to the presentation of tort claims against the state is not quite clear as there are no cases in which this question has been decided or the provisions construed. In the light of the Colorado Claims Commission Act, however, it would appear that these provisions relate only to the presentment of claims on contract, and not tort claims, which are presented to the claims commission.

Claims handled by independent agencies or departments. Section 24-2-1 et seq., C.R.S. 1963, establishes a procedure for the presentation of claims for compensation benefits of volunteer workers injured in civil defense activities. These claims are presented to the Industrial Commission and the procedure thus established is similar to the procedure for the presentation of claims for workmen's compensation benefits.

171. 3-3-1 (18), C.R.S. 1963.

172. 3-3-2 (6), C.R.S. 1963.

173. 3-3-2 (10), C.R.S. 1963.

Claims for damages for injuries by wild animals which are protected by the game and fish laws of the state are presented to the Game, Fish and Parks Commission pursuant to the procedure extablished by sections 62-2-32 through 62-2-38, C.R.S. 1963. Any person who has sustained damages by wild animals must notify the commission of such loss and claim for damages within 10 days and file proof thereof. Within 30 days from the filing of notice the commission, if possible, shall agree with such person upon a settlement. If no settlement can be reached, the claimant and the commission shall each appoint an arbitrator, in which event the two arbitrators shall agree upon a third arbitrator. Within 60 days from the appointment of the arbitrators, an award must be made. The arbitration award shall be final. Payment of the award is out of the game and fish fund.174

All claims against the University of Colorado must be audited and allowed by the Board of Regents pursuant to 124-2-17, C.R.S. 1963.

Claims against counties. All claims against a county shall be presented for audit and allowance to the board of county commissioners of the proper county before an action in any court can be maintained against the county. When allowed by the board, the claims shall be paid by a county warrant, or order, drawn by said board on the county treasury, upon the proper fund in the treasury, for the amount of such claim. When the claim is disallowed, in whole or in part, by the board, such person may appeal the decision of the board to the district court for the same county within 30 days after the making of such decision.[175] Provision is made for the proceedings and pleadings upon appeal to the district court.[176]

Claims against special districts. There are several provisions of the Colorado statutes which provide for the presentation, audit and payment of claims against special districts.[177]

174. 62-2-32 to 62-2-38, C.R.S. 1963; see also note 152, supra.

175. 36-2-10 et seq., C.R.S. 1963.

176. 36-2-13, C.R.S. 1963, as amended

177. E.g., 89-1-25, C.R.S. 1963 (water ork districts); 150-1-25, C.R.S. 1963 (irrigation district of 1905); 150-2-29, C.R.S. 1963 (irrigation district of 1921); 150-4-37, C.R.S. 1963 (internal improvement district); and 29-6-4, C.R.S. 1963 (conservancy districts).

TABLE VI

Provisions Relating To
Claims Against Governmental Entities

C.R.S. 1963

3-3-1 (18) Authorizes division of accounts and control to receive, hear, and settle all claims against the state and issue warrants for payment thereof from the treasury.

24-2-1 et seq. Establishes procedure for presenting claims for compensation benefits of volunteer workers injured in civil defense activities. Claims are presented to Industrial Commission. Procedure is similar to procedure established for the presentment of claims for workmen's compensation benefits.

36-2-10 et seq. All claims and demands held by any person against a county shall be presented for audit and allowance to the board of county commissioners of the proper county, in due form of law, before an action in any court shall be maintainable thereon, and all claims, when allowed, shall be paid by a county warrant, or order, drawn by said board on the county treasury, upon the proper fund in the treasury, for the amount of such claim.

The nature of the claim, the name of and the amount paid to each individual, disclosure of the fund charged with the claim, etc., must be published by the board according to the provisions in 36-2-11.

When any claim of any person against a county shall be disallowed, in whole or in part, by the board, such person may appeal from the decision of such board to the district court for the same county, by causing a written notice of such appeal to be served on the clerk of such board within 30 days after the making of such decision, and executing a bond to such county, with sufficient security, to be approved by the clerk of said board, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. See section 36-2-12.

Section 36-2-13, C.R.S. 1963, as amended, provides for the proceedings and pleadings upon appeal.

TABLE VI
(Continued)

C.R.S. 1963

62-2-32 to 62-2-38	Establishes a procedure for the presentation of claims to the game, fish and parks commission, and for the determination and payment of such claims for damages for injuries by wild animals.
89-1-25	Establishes procedure for the presentation, determination and payment of claims against waterworks districts.
124-2-17	All claims against the University of Colorado must be audited and allowed by the Board of Regents.
150-1-25	Audit and payment of claims against Irrigation District of 1905.
150-2-29	Audit and payment of claims against Irrigation District of 1921.
150-4-37	Audit and payment of claims against Internal Improvement District.
29-6-4	Provides remedy for the recovery of damages to property caused by acts done by conservancy districts.
130-10-1 et seq.	Provides for the establishment of the Colorado Claims Commission, the jurisdiction of the commission, procedure for the presentation of claims, etc. See amendments in chapter 280, 1967 Session Laws.

Actions and Judgments Against Governmental Entities

Statutory provisions relating to actions and judgments against governmental entities. In the preceding section on the claims commission, it was observed that the commission has no jurisdiction over those claims based upon an act or omission of a state employee for which insurance coverage is provided under the provisions of 72-16-1 et seq., C.R.S. 1963, or any other statutory provision. Thus any claim based upon an act or omission of a state employee for which insurance coverage is provided must be brought in the courts, but no action shall be brought unless it is brought within two years from the date the cause of action, if any, shall accrue.[178]

178. 72-16-6, C.R.S. 1963.

If any judgment is given and rendered against a county, provision is made for the payment of such judgment.[179] The county board is authorized to pay such judgment by warrant drawn on the county fund or the judgment may be paid by the levy of a tax upon the taxable property in the county not to exceed one and one-half per centum on the dollars of assessed property for any fiscal year. The board is not required to levy such special tax to pay any such judgment unless in its discretion the board shall so determine. The amount of any such levy necessary to be made for the purpose of paying any judgment against the county is in no way limited by the provisions of article 3 of chapter 36, C.R.S. 1963.[180]

The statutes contain provisions relating to the bringing of an action against a city for the recovery of compensation for personal injury or death.[181] The statute provides that written notice must be given to the town or city within 90 days after the happening of the accident which gave rise to the cause of action. The action must be commenced within two years from the occurrence of the accident causing the injury or death. Cities and municipal corporations, like counties, are also authorized to levy a special tax to pay judgments rendered against them.[182] Like a county, there is no limit on the amount of any levy necessary to be made for the payment of any judgment rendered against the city.[183]

All actions against sheriffs or other officers for the escape of persons imprisoned on civil process shall be commenced within six months from the time of such escape, and not afterwards.[184] In addition, all actions against sheriffs and coroners upon any liability incurred by them by the doing of any act in their capacity or by the omission of any official duty, except in relation to accounting to the county for fees earned or collected, and except for escapes, shall be brought within one year after the cause of action shall have accrued.[185]

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179. 36-2-4, C.R.S. 1963.

180. 36-3-5, C.R.S. 1963.

181. 139-35-1, C.R.S. 1963.

182. 77-10-1, C.R.S. 1963.

183. 36-3-5, C.R.S. 1963.

184. 87-1-1, C.R.S. 1963.

185. 87-1-3, C.R.S. 1963.

TABLE VII

Provisions Relating To Actions and Judgments Against Governmental Entities

C.R.S. 1963

36-2-4	Provides for the payment of a judgment given and rendered against a county. County board can pay judgment by warrant drawn on county fund or may be paid by the levy of a tax upon the taxable property in the county not to exceed one and one-half per centum on the dollars of assessed property for any one fiscal year. The board is not required to levy any special tax to pay any judgment unless in its discretion the board shall so determine.
36-3-5	The provisions of article 3 of chapter 36 shall in no way limit the amount of any levy necessary to be made for the purpose of paying any judgment against any county, city, town or school district, or the interest on such judgment.
72-16-6	No action arising against an officer, employee, or agent of the state or state governmental subdivision for which insurance coverage is provided pursuant to 72-16-1, shall be brought unless the same is brought within two years from the date the cause of the action, if any, shall accrue.
77-10-1	Authorizes municipal corporations to levy a special tax to pay judgments rendered against them.
87-1-1	All action against sheriffs or other officers for the escape of persons imprisoned on civil process, shall be commenced within six months from the time of such escape, and not afterwards.
87-1-3	All actions against sheriffs and coroners upon any liability incurred by them by the doing of any act in their capacity or by the omission of any official duty, except in relation to accounting to the county for fees earned or collected, and except for escapes, shall be brought within one year after the cause of action shall have accrued, and not after that period.
94-1-46 and 94-1-47	Provisions relating to the bringing of an action against an officer of the military forces or an enlisted man acting pursuant to an order of any such officer.

TABLE VII
(Continued)

C.R.S. 1963

139-35-1	Provides relating to the bringing of an action against a city for the recovery of compensation for personal injury or death. Written notice must be given to town or city within 90 days after accident. Action must be commenced within two years from the occurrence of the accident causing the injury or death.

Insurance

Statutory provisions relating to insurance, generally. Pursuant to the provisions of section 13-10-3, C.R.S. 1963, the state, counties, municipalities or quasi-municipalities may cover their liabilities and shall cover the liabilities of their motor vehicle drivers in whole or in part through the procurement of insurance from any insurance company authorized to do business in this state, or, in their discretion, may self-insure and may set aside necessary public funds to create proper reserves against contingent and anticipated liabilities, or may effect a combination of the two methods. The state, counties, municipalities or quasi-municipalities are thus made liable for injuries caused by the negligent operation of government-owned vehicles to the extent of the following limitations: bodily injury liability limited to $10,000 for each person and $20,000 for each accident; and property damage liability limited to $5,000 for each accident.

The state, its agencies, cities, counties, or city and county, are authorized to procure insurance for the purpose of insuring their officers, employees, and agents against any liability for injuries or damages resulting from their negligence or other tortious conduct during the course of their service or employment. The extent of the insurance coverage is limited to $50,000 for bodily injury liability for each person, $100,000 for bodily injury liability for each accident, and $25,000 liability for property damage.[186]

School district. A school district is authorized to expend funds to pay premiums to procure liability and property damage insurance covering such district, its governing body, officers and employees, and others while participating in civil de-

186. 72-16-1 et seq., C.R.S. 1963.

fense activities. Immunity is waived to the extent of the amount as is covered by an existing and valid policy of insurance.187

Boards of education and boards of cooperative services. Boards of education and boards of cooperative services are authorized to procure public liability insurance covering the school district, directors, employees, and others.188 They are also authorized to procure liability and property damage insurance on school busses or motor vehicles owned or rented by the school districts. Each policy of liability insurance purchased by a school district or a board of cooperative services is to contain a condition to the effect that said insurer or carrier shall not assert the defense of sovereign immunity otherwise available to the school district or employee thereof within the maximum amounts payable thereunder. The failure to procure such insurance or the failure to procure any such insurance in an amount sufficient to satisfy the entire claim or claims is not to be construed as creating any liability against the school district, director, or employee, or against the board of cooperative services.189

TABLE VIII

Provisions Relating to the Purchase of Insurance By Governmental Entities

C.R.S. 1963

13-10-3	The state, counties, municipalities or quasi-municipalities authorized to purchase insurance to cover liabilities of motor vehicle drivers.
24-4-4	A School district is authorized to procure insurance to cover liabilities arising from the exercise of civil defense activities.
72-16-1 et seq.	Authorizes the state, its agencies, city, county, city and county to procure insurance to insure officers, employees and agents against their liability.

187. 24-4-4, C.R.S. 1963.

188. 123-30-10 (23) & (24), C.R.S. 1963, as amended (boards of education); 123-34-7, C.R.S. 1963, as amended (boards of cooperative services).

189. 123-30-11, C.R.S. 1963, as amended.

TABLE VIII
(Continued)

C.R.S. 1963

123-30-10 (23) and (24)	Boards of education authorized to procure public liability insurance.
123-30-11	Provides that contract of insurance entered into by board of education pursuant to section 123-30-10 (23) and (24) is to contain condition that carrier shall not assert the defense of sovereign immunity within the maximum amounts payable under the policy.
123-34-7	Boards of cooperative services authorized to procure public liability insurance.

SOVEREIGN IMMUNITY IN OTHER JURISDICTIONS

The doctrine of sovereign immunity has become firmly established in the states. Despite condemnation by legal writers and scholars in terms of the history, the legal theory, and the philosophies that bear on the problem, or the procedure and decisions in particular jurisdictions, the fact of the doctrine's existence remains and the general rule continues to be that there is no state liability for tort unless consent is given. In all of the states, however, consent has been given, to a greater or lesser extent, and in a variety of forms.

It is the purpose of this part to explore the condition of the law on the problems raised by the doctrine of sovereign immunity in the other states and the solutions to these problems which have been formulated, in the hope that trends, procedures, progress, or the lack of it, and state policies as revealed by state action will be made clearer and more significant as illustrating the alternatives open to the state of Colorado in rationalizing our law on the subject.

For this purpose the existing immunities and liabilities in each of the several states are surveyed and examined in terms of the extent to which government entities are immune from liability and the extent in which they are liable. In addition, the various remedies that have been formulated by the states in providing procedures for adjudicating claims against the state, its agencies and subdivisions when immunity has been waived, or the courts have declared the doctrine to be inapplicable, are set out in summary fashion.

Immunities and Liabilities in Other Jurisdictions

There is, of course, great variation from state to state, and reference has been made to the law in each jurisdiction rather than a random sampling. A summary of the law in each jurisdiction is contained herein. This summary is by no means detailed and complete and it is probable that some relevant statutes or lines of judicial decision in some of the states have been overlooked. Nevertheless, a fair picture of the way each state handles the problem of tort claims against it is presented.

The states. The common law doctrine of governmental immunity is the basic rule throughout most states. Few states have broken away from the immunity rule in any substantial degree. New York has done so more completely than any of the other states, and a few others, such as Alaska, Arizona, California, Hawaii, Iowa, Nevada, Oregon, Michigan, Utah, Vermont, and Washington, have gone most but not all of the way.[190]

190. See notes 191, 192, 193, and 194, infra.

Alaska and Hawaii adopted at statehood statutes patterned after the Federal Tort Claims Act.[191] Only Iowa, Nevada, New York, Oregon, Vermont, and Washington have done away with the immunity of the state for tortious acts by statute.[192] Arizona is the only state which is presently liable for its torts at common law as a result of judicial decision.[193] California, Michigan and Utah have enacted legislation which continues to make the state immune, except as otherwise provided by statute, and these exceptions are very broad, which in effect makes the state liable in most circumstances.[194] Thus, with the exception of the 12 states enumerated, in every other jurisdiction the states enjoy general immunity for their tortious acts either at common law or by constitutional provision, subject, in certain states, to specific statutory or judicial exceptions.

Immunity of states. In 24 states this immunity is either reinforced by or derived from constitutional provisions. Four of these states have constitutional prohibitions against the state ever being made a defendant in its own courts.[195] It is interesting to note, however, that all four have provided administrative procedures for the adjudication of tort claims.[196] In 19 states, constitutional provisions to the effect that suits may be brought against the state only as the legislature shall direct

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191. Alaska Stat. § 09.50.250 et seq. (1952, Supp. 1965); Rev. Laws of Hawaii § 245A-1 et seq. (1965 Supp.).

192. "Iowa Tort Claims Act," 61 G.A., ch. 79 (1965) and Iowa Code § 25A.1 et seq. (1966); Nev. Rev. Stat. § 41.031 (1965); N.Y. Ct. Cl. Act § 1 et seq. (1963); Oregon Laws, ch. 627 (1967); Vt. Stat. Ann. T.12, § 5601 et seq (1961, as amended 1963); Rev. Code Wash. § 4.92.010 et seq. (1963).

193. Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963).

194. Calif. Govt. Code Ann. § 810-996.6 (Supp. 1965); Mich. Public Act 170 (1964) and Mich. Stat. Ann § 3.996 (Supp. 1965); Laws of Utah, Ch. 139, § 1 et seq. (1965) and Utah Code Ann. § 63-30-1 et seq. (Supp. 1965).

195. Alabama, Ala. Const. Art. 1, § 14; Arkansas, Ark. Const. Art. V, § 20; Illinois, Ill. Const. Art. IV, § 26; West Virginia, W. Va. Const. Art. VI, § 35.

196. Code of Ala., tit. 55, §§ 333, 334 (Supp. 1963); Ark. Stat. Ann. § 13-1401 et seq. (Supp. 1965); Ill. Ann. Stat. Ch. 37 § 439.1 et seq. (Smith-Hurd Supp. 1966); W. Va. Code Ann. § 1143 et seq. (1961).

have been construed to mean that the state is immune in the absence of legislative action consenting to suit or liability.[197] Four states have constitutional boards of examiners which are given sole jurisdiction over claims against the state.[198] This means that the state is immune except for those claims which are presented and allowed by the board of examiners. Nineteen states, including Colorado, have no constitutional provisions directly concerning the matter but have been made immune from liability by judicial decision.[199]

197. California, Calif. Const. Art. XX, § 6; Delaware, Del. Const. Art. 1, § 9; Florida, Fla. Const. Art. III, § 22; Indiana, Ind. Const. Art. IV, § 24; Iowa, Iowa Const. Art. III, § 31; Kentucky, Ky. Const. § 231; Louisiana, La. Const. Art. 3, § 35; Nebraska, Neb. Const. Art. V, § 22; New York, N.Y. Const. Art. VI, § 23; North Dakota, N.D. Const. Art. I, § 22; Ohio, Ohio Const. Art. I, § 16; Oregon, Ore. Const. Art. IV, § 24; Pennsylvania, Pa. Const. Art. I, § 11; South Carolina, S.C. Const. Art. XVII, § 2; South Dakota, S.D. Const. Art. III, § 27; Tennessee, Tenn. Const. Art. 1, § 17; Washington, Wash. Const. Art. II, § 26; Wisconsin, Wis. Const. Art. IV, § 27; Wyoming, Wyo. Const. Art. I, § 8.

198. Idaho, Idaho Const. Art. 4, § 818; Montana, Mont. Const. Art. VII, § 20; Nevada, Nev. Const. Art. IV, § 22; Utah, Utah Const. Art. VII, § 13.

199. Colorado, Ace Flying Service Inc. v. Colo. Dept. of Agriculture, 136 Colo. 19, 314 P.2d 278 (1957); Connecticut, Anselno v. Cox, 135 Conn. 78, 60 A.2d 767 (1948); Georgia, National Distributing Company v. Oxford, 103 Ga. App. 72, 118 S.E.2d 274 (1961); Kansas, Phillips v. State Highway Commission, 148 Kan. 702, 84 P.2d 927 (1938); Maine, Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923); Maryland, Davis v. State, 183 Md. 385, 37 A.2d 880 (1944); Massachusetts, Executive Air Service, Inc. v. Division of Fisheries and Game, 342 Mass. 356, 173 N.E.2d 614 (1961); Minnesota, Youngstown Mines Corp. v. Prout, 124 N.W.2d 328 (1963); Mississippi, Horne v. State Building Commission, 233 Miss. 810, 103 So.2d 373 (1958); Missouri, Gas Service Co. v. Morris, 353 S.W.2d 645 (1962); New Hampshire, St. Regis Paper Co. v. N.H. Water Resources Board, 92 N.H. 164, 26 A.2d 832 (1942); New Jersey, McCabe v. N.J. Turnpike Authority, 35 N.J. 26, 170 A.2d 810 (1961); New Mexico, State v. Burks, 75 N.M. 19, 399 P.2d 920 (1965); North Carolina, State Highway Commission v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965); Oklahoma, Mountcastle v. State, 193 Okla. 506, 145 P.2d 392 (1943); Rhode Island, Rhode Island Turnpike and Bridge Authority v. Nugent, 95 R.I. 19, 182 A.2d 427 (1962); Texas, Allen v. State, 410 S.W.2d 54 (1966); Vermont, Town of Stockbridge v. State Highway Bd., 125 Vt. 366, 216 A.2d 44 (1965); and Virginia, Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 117 S.W.2d 685 (1961).

Liability of states. Although the states in general enjoy governmental immunity, most of them have made statutory exceptions to the doctrine and have consented to be liable in particular instances. The twelve states which provide liability to the greatest extent are listed above. Also a total of 19 states, including Colorado, are made liable for injuries caused by the negligent operation of government-owned motor vehicles.[200] Twenty states are liable for injuries caused by the defective conditions of public highways, bridges, etc.[201]

200. Alaska, Alaska Stat. § 09.50.250 et seq. (Supp. 1966); Arizona, Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); California, Calif. Govt. Code Ann. § 815 et seq. (Supp. 1965); Colorado, C.R.S. 13-10-1 et seq. (1963); Connecticut, Conn. Gen. Stat. § 52-556 (1958); Hawaii, Rev. Laws of Hawaii, § 245A-1 et seq. (1965 Supp.); Iowa, Iowa Code § 25A-1 et seq. (1966); Kansas, K.S.A. 12-2601 et seq. (Supp. 1966); Michigan, Mich. Stat. Ann. § 3-996 (1)-(15) (1948, as amended 1964); Nevada, Nev. Rev. Stat. § 41-031 (1965); New York, N.Y. Ct. Cl. Act (1963); Oregon, Ore. Rev. Stat. § 278.090 (1965); Pennsylvania, Pa. Stat. Ann. T. 71 § 634 (Purdon 1962); South Carolina, S.C. Code Ann. § 33-229 (1962); Tennessee, Tenn. Code Ann. § 9-801 et seq. (1956, as amended 1965); Utah, Utah Code Ann. § 63-30-1 et seq (Supp. 1965); Vermont, Vt. Stat. Ann. T. 12 § 5601 et seq. (1961, as amended 1963); Washington, Rev. Code Wash. § 4.92.010 et seq. (1963); Wisconsin, Wis. Stat. Ann. § 345.01 (1965).

201. Alaska, Alaska Stat. § 09.50.250 et seq. (Supp. 1966); Arizona, Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); California, Calif. Govt. Code Ann. § 815 et seq. (Supp. 1965); Connecticut, Conn. Gen. Stat. § 13a-144 (Supp. 1966); Georgia, Ga. Code Ann. § 95-1710 (1958); Hawaii, Rev. Laws of Hawaii, § 245A-1 et seq. (1965 Supp.); Iowa, Iowa Code § 25A-1 et seq. (1966); Kansas, K.S.A. § 68-419 (1964); Louisiana, Kilpatrick v. State, 154 So.2d 439 (1963); Maine, Me. Rev. Stat. Ch. 17 § 1451 (1964); Massachusetts, Mass. Gen. Laws Ann. Ch. 81 § 18 (1961); Michigan, Mich. Stat. Ann. 3-996 (1)-(15) (1948, as amended 1964); Nevada, Nev. Rev. Stat. § 41.031 (1965); New Hampshire, N.H. Rev. Stat. Ann. §§ 245:20, 247:17 (1966); New York, N.T. Ct. Cl. Act (1963); Oregon, Ore. Rev. Stat. § 366.430, 373.060, and 105.760 (1965); South Carolina, S.C. Code Ann. § 33-229 (1962); Tennessee, Tenn. Code Ann. § 9-801 et seq. (1956, as amended 1965); Utah, Utah Code Ann. § 63-30-1 et seq. (Supp. 1965); Vermont, Vt. Stat. Ann. T. 19 § 29, 33 (1959); Washington, Rev. Code Wash. § 4.92.010 et seq. (1963).

The purchase of liability insurance constitutes in some states a waiver of immunity. Eleven states authorizing the purchase of general liability insurance,[202] and six states authorizing only automobile liability insurance,[203] have express provisions waiving their immunity to the extent of the insurance. Six other states, including Colorado, are also permitted to purchase either general or automobile liability insurance, but the statutes do not indicate that the purchase constitutes a waiver of the defense of sovereign immunity.[204]

Other Factors affecting immunity or liability. Several states have constitutional prohibitions against the enactment of special acts giving legislative relief.[205] Another significant fact is that enactment of procedural statutes authorizing suits against the state or its subdivisions by all persons having claims against them has very little bearing upon the substantive tort liability of the government entity. In many states, these enactments have been interpreted as merely permitting the filing of suits or claims, but as having no effect upon the state's substantive tort liability, the theory being that these statutes merely permit actions to be brought when liability independently exists.206

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202. Arkansas, Ark. Stat. Ann. § 66-3240 et seq. (1963 Supp.); Idaho, Idaho Code § 41-3501 et seq. (1962); Indiana, Ind. Stat. Ann. § 39-1819 (Burns 1963); Iowa, Iowa Code § 517.1 (1966); Montana, Mont. Rev. Code § 83-701 et seq. (1965 Supp.); Nevada, Nev. Rev. Stat. §§ 41.037, 41.038 (1965); New Hampshire, N.H. Rev. Stat. Ann. § 412:3 (1955, as amended 1961); New Mexico, N.M. Stat. Ann. § 5-6-18 et seq. (1966 Supp.); Oregon, Ore. Rev. Stat. §§ 243.110, 278.090 (1965); Utah, Utah Code Ann. § 63-30-1 et seq. (1965 Supp.); Vermont, Vt. Stat. Ann. T. 29 § 1403 et seq. (1959).

203. Connecticut, Conn. Gen. Stat. § 52-556 (1958); Florida, Fla. Stat. §§ 234.03, 240.191, 455.06 (1965 Supp.); Georgia, Ga. Code Ann. §§ 32-429, 32-431 (1965 Supp.); Kansas, Kan. Stat. Ann. § 12-2601 et seq. (1964); North Dakota, N.D. Rev. Code § 39-01-08 (1965 Supp.); Oklahoma, Okla. Stat. Ann. T. 47 §§ 157.1, 158.1 (1962, as amended 1963).

204. California, Calif. Govt. Ann. §§ 990-991.2 (Supp. 1965); Colorado, C.R.S. § 13-10-1 (1963); Kentucky, K.R.S. § 44-055 (1962); Michigan, Mich. Stat. Ann. § 3.996 (1)-(15) (1948, as amended 1964); Pennsylvania, Pa. Stat. Ann. T. 71 § 364 (Purdon 1962); Wisconsin, Wis. Stat. Ann. § 66.18 (1965).

205. E.g., Neb. Const. Art. III, § 18.

206. E.g., Lauritzen v. Chesapeake Bay Bridge and Tunnel Dist., 259 F. Supp. 633 (1966); Va. Code § 8-752 et seq. (1957, as amended 1966).

TABLE IX

States In Which Liability Is General Rule

Alaska[1]	New York[2]
Arizona[3]	Oregon[2]
Hawaii[1]	Vermont[2]
Iowa[2]	Washington[2]
Nevada[2]	

1 Adopted at statehood statutes patterned after the Federal Tort Claims Act.

2 Enacted statutes which have abolished sovereign immunity.

3 Is liable at common law as result of judicial abrogation of doctrine.

TABLE X

States Where Immunity Is Derived From Constitution

Group 1	Group 2		Group 3
Alabama	California	Ohio	Idaho
Arkansas	Delaware	Oregon	Montana
Illinois	Florida	Pennsylvania	Nevada
West Virginia	Indiana	South Carolina	Utah
	Kentucky	South Dakota	
	Louisiana	Tennessee	
	Nebraska	Wisconsin	
	North Dakota	Wyoming	

Group 1. Constitutional provision takes an affirmative form to the effect that the state is immune from suit.

Group 2. Constitutional provisions construed by courts to confer immunity in the absence of express legislative action.

Group 3. Constitution establishes a board of examiners to hear and determine claims against the state.

TABLE XI

States Where Immunity Is Conferred By Statute*

California Michigan Utah

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* These states are immune generally, but have broad statutory exceptions to their immunity.

TABLE XII

States Where Immunity Is Derived From Common Law

COLORADO	Massachusetts	New Mexico
Connecticut	Minnesota	North Carolina
Georgia	Mississippi	Oklahoma
Kansas	Missouri	Rhode Island
Maine	New Hampshire	Texas
Maryland	New Jersey	Vermont
		Virginia

TABLE XIII

States Which Are Liable For Negligent Operation of Motor Vehicles

Alaska	Iowa	Pennsylvania
Arizona	Kansas	South Carolina
California	Michigan	Tennessee
COLORADO	Nevada	Utah
Connecticut	New York	Vermont
Hawaii	Oregon	Washington
		Wisconsin

TABLE XIV

States Which Are Liable for Injuries Caused By Defective Highways and Bridges

Alaska	Iowa	New York
Arizona	Kansas	Oregon
California	Louisiana	South Carolina
Connecticut	Maine	Tennessee
Georgia	Massachusetts	Utah
Hawaii	Michigan	Vermont
	New Hampshire	Washington

TABLE XV

States Authorizing Purchase of Liability Insurance And Expressly Waiving Immunity to the Extent of the Insurance

Arkansas[1]	Iowa[1]	North Dakota[2]
Connecticut[2]	Kansas[2]	Oklahoma[2]
Florida[2]	Montana[1]	Oregon[1]
Georgia[2]	Nevada[1]	Utah[1]
Idaho[1]	New Hampshire[1]	Vermont[1]
Indiana[1]	New Mexico[1]	

1 General liability insurance.

2 Automobile liability insurance only.

TABLE XVI

States Authorizing Purchase of Liability Insurance But Not Expressly Waiving Immunity

California[1]	Michigan[1]
COLORADO[2]	Pennsylvania[2]
Kentucky[2]	Wisconsin[1]

1 General liability insurance.

2 Automobile liability insurance only.

Inverse Condemnation. Some states have acknowledged liability by classifying some types of property harms as sounding in condemnation for eminent domain purposes. The form of recovery for this type of damage is often referred to as inverse condemnation and is usually supported by the self-executing constitutional prohibition against the taking or damaging of private property for a public purpose. This is done when a tort action for property damage would not succeed because of the immunity doctrine.[207]

The term inverse condemnation in its most general sense is used to indicate an action instituted by a landowner for the purpose of compelling the state to compensate for any taking or damaging of his property. It is distinguished from a tort action in trespass or negligence in that it proceeds on the constitutional theory that private property may not be taken or damaged for public purpose without compensation.[208] More particularly, the term inverse condemnation has been applied to liability for purely consequential damage, i.e., damage in the absence of actual physical taking.

Not all states give relief by way of actions for damages when consequential property harms occur in connection with public uses. In seventeen states there is some liability under a theory of inverse condemnation for purely consequential damage in the absence of an actual taking.[209] In fifteen states there is no

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207. See generally, Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727 (1967); Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. Rev. 3; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

208. "Private property shall not be taken or damaged, for public or private use, without just compensation." Colo. Const. Art. II § 15; "No person shall be deprived of life, liberty or property, without due process of law." Colo. Const. Art. II § 25; Farmers Irrigation Co. v. Game and Fish Commission, 149 Colo. 318, 369 P.2d 557 (1962); Faber v. State, 143 Colo. 240, 353 P.2d 609 (1960), distinguishing Colo. Racing Commission v. Brush Racing Ass'n., Inc., 136 Colo. 279, 316 P.2d 582 (1957) and Ace Flying Service, Inc. v. Colo. Department of Agriculture, 136 Colo. 19, 314 P.2d 278 (1957); Boxberger v. State Highway Dept., 126 Colo. 438, 256 P.2d 1007 (1952).

209. Ariz. Const. Art. II §§ 4,17 and State v. Leeson, 84 Ariz. 44, 323 P.2d 692 (1958); Ark. Const. Art. II §§ 8,13,22 and Hot Springs County v. Bowman, 229 Ark. 790, 318 S.W.2d 603 (1958); Calif. Const. Art. I §§ 13,14 and Frustuck v. City of Fairfax, 212 Cal. App.2d 345, 28 Cal. Rptr. 357 (1963); Colo. Const. Art. II §§ 6,25 and Farmers Irrigation Co. v. Game and

such liability.[210] In addition, the authorities in six states

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Fish Commission, 149 Colo. 318, 369 P.2d 557 (1962); Ill. Const. Art. II §§ 2, 13, 19 and People v. Rosenstone, 16 Ill. 2d 513 (1959); Minn. Const. Art. II § 13 and State v. Anderson, 220 Minn. 139, 19 N.W.2d 70 (1945); Mo. Const. Art. I § 26 and Lewis v. City of Potosi, 348 S.W.2d 577 (Mo. 1961); Neb. Const. Art. I § 21 and Patrick v. City of Bellevue, 164 Neb. 196, 82 N.W.2d 274 (1957); N.M. Const. Art. II § 20 and Board of County Commissioners of Lincoln County v. Harris, 69 N.M. 315, 366 P.2d 710 (1961); Penn. Const. Art. I §§ 10, 11 and Laws of Penn. 1963, No. 6, §§ 502(e), 612; S.C. Const. Art. I §§ 5, 17 and Chick Springs Water Co. v. State Highway Dept., 178 S.C. 415, 183 S.E. 27 (1935); Tex. Const. Art. I §§ 13, 17 and Abilene v. Downs, 367 S.W.2d 153 (Tex. 1963); Vt. Const. Art. I §§ 2, 4 and Griswald v. Town School Dist., 117 Vt. 224, 88 A.2d 829 (1952); Va. Const. Art. IV § 58 and Hicks v. Anderson, 182 Va. 195, 28 S.E.2d 629 (1941); Wash. Const. Art. I §§ 3, 16 and Peterson v. King County, 41 Wash. 2d 907, 252 P.2d 797 (1953); W.Va. Const. Art. III §§ 9, 10, 17 and Morgan v. Logan 125 W.Va 445, 24 S.E.2d 760 (1943); Wyo. Const. Art. I §§ 6, 33 and Hirt v. Casper, 56 Wyo. 57, 103 P.2d 394 (1940).

210. Conn. Const. Art. I §§ 11, 12 and Benson v. Housing Authority of City of New Haven, 145 Conn. 196, 140 A.2d 320 (1958); Fla. Declaration of Rights §§ 4, 12 and City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 1958); Ind. Const. Art. I §§ 12, 21 and State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960); Iowa Const. Art. I §§ 9, 18 and Anderlik v. Highway Commission, 240 Iowa 919, 38 N.W.2d 605 (1949); Kan Bill of Rights § 18 and Richert v. Board of Education of the City of Newton, 177 Kan. 502, 280 P.2d 596 (1955); Me. Const. Art. I §§ 6, 21 and Opinion of the Justices, 103 Me. 506, 69 A. 627 (1908); Mass Declaration of Rights § 10 and Connor v. Metropolitan Dist. Water Supply Commission, 314 Mass. 33, 49 N.E.2d 593 (1943); N.J. Const. Art. I § 20 and N.J. Bell Telephone Co. v. Delaware River Joint Commission, 125 N.J. 235, 15 A.2d 221 (1940); N.C. Const. Art. I § 35 and Snow v. N.C. State Highway Commission, 136 S.E.2d 678 (N.C. 1964); Ohio Const. Art. I §§ 16, 19 and Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958); Okla. Const. Art. II §§ 7, 24 and State v. Alford, 347 P.2d 215 (Okla. 1959); S.D. Const. Art. VI §§ 2, 13 and Vesely v. Charles Mix County, 66 S.D. 570, 287 N.W. 51 (1936); Tenn. Const. Art. I §§ 17, 21 and Hawkins v. Dawn, 347 S.W.2d 480 (Tenn. 1961); Utah Const. Art. I §§ 7, 11, 22 and Fairclough v. Salt Lake County, 10 Utah2d 417, 354 P.2d 105 (1960); Wis. Const. Art. I §§ 9, 13 and Wisconsin Power and Light Co. v. Columbia County, 3 Wis.2d, 87 N.W.2d 279 (1958).

indicate,[211] but do not hold, that there is liability; and five states indicate,[212] but do not hold, that there is no liability.

The political subdivisions. The traditional common law rule applicable to municipal corporations is that there is no liability for injuries caused in the performance of "governmental" functions, whereas liability is imposed for similar injuries caused in the performance by the municipality of "proprietary" functions.[213] This distinction is often referred to as a distinction between activities of employees which are "ministerial" or "discretionary."[214] Liability attaches when an employee is engaged in the performance of "ministerial" duties, but not when he is performing "discretionary" duties. This distinction has not in general been applied in tort suits against the state, because they are usually deemed immune regardless of what kind of functions they are performing. The distinction is not always applied to counties, which in some jurisdictions are treated at common law as arms of the state, but in general counties are also subject to the distinction.[215] These distinctions are also applied to school districts, special districts and other political entities.[216]

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211. Ala. Const. Art. I § 23, Art. XII § 235 and Cf. McClung v. Louisville and N.R.R., 255 Ala. 302, 51 So.2d 371 (1951); Ga. Const. §§ 2-103, 2-301 and Cf. Sheehan v. Richmond County, 100 Ga. App. 496, 111 S.E.2d 924 (1959); La. Const. Art. I §§ 2, 9 and Cf. Beck v. Boh. Bros. Construction Co., 72 So. 2d 765 (La. 1954); Miss. Const. Art. III §§ 14, 17 and Cf. Quin v. Mississippi State Highway Commission, 194 Miss. 411, 11 So.2d 810 (1943) (dictum); Mont. Const. Art. III §§ 14, 27 and Cf. State v. District Court, 48 Mont. 614, 139 P. 791 (1914) (dictum); N.D. Const. Art. I §§ 13, 14, 22 and Cf. Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957).

212. Idaho Const. Art. I §§ 13, 14, 18 and Cf. Turcotte v. State, 84 Ida. 451, 373 P.2d 569 (1962); Ken. Const. § 13 and Cf. Danville v. Smallwood, 347 S.W.2d 516 (Ky. 1961); Md. Const. Art. III § 40 and Cf. Feldman v. Star Homes, Inc., 199 Md. 1, 84 A.2d 903 (1951) (dictum); N.Y. Const. Art. I §§ 6, 7 and Cf. In re East 5th St., Borough of Manhattan, 146 N.Y.S. 2d 794 (1955) (dictum); Ore. Const. Art. I §§ 10, 18 and Cf. Tomasek v. State, 196 Ore. 120, 248 P.2d 703 (1952).

213. See notes 14, 21-35, supra.

214. See notes 37-47, supra.

215. See notes 10-12, supra.

216. See notes 15, 16, supra.

Immunity of subdivisions. In 35 states, including Colorado, counties, municipalities, and other political subdivisions are immune from tort liability, at least for "governmental" and "discretionary" functions, either at common law or by statute.[217] In three of these states general immunity is conferred by stat-

217. Alabama, Hillis v. City of Huntsville, 151 So.2d 240 (Ala. 1963); Arkansas, Kirksey v. City of Fort Smith, 300 S.W.2d 257 (Ark. 1957); California, see note 218, infra.; Colorado, County Commissioner v. Bish, 18 Colo. 474, 33 Pac. 184 (1893), City and County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960); Connecticut, Pluhowsky v. City of New Haven, 197 A.2d 645 (Conn. 1964); Delaware, Pruett v. Dayton, 168 A.2d 543 (Del. 1961); Georgia, Ayers v. Franklin County, 73 Ga. App. 207, 36 S.E.2d 110 (1945), Ga. Code Ann. § 23-1502 (Supp. 1965), City of Thompson v. Davis, 92 Ga. App. 216, 88 S.E.2d 300 (1955), Ga. Code Ann. §§ 69-301, 69-303 (1957); Idaho, Ford v. City of Caldwell, 79 Idaho 499, 321 P.2d 589 (1958); Indiana, Sherfey v. City of Brazil, 213 Ind. 493, 13 N.E.2d 568 (1938), Flowers v. Board of Commissioner of County of Vanderburgh, 240 Ind. 668, 168 N.E.2d 224 (1960); Kansas, Wilburn v. Boeing Airplane Co., 188 Kan. 722, 366 P. 2d 246 (1961), Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966); Louisiana, Hamilton v. City of Shreveport, 247 La. 784, 174 So.2d 529 (1965); Maine, Dugan v. City of Portland, 157 Me. 521, 174 A.2d 660 (1961); Maryland, Irvine v. Montgomery County, 210 A.2d 359 (Md. 1965); Massachusetts, Moschella v. City of Quincy, 196 N.E.2d 620 (Mass. 1964); Michigan, see note 218, infra.; Missouri, Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963), Smith v. Consolidated School Dist. No. 2, 408 S.W.2d 50 (Mo. 1966); Montana, Barovich v. City of Miles City, 135 Mont. 394, 340 P.2d 819 (1959), Jacoby v. Chouteau County, 112 Mont. 70, 112 P.2d 1068 (1941); Nebraska, McKinney v. County of Cass, 180 Neb. 685, 144 N.W.2d 416 (1966); New Hampshire, Gossler v. City of Manchester, 107 N.H. 310, 221 A.2d 242 (1966); New Mexico, Andrade v. City of Alburquerque, 74 N.M. 535, 395 P.2d 597 (1965); North Carolina, Mosseller v. City of Asheville, 267 N.C. 104, 147 S.E.2d 558 (1966); North Dakota, Belt v. City of Grand Forks, 68 N.W.2d 114 (N.D. 1955); Ohio, Hyde v. City of Lakewood, 2 Ohio St.2d 155, 207 N.E.2d 547 (1965); Oklahoma, Chicago, R.I. and Pac. R.R. Co. v. Board of County Commissioner, 389 P.2d 476 (Okla. 1964); Pennsylvania, Esposito v. Emery, 249 F. Supp. 308 (E.D.Pa. 1965), Dillon v. York City School Dist., 422 Pa. 103, 220 A.2d 896 (1966); Rhode Island, Mais v. Ilg, 199 A.2d 727 (R.I. 1964); South Carolina, Chilton v. City of Columbia, 247 S.C. 407, 147 S.E.2d 642 (1966); South Dakota, Conway v. Humbert, 145 N.E.2d 524 (1966); Tennessee, Johnson v. City of Allison, 50 Tenn. App. 532, 362 S.W.2d 813 (1962); Texas, City of San Antonio v. Ramundo, 411 S.W.2d 428 (Tex. 1967); Utah, see note 218, infra;

ute.[218] In the majority of these jurisdictions the proprietary-governmental distinction is applied both to municipalities and to counties. In five states only the counties enjoy immunity, municipalities having been made liable either by statute or at common law.[219] In eleven states, both counties and municipalities appear to be liable at common law, and by statute.[220]

Liability of subdivisions. The broadest general category of liability is that of municipalities for injuries caused in the performance of so-called "proprietary" functions. Although the criteria for distinguishing proprietary from governmental functions vary from state to state, there is general agreement that a city may be liable in the former but not the latter area. As previously indicated, this distinction is also generally applied to counties.

Virginia, Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962); West Virginia, Jones v. City of Mannington, 148 W.Va. 583, 136 S.E.2d 882 (1964); Wyoming, Chavez v. City of Laramie, 389 P.2d 23 (Wyo. 1964), Fanning v. City of Laramie, 402 P.2d 460 (Wyo. 1965).

218. California Calif. Govt. Code Ann. §§ 810-996.6 (West 1966); Mich. Comp. Laws §§ 691.1401-1415 (Supp. 1965); Utah Code Ann. § 63-30-10 et seq. (Supp. 1965).

219. Florida, Koulakis v. Boyd, 138 So.2d 505 (Fla. 1962), Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Illinois, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959), Hutchings v. Kraject, 34 Ill.2d 379, 215 N.E.2d 274 (1966); Kentucky, Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Mississippi, Logan v. City of Clarksdale, 340 Miss. 716, 128 So.2d 537 (1961); New Jersey, Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966), Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966).

220. Alaska, Alaska Stat. § 09.50.250 et seq. (Supp. 1966), Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963); Arizona, Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); Hawaii, Rev. Laws of Hawaii § 245A-1 et seq. (1965 Supp.), Carter v. County of Hawaii, 47 Haw. 68, 384 P.2d 308 (1963); Iowa, Iowa Code § 25A-1 et seq. (1963); Minnesota, Minn. Stat. Ann. § 466.01 et seq. (1963), Spanel v. Mounds View School Dist. No. 621, 118 N.W.2d 795 (Minn. 1962); Nevada, Nev. Rev. Stat. §§ 41.031-.038 (1965), Walsh v. Clark County School Dist., 419 P.2d 775 (Nev. 1966); New York, N.Y. Ct. Cl. Act § 8 (1963), Hefele v. City of New York, 267 N.Y.S. 2d 946 (1966); Oregon, Ore Laws 1967, Ch. 627; Washington, Rev. Code Wash. § 4.92.010 et seq. (1963), Provins v. Bevis,

As noted above, in the area of "governmental" activities, eleven states hold their subdivisions liable at common law and/or by statute for their torts.[221] Although California, Michigan and Utah have by statute enacted the rule of governmental immunity as applicable to subdivisions, these three states have made broad statutory exceptions to the rule which, in effect, makes the subdivisions liable for most activities involving the possibility of injury to private persons.[222] In five states municipalities but not counties are generally liable at common law for their torts.[223]

Liability for road defects. By far the most specific exception to the immunity rule is statutory or common law liability for injuries arising from defective conditions of public streets and sidewalks. In 26 states both counties and municipalities are so liable[224] and in six additional states only municipalities are liable.[225]

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70 Wash. Dec.2d 127, 422 P.2d 505 (1967); Wisconsin, Wis. Stat. Ann. § 895.43 (1966).

221. See note 220, supra.

222. See note 218, supra.

223. See note 219, supra.

224. Alabama, Code of Ala. T. 37 § 502 (1958), Code of Ala. T. 23 § 57 (1958), Densmore v. Birmingham, 223 Ala. 210, 135 So. 320 (1931) (limits the statute's impact to ministerial functions); Alaska, Alaska Stat. § 09.65.70 (Supp. 1966); Arizona, Taylor v. Roosevelt Irrigation Dist., 71 Ariz. 254, 226 P.2d 154 (1950); California, Calif. Govt. Code Ann. §§ 815-996.6 (Supp. 1963); Connecticut, Conn. Gen. Stat. § 13a-149 (Supp. 1966); Georgia, Ga. Code Ann. §§ 95-1001, 69-131 (1958); Hawaii, Rev. Laws of Hawaii § 245A-1 et seq. (1965 Supp.); Iowa, Iowa Code § 25A.1 et seq. (1966); Kansas, Kan. Stat. Ann. § 68-301 (1964), Bishop v. Board of County Commissioners, 188 Kan. 603, 364 P.2d 65 (1961); Maine, Me. Rev. Stat. Ch. 313 § 3651 et seq. (1964), Beqing v. Bernard, 160 Me. 233, 202 A.2d 547 (1964); Massachusetts, Mass. Gen. Laws Ann. Ch. 84 § 15 (1961, as amended 1965), Souza v. City of New Bedford, 22 Mass. App. Dec. 106 (1961); Michigan, Mich. Comp. Laws §§ 691.1401-.1415 (Supp. 1965); Minnesota, Minn. Stat. Ann. §§ 466.01-.17 (1965); Nebraska, Nev. R.R. Stat. §§ 14-801, 39-809 (1943); Nevada, Nev. Rev. Stat. § 41.031 et seq. (1965); New Hampshire, N.H. Rev. Stat. Ann. §§ 245:20, 247:17 (1966); New York, N.Y. Ct. Cl. Act (1963); North Dakota, N.D. Rev. Code § 40-42-01 et seq. (1960); Ohio, Ohio Rev. Code Ann. § 305.12 (Page 1953); Oregon, Ore. Rev. Stat. § 368.940 (1965), Oregon Laws 1967, Ch. 627; South Carolina, S.C. Code Ann. §§ 33-234, 47-70, 47-71, 14-401 et seq., 33-921 et seq. (1962); South

Liability for negligent operation of motor vehicles. Another area in which a number of states have imposed liability upon their political subdivisions, either by statute or by court decision, is the area of injuries caused by the negligent operation of motor vehicles. In 19 states, including Colorado, municipalities and counties both are liable for damages caused by the negligent operation of motor vehicles.[226] In five additional

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Dakota, S.D. Code § 28.0913 (Supp. 1960); Utah, Utah Code Ann. § 63-30-8 (Supp. 1965); Washington, Rev. Code Wash. § 4.92.010 et seq. (1963); West Virginia, W.Va. Code Ann. § 1597 (9) (1961), Cunningham v. County Court of Wood County, 134 S.E.2d 725 (W.Va. 1964); Wisconsin, Wis. Stat. Ann. § 81.15 (1965), Dunwiddie v. Rock County, 28 Wis.2d 568, 137 N.W.2d 388 (1965).

225. Florida, Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), Koulakis v. Boyd, 138 So.2d 505 (Fla. 1962); Illinois, Ill. Ann. Stat. Ch. 34 § 301.1 (Smith-Hurd Supp. 1961), Hutchings v. Kraject, 34 Ill.2d 379, 215 N.E.2d 274 (1966); Kentucky, Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Louisiana, Carlisle v. Parrish of East Baton Rouge, 114 So.2d 62 (1959); Mississippi, Logan v. City of Clarksdale, 240 Miss. 716, 128 So.2d 537 (1961); North Carolina, N.C. Gen. Stat. § 160.54 (1964), Faw v. North Wilkesboro, 253 N.C. 406, 117 S.E.2d 14 (1960); Vermont, Vt. Stat. Ann. T. 19 § 1371 (1959).

226. Alaska, Alaska Stat. § 09.65.70 (Supp. 1966); Arizona, Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); California, Calif. Govt. Code Ann. §§ 815-996.6 (1963); Colorado, C.R.S. § 13-10-1 et seq. (1963); Hawaii, Rev. Laws of Hawaii § 245A-1 et seq. (1965 Supp.); Iowa, Iowa Code § 25A.1 et seq. (1966); Michigan, Mich. Stat. Ann. 3.996 (1)-(15) (1964); Minnesota, Spanel v. Mounds View School Dist. No. 621, 118 N.W.2d 795 (1962), Minn. Stat. Ann. § 466.01 et seq. (1965); Nevada, Nev. Rev. Stat. § 41.031 (1965); New York, N.Y. Ct. Cl. Act (1963); North Carolina, N.C. Stat. Ann. §§ 153.9.44, 160.191.1 (1964); Ohio, Ohio Rev. Code Ann. §§ 307.44, 701.02 (Page 1953); Oregon, Oregon Laws 1967, Ch. 627; Pennsylvania, Pa. Stat. Ann. T. 75 § 623 (Purdon 1960); South Carolina, S.C. Code Ann. §§ 33-234, 33-921, 47-70, 47-71, 14-401 (1962), Clawson v. City of Sumter, 148 S.E.2d 350 (1966); Utah, Utah Code Ann. § 63-30-7 (Supp. 1965); Washington, Rev. Code Wash. § 4.92.010 et seq. (1963), Kelso v. City of Tacoma, 63 Wash.2d 913, 390 P.2d 2 (1964); West Virginia, W.Va. Code Ann. § 494 (6) (1961); Wisconsin, Wis. Stat. Ann. § 345.01 (1965).

states only the municipalities are so liable.[227]

Insurance. In 25 states, including Colorado, the political subdivisions are authorized to purchase some form of liability insurance,[228] and in 14 of these states the statute indicates that such purchase constitutes a waiver of immunity to the extent of the coverage.[229]

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227. Florida, Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Illinois, Ill. Ann. Stat. Ch. 34 § 301.1 (Smith-Hurd Supp. 1966), Hutchings v. Kraject, 34 Ill.2d 379, 215 N.E.2d 274 (1966) (held statute unconstitutional); Kentucky, Haney v. City of Lexington, 386 S.W.2d 738 (1962); Mississippi, Logan v. City of Clarksdale, 240 Miss. 716, 128 So.2d 537 (1961); New Jersey, Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964), Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966).

228. Arkansas, Ark. Stat. Ann. § 66-3240 et seq. (Supp. 1963); California, Calif. Govt. Code Ann. §§ 990-991.2 (1965 Supp.); Colorado, C.R.S. § 13-10-3 (1963); Florida, Fla. Stat. §§ 234.03, 240.191, 455.06 (1965 Supp.); Georgia, Ga. Code Ann. § 56-2437 (1960), Ga. Const. Art. 2-5902; Idaho, Idaho Code § 41.3501 et seq. (1962), Dewey v. Keller, 86 Idaho 506, 388 P.2d 988 (1964); Indiana, Ind. Stat. Ann. § 39-1819 (Burns 1965), Hardbeck v. Anderson, 209 N.E.2d 769 (Ind. 1965); Iowa, Iowa Code § 517.1 (1966); Kansas, Kan. Stat. Ann. § 12-2601 et seq. (1964), Caywood v. Board of County Commissioners, 194 Kan. 419, 399 P.2d 561 (1965); Michigan, Mich. Stat. Ann. § 3.996 (1)-(15) (1964); Minnesota, Minn. Stat. Ann. § 466.01 et seq. (1965); Nevada, Nev. Rev. Stat. § 41.031 (1965); New Hampshire, N.H. Rev. Stat. Ann. § 412:3 (1955, as amended 1961), Cushman v. Grafton County, 97 N.H. 32, 79 A.2d 630 (1951); New Mexico, N.M. Stat. Ann. § 5-6-18 et seq. (Supp. 1966); North Carolina, N.C. Gen. Stat. § 153.9.44 (1964), N.C. Gen. Stat. § 160.191.1 (1964); North Dakota, N.D. Rev. Code §§ 39-01-08, 40-43-07 (Supp. 1965); Ohio, Ohio Rev. Code Ann. § 307.44 (Page 1953); Oklahoma, Okla. Stat. Ann. T. 11 § 16.1 (1959); Oregon, Ore. Rev. Stat. § 243.110 (1965), Vendrell v. School Dist. No. 26C, 226 Ore. 263, 360 P.2d 282 (1961); Pennsylvania, Pa. Stat. Ann. T. 53 § 65713, T. 16 §§ 2303, 5502 (1956); Utah, Utah Code Ann. § 63-30-28 (Supp. 1965); Vermont, Vt. Stat. Ann. T. 29 § 1403 et seq. (1959), T. 24 § 1092 (1959); West Virginia, W.Va. Code Ann. § 494 (6) (1961); Wisconsin, Wis. Stat. Ann. § 66.18 (1965); Wyoming, Wyo. Stat. Ann. § 15-1-4 (1965).

229. See note 228, supra. Florida, Georgia, Idaho, Indiana, Kansas, Minnesota, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Utah, Vermont, Wyoming.

TABLE XVII

Political Subdivisions Immune From Liability at Common Law and by Statute (Both Counties and Municipalities)

Alabama	Louisiana	North Carolina	Utah[1]
Arkansas	Maine	North Dakota	Vermont
California[1]	Maryland	Ohio	Virginia
COLORADO	Massachusetts	Oklahoma	West Virginia
Connecticut	Michigan[1]	Pennsylvania	Wyoming
Delaware	Missouri	Rhode Island	
Georgia	Montana	South Carolina	
Idaho	Nebraska	South Dakota	
Indiana	New Hampshire	Tennessee	
Kansas	New Mexico	Texas	

[1] Statutes which make subdivisions immune generally, but have broad exceptions to immunity rule.

TABLE XVIII

Political Subdivisions Liable at Common Law and/or by Statute (Both Counties and Municipalities)

Alaska	Nevada
Arizona	New York
Hawaii	Oregon
Iowa	Washington
Minnesota	Wisconsin

TABLE XIX

States In Which Counties Are Immune and Municipalities Are Liable

Florida
Illinois
Kentucky
Mississippi
New Jersey

TABLE XX

Political Subdivisions Liable For Injuries Caused by Defective Conditions of Streets, Sidewalks, etc.

Alabama	Kentucky[1]	North Carolina[1]
Alaska	Louisiana[1]	North Dakota
Arizona	Maine	Ohio
California	Massachusetts	Oregon
Connecticut	Michigan	South Carolina
Florida[1]	Minnesota	South Dakota
Georgia	Mississippi[1]	Utah
Hawaii	Nebraska	Vermont[1]
Illinois[1]	Nevada	Washington
Iowa	New Hampshire	West Virginia
Kansas	New York	Wisconsin

[1] Only municipalities are liable; counties are immune.

TABLE XXI

Political Subdivisions Liable For Injuries Caused by Negligent Operation of Motor Vehicles

Alaska	Minnesota	Utah
Arizona	Mississippi[1]	Washington
California	Nevada	West Virginia
COLORADO	New Jersey[1]	Wisconsin
Florida[1]	New York	
Hawaii	North Carolina	
Illinois[1]	Ohio	
Iowa	Oregon	
Kentucky[1]	Pennsylvania	
Michigan	South Carolina	

[1] Only municipalities are liable; counties are immune.

TABLE XXII

Political Subdivisions Authorized to Purchase Liability Insurance*

Arkansas	Minnesota[1]	Utah[1]
California	Nevada[1]	Vermont[1]
COLORADO[2]	New Hampshire[1]	West Virginia
Florida[1]	New Mexico[1]	Wisconsin
Georgia[1&2]	North Carolina[1]	Wyoming[1]
Idaho[1]	North Dakota	
Indiana[1]	Ohio[2]	
Iowa	Oklahoma[1]	
Kansas[1&2]	Oregon[1]	
Michigan	Pennsylvania	

* Includes either general liability insurance or automobile liability insurance, or both.

1 Statutes authorizing purchase of liability insurance expressly waive the subdivisions immunity to the extent of the insurance coverage so obtained.

2 Statutes authorize purchase of automobile liability insurance only.

Remedies and Procedures For Adjudicating Claims

Introduction. In those states in which liability for torts is the general rule, either as a result of judicial decision or legislative enactment, a claimant may usually bring an action against the state in any proper court the same as if he were suing a private person. However, there are generally provided by statute certain procedures that the claimant must follow. In those states in which immunity from liability is the general rule the state may either not be sued at all, or may be sued only in the manner and courts prescribed by the legislature. The manner in which tort claims may be enforced against the states and their subdivisions, either in those situations in which responsibility has been undertaken or in those situations in which the state and subdivisions remain immune, varies widely.

Summary of remedies in states. Twelve states provide for recovery in their regular courts by all or most tort claimants.[230]

230. See note 191, 192, 193, and 194, supra. These states are Alaska, Arizona, California, Hawaii, Iowa, Michigan, Nevada, New York, Oregon, Utah, Vermont, and Washington.

The regular courts of eight additional states, including Colorado, are presumably open to enforce the statutory liability of those states, i.e., for defective highways and/or negligent operation of motor vehicles.[231] Nine states have administrative claims tribunals or officers whose determinations are final.[232] Ten states,

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231. These states are Colorado, Connecticut, Florida, Kansas, Louisiana, Maine, Massachusetts, and South Carolina.

232. Alabama, Code of Ala. T. 55 §§ 333, 334 (Supp. 1963) (Board of Adjustment. The Board hears claims for damages to persons or property caused by the state or its agencies. Relief for injuries caused by counties or municipalities may not be had before the Board.); Arkansas, Ark. Stat. Ann. § 13-1401 et seq. (1965 Supp.) (State Claims Commission); Connecticut, Conn. Gen. Stat. § 4-141 (Supp. 1963) (Claims Commission. The Commission's determination is final as to claims less than $2,500. Larger claims require legislative approval and the Commission's action is merely recommendatory to the legislature. The Commission may also authorize suits against the state in the regular courts, but the state cannot be sued without the consent of the Commission.); Kentucky, K.R.S. § 44-070 et seq. (1962) (Board of Claims. The Board has jurisdiction to hear and to allow claims for damages as a result of negligence on the part of the state and its agencies. The jurisdiction of the Board is exclusive and a claim shall not exceed $10,000. The Board's findings of fact, where based on substantial evidence, are conclusive upon review by the courts and the awards are enforceable as court judgments.), Foley Construction Co. v. Ward, 375 S.W. 2d 392 (Ky. 1964); Massachusetts, Mass. Gen. Laws Ann. Ch. 12 § 3A-D (1966) (Attorney General. The Attorney General has authority to investigate and determine claims against the state not otherwise provided for by law. The Attorney General's determination is final up to the amount of $1,000. Upon a determination that the claimant is entitled to damages in excess of $1,000, the Attorney General's decision is only recommendatory to the general court.); North Carolina, N.C. Gen. Stat. § 143.291 (1964, as amended 1965) (The Industrial Commission is authorized to hear and determine tort claims against the state. The Commission determination may be appealed on questions of law, but findings of fact are conclusive if supported by substantial evidence. The amount of damages awarded cannot exceed the amount of $12,000.); Ohio, Ohio Rev. Code Ann. § 127.11 (Page Supp. 1966) (Sundry Claims Board. The Board has jurisdiction to hear claims against the state for the payment of which no money has been appropriated. The Board has authority to determine and order final payment of claims not exceeding $1,000. All claims over $1,000 are reported to the following session of the legislature for action.); Tennessee, Tenn. Code Ann. §

including Colorado, have administrative tribunals or legislative committees whose determinations are merely recommendatory to the legislature.[233] In addition, several states have passed private

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9-801 et seq. (1956, as amended 1965) (Board of Claims. The Board has jurisdiction to hear and determine all claims against the state for personal injuries or property damage caused by defective highways and negligence in the operation of motor vehicles. The decision of the Board upon any claim is final.); West Virginia, W.Va. Code Ann. § 494 (6) (1961) (Attorney General. The Attorney General is authorized to act as a special instrumentality of the legislature for the purpose of considering and determining claims against the state and recommending the disposition thereof to the legislature.).

233. Colorado, C.R.S. § 130-10-3 (1965 Supp.) (Claims Commission. The Commission was established to aid the General Assembly in the consideration and evaluation of tort claims against the state. The determination of the Commission is recommendatory to the General Assembly.); Georgia, Ga. Code Ann. § 47-504 et seq. (Supp. 1965) (Claims Advisory Board. The Board's determination of claims is recommendatory to the General Assembly.); Idaho, Idaho Const. Art. 4 § 818, Art. 5 § 10. (The constitution provides that a Board of Examiners consisting of certain state officials shall have exclusive jurisdiction and power to examine all claims against the state and that no claim shall be passed upon by the legislature without having been first so presented. Another section of the constitution provides that the Supreme Court shall have original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory to be reported to the legislature for action. The courts have reconciled the two sections by requiring claims to be submitted to the Board before the court may hear them. Thomas v. State, 16 Idaho 81, 100 Pac. 761 (1901), Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962). The legislature has also set up procedures for presenting claims to the Board. Idaho Code §§ 67-1008, 67-2001 (1947). The word "claims" has not been held to include tort claims so that there can be no recovery for torts of agents or employees of the state or its instrumentalities, unless the immunity is expressly waived by statute.); Minnesota, Minn. Stat. Ann. § 3.66 et seq. (1965) (State Claims Commission. The Commission was created in 1953 and given jurisdiction to adjudicate and hear claims against the state, its determination being only recommendatory to the legislatire.); Montana, Mont. Const. Art. VII § 20, implemented by Mont. Rev. Code § 82-1101 et seq. (Supp. 1965) (Board of Examiners. The Board has the duty of examining all unliquidated claims against the state, its final determination being recommendatory to the legislature.); Nevada, Nev. Const. Art. IV § 22. (The constitution creates

legislation compensating individuals having tort claims against the state. Fourteen states are authorized to purchase general liability insurance and nine more are authorized to purchase automobile liability insurance.[234] When insurance is in force, there is of course a right to recover against the insurer. In three states, a claimant must bring his action against the state in a special claims court.[235]

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a Board of Examiners with the duty of examining all unliquidated claims against the state. The conclusion and determination of the Board is only recommendatory to the legislature.); Rhode Island, R.I. Gen. Laws § 22-7-1 et seq. (1956) (The legislature has established a joint committee on accounts and claims, consisting of four Senate members and five House members, with the responsibility of investigating all claims against the state. The committee's determination is recommendatory to the legislature.); South Dakota, S.D. Code § 33.4301 et seq. (Supp. 1960) (The state has established a Commission of Claims, with each senior circuit judge in the state to serve as commissioner in the respective counties, to hold hearings on tort and contract claims against the state, and to transmit advisory recommendations concerning them to the next session of the legislature.); Utah, Utah Const. Art. VII § 13, Utah Code Ann. § 63-6-10 (1953) (Claims against the state must be filed with the governmental entity or its insurance carrier, and upon its denial an action may be brought in the courts. If payment by the entity is not authorized by law then the judgment or claim shall be presented to the Board of Examiners.); Vermont, Vt. Stat. Ann. T. 32 § 935 (1959) (A Claims Commission has been established to hear and determine claims when the amount claimed does not exceed $1,000. An appeal from the decision of the Commission is granted by petition of the claimant to the General Assembly.).

234. See notes 202, 203, and 204, supra.

235. Illinois, Ill. Stat. Ann. Ch. 37 § 439.1 et seq. (Smith-Hurd Supp. 1966) (In 1903 the legislature created a Court of Claims, which in 1917 was given jurisdiction of matters in contract, and in 1945 was given jurisdiction in actions concerning the negligence of the state's officers, agents and employees in the course of their employment. The determination of the court is final and conclusive and awards for damages for torts may be granted only up to $25,000. The entire enactment has been interpreted as "a complete waiver by the state of its immunity from liability in tort for the negligent exercise of a governmental function." Rickelman v. State, 19 Ill. Ct. Cl. 54 (1949); Michigan, Mich. Stat. Ann. §§ 27A.6401-.6475 (1962) (Claims against the state authorized by Mich. Stat. Ann. §§ 3.996 (1)-(15) (1964) are brought in

Summary of remedies in subdivisions. With respect to political subdivisions, they are generally liable for injuries caused in the course of performing a proprietary activity and this liability can be enforced in the regular courts. In addition, the courts of 13 states enforce the general liability of their subdivisions in tort.[236] Five more states enforce the liability of municipalities only in the regular courts,[237] and the courts of 17 states, including Colorado, are open to enforce the specific statutory liabilities of subdivisions.[238] Twenty-five states authorize their political subdivisions to purchase general liability insurance and/or automobile liability insurance.[239] To the extent that such insurance is in force, an injured party has a legal remedy against the insurer. In addition to the foregoing, it is probable that in many cases informal administrative remedies are available to a person injured by a subdivision.

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the Court of Claims created pursuant to the Court of Claims Act. This act has been construed as not waiving the defense of governmental immunity which is applicable unless prohibited by the 1964 legislation.); New York, N.Y. Const. Art. VI § 23. (New York's constitution provides for the establishment of a court of claims to hear claims providing that "the state. . .waives its immunity from liability and action and. . .assumes liability and consents to have the same determined in accordance with the same rules of law as applied to action. . .against individuals and corporations. . ." N.Y. Ct. Cl. Act § 8 (1963). New York has thus made itself and all its agencies and political subdivisions generally liable for torts.).

236. See notes 218 and 220, supra.

237. See note 219, supra.

238. See notes 224, 225, 226, and 227, supra.

239. See note 228, supra.

TABLE XXIII

States In Which Action Against State May be Brought In Regular Courts to Enforce General Liability

Alaska	Nevada
Arizona	New York
California	Oregon
Hawaii	Utah
Iowa	Vermont
Michigan	Washington

TABLE XXIV

States In Which Action Against State May be Brought In Regular Courts to Enforce Statutory Liability

COLORADO	Louisiana
Connecticut	Maine
Florida	Massachusetts
Kansas	South Carolina

TABLE XXV

States In Which Claims Must be Presented To An Administrative Tribunal Or Officer Whose Determination Is Final

Alabama - Board of Adjustment
Arkansas - State Claims Commission
Connecticut - State Claims Commission - final determination not to exceed $2,500
Kentucky - Board of Claims - final determination not to exceed $10,000
Massachusetts - Attorney Gnneral - final determination not to exceed $1,000
North Carolina - Industrial Commission - final determination not to exceed $12,000
Ohio - Sundry Claims Board - final determination not to exceed $1,000
Tennessee - Board of Claims
West Virginia - Attorney General

TABLE XXVI

States In Which Claims Must Be Presented To An Administrative Tribunal or Legislative Committee Whose Determination Is Recommendatory To The Legislature

COLORADO - Claims Commission
Georgia - Claims Advisory Board
Idaho - constitutional Board of Examiners
Minnesota - State Claims Commission
Montana - constitutional Board of Examiners
Nevada - constitutional Board of Examiners
Rhode Island - Joint Committee on Accounts and Claims - Legislative
South Dakota - Commission of Claims
Utah - constitutional Board of Examiners
Vermont - Claims Commission - hears claims not in excess of $1,000

TABLE XXVII

States In Which Action Must Be Brought In A Special Court

Illinois - Court of Claims
Michigan - Court of Claims
New York - Court of Claims

TABLE XXVIII

States In Which General Liability of Subdivisions Is Enforced In Regular Courts

Alaska	Michigan	Utah
Arizona	Minnesota	Washington
California	Nevada	Wisconsin
Hawaii	New York	
Iowa	Oregon	

TABLE XXIX

States In Which General Liability Of Municipalities Only Is Enforced In Regular Courts

Florida
Illinois
Kentucky
Mississippi
New Jersey

TABLE XXX

States In Which Statutory Liabilities of Subdivisions Are Enforced In Regular Courts

Alabama	Louisiana	North Carolina
COLORADO	Maine	North Dakota
Connecticut	Massachusetts	Oregon
Georgia	Montana	South Carolina
Kansas	Nebraska	South Dakota
	New Hampshire	West Virginia

Methods of providing remedies. As can be seen from the above summary, the several states have accepted responsibility for their wrongs to some degree and have provided various methods for the redress of such grievances. The method of redress may take the form of allowing the state to be sued in the regular courts of the state, in a specially created court of claims, before an ex officio board or a board created for that purpose, allowing the presentation of claims directly to the legislature, providing for the purchase of liability insurance with a right of action against the carrier, or a combination of all or any of these.

Thus the method of redress for injuries caused by torts of the state and its agencies may be legislative, administrative, judicial, or by the use of liability insurance. Although most states use one or two methods generally, and several use all three methods, very few states use only one method exclusively. For example, New York is the only state which uses the judicial method exclusively and gives its court of claims jurisdiction broad enough to include almost any claim against the state and its in-

strumentalities, including political subdivisions.[240] Alabama is probably the only state using the administrative method exclusively for claims against the state, but claims against the subdivisions are specifically exempt from the jurisdictional coverage of the Board of Adjustment.[241]

Legislative method. Historically, the first agency for the adjudication of claims against the state was the legislature. In fact, private tort claims are still made the subject of individual legislative consideration and appropriation in many states, including Colorado.[242] The legislative procedure for the adjudication of claims is usually patterned after the following procedure. The claimant requests a legislator to introduce a bill which appropriates an amount sufficient to satisfy his claim. After introduction the bill is referred to the appropriate committees of the House and Senate. The committees hold hearings and examine the documentary material. The committees then make their decisions. Final approval by two-thirds of the members of each house and by the Governor is necessary before the claim can be paid.[243] Only a majority vote is necessary for final approval in Colorado.

With little variation, the above procedure is essentially the same in all states using the legislative method. The committees to which a claim bill is referred may vary from state to

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240. N.Y. Const. Art. VI § 23; N.Y. Ct. Cl. Act § 8 (1963); Granger v. State, 14 A.D.2d 645, 218 N.Y.S.2d 742 (1961); Shaw v. Village of Hempstead, 177 N.Y.S.2d 744 (1958); Hefele v. City of New York, 267 N.Y.S.2d 946 (1966) (New York has thus made itself and all its agencies and political subdivisions generally liable for their torts. Since the Court of Claims is a court of record with appeal permitted, the number of reported opinions in suits against the state, its agencies or subdivisions far exceeds those from any other state. Most cases turn on ordinary questions of tort law.).

241. Code of Ala. T. 55 §§ 333, 334 (Supp. 1963); State Board of Adjustment v. Lacks, 247 Ala. 72, 22 So.2d 377 (1945).

242. See Governmental Immunity, Kentucky Legislative Research Commission, Research Report No. 30, p. 24 (1965); e.g., Senate Bill No. 4, House Bill No. 1061, 1968 Session of the Forty-sixth Colorado General Assembly, and House Bill 1114, 1967 Session of the Forty-Sixth Colorado General Assembly.

243. See Claims Against the State, Florida Legislative Council and Reference Bureau, p. 5 (1957); Payment of Claims Against the State, Minnesota Legislative Research Committee, p. 17 (1954).

state.[244] Also, in some states the request in the bill is for permission to sue the state in a specific case rather than a request for an appropriation to satisfy a claim.[245] However, the constitutional prohibition of special acts may make this impossible in some states.[246]

Role of legislative method in relation to other methods. Generally, the role played by the legislature is limited to claims which may not be adjudicated in any other fashion. This duty of the legislature may by law be vested in an administrative agency or in the courts to whatever degree the legislative body is willing to relinquish the sovereign immunity of the state.[247] Claims covered by liability insurance have been the first to be severed from legislative control.[248] In states which have established an administrative agency or board to hear and determine claims, the legislature has often declared that the board's or commission's determination shall be final.[249] Other states have provided that the determination is recommendatory and the legislature retains final approval over the board's recommendations.[250]

Administrative method. This method of creating a board or commission with authority to hear and determine claims brought against the state is employed in 19 states. The composition, extent of authority and jurisdiction, and methods of making awards vary from state to state.

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244. See Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1954).

245. E.g., House Bill No. 1005, 1968 Session, Forty-sixth Colorado General Assembly, and House Bill No. 1127, 1967 Session, Forty-sixth Colorado General Assembly.

246. E.g., Neb. Const. Art. III § 18, Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938); Okla. Const. Art. V § 59, Duncan v. State Highway Commission, 311 P.2d 203 (Okla. 1957); Lowry v. Commonwealth, 365 Pa. 474, 76 A.2d 363 (1950); Ind. Const. Art. IV § 24; State ex rel Davis v. Love, 99 Fla. 333, 126 So. 374 (1930).

247. See Claims Against the State, Fla. Legislative Council and Reference Bureau, p. 6 (1957).

248. See notes 202, 203, 204, 228, and 229, supra.

249. See note 232, supra.

250. See note 233, supra.

Composition. The board or commission may function ex officio or the membership may be appointed for the sole purpose of adjudicating claims and have no other state duties. The most prevalent form used is the ex officio board composed of all or some of the principal officers of the state. Its membership varies among the states but three is the number most commonly used. In Colorado, the Claims Commission is made up of the state auditor, state controller, and state budget director.[251] Two states, West Virginia and Massachusetts, use the attorney general as a one-man instrumentality.[252] Instead of an ex officio board, the legislature of North Carolina has designated an existing state agency, the Industrial Commission, as its claims board.[253] Some states, such as Arkansas and Minnesota, have an ad hoc claims commission.[254] In South Dakota the senior circuit judge of the county where the alleged claim arose is the commissioner of claims.[255] Instead of an administrative board or commission the state of Rhode Island has created a permanent legislative Joint Committee on Accounts and Claims, consisting of four Senate and five House members.[256]

In addition to the regular members of the board, some states provide for investigators whose duty it is to investigate the facts, receive complaints, take depositions, receive testimony, and report his findings to the board.[257] To facilitate its investigation, the board may also be authorized to administer oaths, subpoena witnesses, and take depositions. The proceedings of the board are usually informal and authority is usually given for the board to draft its own rules of procedure and evidence.

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251. C.R.S. § 130-10-1 et seq. (1963, as amended 1967).

252. Mass. Gen. Laws Ann. Ch. 12 § 3A-D (1966); W.Va. Code Ann. § 1143 et seq. (1961).

253. N.C. Gen. Stat. § 143.291 (1964, as amended 1965).

254. Ark. Stat. Ann. § 13-1401 et seq. (Supp. 1965); Minn. Stat. Ann. § 3.66 et seq. (1965).

255. S.D. Code § 33.4301 et seq. (Supp. 1960).

256. R.I. Gen. Laws § 22.7.1 et seq. (1956).

257. Ark. Stat. Ann. § 13-1402 (Supp. 1965) (The comptroller is designated as the investigator.); Iowa Code §§ 25.1-.8 (1966) (special assistant attorney general); Tenn. Code Ann. § 9-803 (1956, as amended 1965) (special assistant attorney general).

Jurisdiction. The jurisdiction of the administrative claims board is limited to the degree of delegation of legislative authority. The legislative delegation of authority and jurisdiction in some states is stated in language broad enough to include all claims against the state for which relief is not otherwise provided by law.[258] This broad jurisdiction is mitigated in some states by judicial interpretations,[259] and in others by statutes, which allow certain types of claims to be adjudicated in the courts or by other administrative agencies.[260] These statutes often give a detailed listing of the categories of claims over which the board is granted jurisdiction.[261] In some instances, including Colorado, the act creating the board or commission, instead of enumerating the specific areas of jurisdiction, will give the board general jurisdiction to hear claims with enumerated exceptions.[262]

Recommendatory action. In ten states using this method, including Colorado, the board merely recommends to the legislature

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258. Iowa Code § 25.1 et seq. (1966) (The State Appeals Board is granted jurisdiction to hear all claims against the state for which ". . .the state would be liable except for the fact of its sovereignty. . ."); Ark. Stat. Ann. § 13-1401 et seq. (Supp. 1965) (All types of claims, both in contract and tort, are heard and may be allowed by the Claims Commission.).

259. Idaho Const. Art. 4 § 818. The Board of Examiners is given exclusive jurisdiction to hear all claims against the state. The word "claims", however, has not been held to include tort claims so that there can be no recovery for the torts of agents or employees of the state or its instrumentalities, unless immunity is expressly waived by statute. Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957); Carlon v. State, 18 Ill. Ct. Cl. 167 (1949), holding that the Court of Claims has no jurisdiction over the torts of local school boards and municipal corporations under Ill. Stat. Ann. Ch. 37 § 431.1 et seq. (Smith-Hurd Supp. 1966).

260. Some states limit the jurisdiction of its administrative claims board to claims which do not exceed a specified amount. E.g., Conn. Gen. Stat. § 4.141 (Supp. 1961) (claims over $2,500 require legislative approval); e.g., Neb. R.R. Stat. § 24.324 (1943) (allows claims on contract to be sued in courts).

261. E.g., Code of Ala. T. 55 § 334 (Supp. 1963); Tenn. Code Ann. § 9-801 et seq. (1956, as amended 1965).

262. E.g., C.R.S. § 130-10-4 (1963, as amended 1967).

that the claim be paid.[263] In this case, the liability of the state attaches only when the legislature approves the claim and an appropriation is made. The usual procedure is for the board to investigate the claim and to transmit all the facts together with its approval or disapproval and recommended award to the legislature. In some states the recommended awards are included in the budget and in others the approved award must be reported to the legislature in bill form.[264] An aggrieved claimant may generally appeal the board's determination to the legislature, except in those states in which the claimant may bring an action on a rejected claim against the state in designated courts.[265] The determination of the legislature is usually final.

Final action. In nine states using this method, the board is given authority to hear and make a final determination of the claim.[266] This final determination may be unlimited as to amount or the determination may be final if it does not exceed a certain amount. If the board determines that the claimant is entitled to an amount above the statutory limit, the board's determination then becomes recommendatory to the legislature.[267]

Awards. In states which have a contingent appropriation for the payment of claims against the state, the claim when finally approved by the board may be paid through the regular channels without further approval of the legislature until the appropriation is exhausted, in which case the board's determination then becomes recommendatory to the next session of the legislature.[268] Also, a recommendation for the payment of an award above the statutory limit may be recommendatory to the legislature while those awards below the statutory amount may be paid from the contingent appropriation. In some states the awards are paid only through an appropriation made by the legislature after the claims have been

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263. See note 233, supra.

264. E.g., C.R.S. § 130-10-1 et seq. (1963, as amended 1967). See Claims Against the State, Florida Legislative Council and Reference Bureau, p. 22 (1957).

265. E.g., Vt. Stat. Ann. T. 32 § 935 (1959); Rev. Code Wash. § 4.92.010 et seq. (1963). Ibid, at p. 24.

266. See note 232, supra.

267. See notes 232 and 233, supra.

268. See Claims Against the State, Florida Legislative Council and Reference Bureau, p. 23 (1957).

passed upon by the board, in which case the liability of the state attaches only when the legislature approves the claim and an appropriation is made.[269] In some states in which the board's determination is final, no appeal to either the courts or to the legislature is allowed and the decision of the board may be enforced as a judgment at law.[270]

Judicial method. Although most states utilize their courts in varying degrees for suits against the state, the jurisdiction of the court is usually limited to a specific category of claims, such as actions on contract.[271] If actions are permitted on torts, they are usually limited to specific causes, such as cases arising out of defects in highways or injuries caused by the negligent operation of motor vehicles, but generally ordinary torts are excluded.[272] As mentioned above, only 12 states provide for recovery in their regular courts by all or most tort claimants.[273] The regular courts of eight additional states are open to enforce the statutory liability of those states.[274]

With respect to the political subdivisions of the states, the regular courts are open to enforce liability caused by negli-

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269. Ibid.

270. Ibid.

271. "Persons having claims on contract. . ., which have been disallowed, may bring action thereon against the state and prosecute the action to final judgment." Ariz. Rev. Stat. § 12-821 et seq. (1956); Ind. Stat. Ann. § 4.1501 (Burns 1946) (The statute provides for suits on claims against the state but covers only contract matters.); La. Rev. Stat. § 13.5101 et seq. (Supp. 1962, as amended 1966); Mass. Gen. Laws Ann. Ch. 258 §§ 1-4 (1959) (The statute permits the superior court to hear ". . .all claims at law or in equity . . ." against the Commonwealth. However, the term "all claims" has been construed not to include tort claims. Arthur A. Johnson Corp. v. Commonwealth, 306 Mass. 347, 28 N.E.2d 465 (1940); Neb. R.R. Stat. § 24-319 (1943) (This statute has been ineffectual as far as tort claims are concerned. Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962); Va. Code § 8-752 et seq. (1957, as amended 1966) (Pursuant to this provision, proceedings based on contracts will lie against the state but actions based on torts are not authorized.).

272. See notes 200 and 201, supra.

273. See note 230, supra.

274. See note 231, supra.

gence in the performance of proprietary functions. In addition, the courts of 13 states enforce the general liability of their subdivisions in tort.[275] Five additional states enforce the liability of municipalities only in the regular courts,[276] and the courts of 17 are open to enforce the specific statutory liabilities of subdivisions.[277]

A state may consent to be sued in one of two ways: (1) by general act which authorizes suits in cases falling within a general category, and (2) by special act which authorizes a designated party to bring suit on a particular claim. As has been previously pointed out, there may be constitutional provisions in the particular state which prohibit either the state from being made a defendant in its own courts,[278] in which case the administrative or legislative method, or both, is the only alternative, or provisions which prohibit special legislation, in which case permission to sue must be given by general act.[279]

Procedure. Suits against the state may be brought in one of several courts as designated in the act which consents to suit. States which have waived their immunity usually have granted jurisdiction of claims cases to trial courts already in existence, usually the trial courts of the county or district where the cause of action arose. However, in some states suits against the state may only be brought in a court in the county or district in which the state capital is located.[280] In some states the constitution empowers the state supreme court or other state courts with original jurisdiction of suits against the state. The conclusion of the court is usually final although some states declare that the decision of the court is recommendatory in nature only and must be reported to the legislature for final action.[281] Also, some states having administrative boards or commissions require that

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275. See notes 218, 220 and 236, supra.

276. See notes 219 and 237, supra.

277. See notes 224, 225, 226, 227 and 238, supra.

278. Ala. Const. Art. 1 § 14; Ark. Const. Art. V § 20; Ill. Const. Art. IV § 26; W.Va. Const. Art. VI § 35.

279. See note 246, supra.

280. See Claims Against the State, Florida Legislative Council and Reference Bureau, p. 25 (1957).

281. E.g., Mass. Gen. Laws Ann. Ch. 258 §§ 1-4 (1959); Idaho Const. Art. V § 10; N.C. Const. Art. IV § 9.

the claim be submitted to the board or commission before going to the courts for a hearing.[282]

The procedure in claims suits generally is the same as when an individual sues another individual, including the method of appeal and the rules of evidence. However, special rules of procedure and evidence may be established.

Special claims court. Jurisdiction of claims cases may be vested in a special court created for that purpose. Three states, Illinois, New York, and Michigan have established a special court of claims.[283] The composition of the court varies. In New York, the Governor appoints five full time judges to serve for nine-year terms,[284] and in Illinois, the Governor appoints the three judges of the court to serve a term concurrent with his.[285] In Michigan, the circuit judges alternately sit on the bench of the court of claims.[286]

In Michigan, the act creating the court of claims has been construed as not waiving the defense of governmental immunity which is applicable unless expressly waived by statute. Its jurisdiction is limited to claims against the state.[287]

The Illinois court of claims has jurisdiction over cases against the state involving general liability for torts where the damages claimed do not exceed $25,000. If the court determines that the claimant is entitled to an amount which exceeds $25,000, the award is recommendatory only and requires a subsequent appropriation by the legislature. A decision of the court is not appealable.[288]

The jurisdiction of the court of claims in New York is very broad. The waiver of immunity from liability for torts extends to

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282. Conn. Gen. Stat. § 4-141 (Supp. 1963); Idaho Const. Art. 4 § 818, Art. 5 § 10, Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962); Miss. Code Ann. § 4387 et seq. (1942).

283. See note 235, supra.

284. N.Y. Ct. Cl. Act § 8 et seq. (1963).

285. Ill. Ann. Stat. Ch. 37 § 439.1 et seq. (Smith-Hurd Supp. 1966).

286. Mich. Stat. Ann. §§ 27A.6401-.6475 (1962).

287. Ibid.

288. See note 285, supra.

the state, its departments and agencies, and the counties and municipalities. The court of claims is a court of record with appeal permitted to the appellate division and ultimately to the court of appeals.289

No attempt has been made in this summary to detail the procedures followed before the various court of claims, claims commissions, and legislative committees. The procedures are various, sometimes simple and sometimes complex. In general a rigid compliance with the procedures is insisted upon. The tendency is to establish a regular system of investigation and hearing and in almost all states which have standardized procedures for presentation of claims, one feature is the imposition of time limits, often fairly short, within which claims must be filed or be forever lost.

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289. See note 284, supra., § 24.

Trends Toward Sovereign Responsibility

The basic doctrine that the sovereign cannot be sued or held liable without its consent continues to be the general rule, not the exception. We have seen, however, that consent has been given in many cases, and in a variety of forms. This consent has taken the form of (1) private laws enacted as a matter of legislative grace, (2) general or limited public legislation creating liability, (3) indirect liability through such means as insurance, (4) liability of governmental units under the judge-made doctrine concerning proprietary or ministerial functions, and (5) judicial abrogation of the doctrine of immunity, in whole or in part, by various courts. All of these forms of assuming responsibility for governmental torts combine to support the conclusion of most legal writers that there is a trend toward governmental responsibility and away from governmental immunity.

Private laws. Several states have assumed liability by passing private legislation compensating individuals having tort claims against the state. Several states have also consented to suit by passing a special act which authorizes a designated party or parties to bring suit on a particular claim. These procedures have been followed in Colorado.[290]

As has been previously pointed out, there may be constitutional provisions in the particular state which prohibit either the state from being made a defendant in its own courts, in which case the administrative or legislative method for the adjudication

290. In the 1967 Session, Forty-sixth Colorado General Assembly, the general assembly adopted H.B. No. 1114, which granted $20,000 to a widow for damages sustained when her husband was killed as a result of negligent repairs of a state highway. The general assembly also adopted H.B. No. 1127, which granted to persons who sustained injury by the diversion of Clay Creek flood water by Clay Creek Dam in June, 1965, the right to initiate a civil action against the state to recover damages. In the 1968 Session, the general assembly adopted H.B. No. 1005, which granted to persons in Jefferson County who sustained property damage the right to bring a civil action against the state to determine the state's negligence. These actions are to be conducted in accordance with the Colorado Rules of Civil Procedure and the laws of the state applicable to actions for damages to property. The state is to have all rights to which any other defendant would be entitled.

of claims is the only remedy,[291] or provisions which prohibit special legislation, in which case permission to sue must be given by general act.[292]

In some cases, the legislatures consider the claims directly. Nine states have delegated their authority to consider claims to an administrative claims tribunal or officer whose determination is final.[293] Ten states, including Colorado, have administrative tribunals or legislative committees whose determinations are merely recommendatory to the legislature.[294] The legislature, if it approves the recommendation of the tribunal, can then either pass an appropriation bill for the amount of the claim, or pass a bill authorizing the particular claimant to sue in the courts.

The extent to which the state legislatures have moved toward the assumption of state liability through special acts and private bills has not been ascertained, as it would call for a complete survey of the session laws of each state and is beyond the scope of this study. Nevertheless, it is sufficient to say that the various state legislatures appear to be using this method of assuming liability more than ever before.

Public legislation creating liability. Some public legislation provides for the payment of claims within limited areas. This legislation, which provides an inroad upon sovereign immunity by way of statutory exception to the immunity rule, has usually been of a piecemeal character. Nevertheless, this piecemeal legislation has accumulated to the extent that it provides a substantial ground for tort liability.

The most common types of limited legislation are statutes creating liability for the negligent operation of motor vehicles and for injuries caused by defective sidewalks, streets, etc. A total of 19 states, including Colorado, have made themselves liable for injuries caused by the negligent operation of government-owned motor vehicles.[295] Twenty states are liable for injuries caused by the defective conditions of public highways, bridges, etc.[296]

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291. See note 278, supra.

292. See note 246, supra.

293. See note 232, supra.

294. See note 233, supra.

295. See note 200, supra.

296. See note 201, supra.

In 19 states, including Colorado, municipalities and counties both are liable for negligent operation of motor vehicles,[297] and in five additional states only municipalities are liable.[298] In 25 states both counties and municipalities are liable for injuries arising from defective streets and sidewalks,[299] and in six additional states only municipalities are liable.[300] In Colorado, the state, by statutory provision, has accepted liability for injuries sustained in civil defense activities[301] and for damages caused by wild game.[302]

General legislation of a comprehensive nature dealing with governmental tort liabilities and immunities has been enacted in recent years in several states.[303] This legislation undertakes government responsibility in most cases. New York has adopted legislation which purports to make it liable for substantially all of its torts.[304] Alaska and Hawaii have adopted statutes patterned after the Federal Tort Claims Act.[305] Iowa, Nevada, Oregon, Vermont and Washington, in addition to New York, have done away with immunity of the state by statute.[306] California, Michigan and Utah have enacted legislation which continues to make the state immune, except as otherwise provided by statute, and these exceptions are very broad, which in effect makes the state liable in most circumstances.[307]

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297. See note 226, supra.

298. See note 227, supra.

299. See note 224, supra.

300. See note 225, supra.

301. C.R.S. § 24-3-1 (1963).

302. C.R.S. § 62-2-31 (1963).

303. Calif. Govt. Code Ann. §§ 810-996.6 (1966); Mich. Stat. Ann. §§ 691.1401-.1415 (Supp. 1965); Minn. Stat. Ann. §§ 466.01-.17 (1963); Nev. Rev. Stat. §§ 41.031-.038 (1965); Utah Code Ann. §§ 63-30-1 to 63-30-34 (Supp. 1965); Wis. Stat. Ann. § 895.43 (1966).

304. N.Y. Ct. Cl. Act § 8 (1963).

305. Alaska Stat. § 09.50.250 et seq. (Supp. 1965); Rev. Laws of Hawaii, § 254A-1 et seq. (Supp. 1965).

306. Iowa Code § 25A.1 et seq. (1966); Nev. Rev. Stat. § 41.031 (1965); Oregon Laws 1967, ch. 627; vt. Stat. Ann. T. 12 § 5601 et seq. (1961, as amended 1963); Rev. Code Wash. § 4. 92.010 et seq. (1963).

307. See note 194, supra.

Although these states appear to be few in number, it is significant that the statutory assumption of liability by these states has occurred in recent years. Several states are now in the process of modifying their sovereign immunity,[308] and several more are in the process of study.[309] It thus appears that the trend toward assumption of responsibility by legislation will continue, whether it be in a limited form or in a general comprehensive form.[310]

Indirect methods of creating liability. The most important indirect method by which tort liability of governmental units is created is the use of public liability insurance.

> Legislators who are wary of making state or local units liable for torts are increasingly willing to provide for payment of premiums for

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308. H.B. No. 119, 28th Legislature, 1st Regular Session 1967, State of Arizona. This is one of several comprehensive bills dealing with governmental immunity and liability which has been introduced in the Arizona Legislature. To date, none of these bills have been adopted. See Hink and Schutter, The Need for a Legislative Solution to Government Tort Liability in Arizona, Public Affairs Bulletin, Ariz. State Univ., Vol. 5, No. 4.

309. E.g., Public Laws of Maine 1965, ch. 202, and ch. 425 § 8-A. This is a legislative resolution requiring the Attorney General of Maine to conduct a two-year study of sovereign immunity and to report his findings to the legislature. It is understood by this writer that a study is being conducted in Texas.

310. For the background study and policy evaluations which underlie the California Legislation, see Cal. Law Revision Comm'n, Recommendations Relating to Sovereign Immunity: Number 1 -- Tort Liability of Public Entities and Public Employees, in 4 Reports, Recommendations and Studies 801 (Cal. Law Revision Comm'n ed. 1963). For background information on the Utah legislation, see Utah Legislative Council, Report of the Governmental Immunity Committee, (1964). See also Kentucky Legislative Research Commission, Governmental Immunity, Research Report No. 30 (1965); Governmental Immunity Interim Commission of Minnesota, Report of the Governmental Immunity Interim Commission, (1965); State Legislative Research Commission of South Dakota, Staff Memorandum: The Feasibility of Abolishing or Modifying the Doctrine of Sovereign Immunity in South Dakota, (1967).

> liability insurance, either insurance protecting the units and waiving immunity to the extent of the insurance coverage, or insurance protecting the officers or employees . . . The typical statute and policy provide that the insurer may not set up sovereign immunity as a defense, for in the absence of such provision some courts have held that the insurer is not liable unless the governmental unit would be.[311]

Some cases have held that the carrying of liability insurance is a limited consent, or waiver of the immunity, at least to the extent of the insurance coverage.[312] Other cases have held that the immunity is not waived by the insurance.[313]

Eleven states authorizing the purchase of general liability insurance, and six states authorizing the purchase of only automobile liability insurance, have express provisions either waiving their immunity to the extent of the insurance coverage obtained or denying the defense of immunity to the insurer.[314] Six other states, including Colorado, are also permitted to purchase either general or automobile liability insurance, but the statutes do not indicate that the purchase constitutes a waiver of the defense of sovereign immunity.[315] In 25 states, including Colorado, the political subdivisions of the state are authorized to purchase some form of liability insurance,[316] and in 14 of these states the stat-

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311. 3 Davis, Administrative Law § 25-04 (1958).

312. Marshall v. City of Green Bay, 18 Wis.2d 496, 118 N.W.2d 715 (1962); Vendrell v. School Dist., 226 Ore. 263, 360 P.2d 282 (1961); Flowers v. Board of Commissioners, 240 Ind. 668, 168 N.E.2d 224 (1960); Ginter v. Montgomery County, 327 S.W.2d 98 (Ky. 1959); Ballew v. City of Chattanooga, 205 Tenn. 289, 326 S.W.2d 466 (1959); Moreno v. Aldrich, 113 So.2d 406 (Fla. App. 1959); Lynwood v. Decatur Park District, 26 Ill. App. 2d 431, 168 N.E.2d 185 (1960).

313. Maffei v. Incorporated Town of Kemmerer, 80 Wyo. 33, 338 P. 2d 808 (1959); Turner v. Gastonia City Board of Education, 250 N.C. 456, 109 S.E.2d 211 (1959); Cunningham v. County Court of Wood County, 148 W. Va. 303, 134 S.E.2d 725 (1964).

314. See notes 202 and 203, supra.

315. See note 204, supra.

316. See note 228, supra.

utes indicate that such purchase constitutes a waiver of immunity to the extent of the coverage.[317] It appears that more states are following this trend or at least considering this approach.[318]

Common law exceptions to immunity. As has been indicated before, one of the central ideas in the law of governmental tort liability is that a government entity is liable for its torts in the exercise of proprietary but not governmental functions.[319] This distinction between governmental and proprietary functions has been severely criticized, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction.[320] The United States Supreme Court, in speaking on the distinction, has stated that "A comparative study of the cases in the forty-eight states will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."[321]

It has been declared that governmental immunity from tort liability is shrinking as time goes on, and that the tendency of the courts is to restrict the immunity doctrine, to construe it strictly against the governmental entity, and to move away from the somewhat artificial distinction between governmental and proprietary functions.[322] The courts are more inclined to find a particular activity as being proprietary in nature, rather than governmental, thus making the entity liable. This trend has further eroded the sovereign immunity doctrine and will probably continue to do so.

Judicial abrogation of the doctrine.

> Sovereign immunity in state courts is on the run. State courts are taking the offensive against it. The development during the period 1957-1965 is deep and dramatic. The movement seems to be

317. See note 229, supra.

318. Note, Municipal Tort Liability; Purchase of Liability Insurance As a Waiver of Immunity, 18 Wyo. L.J. 229 (Spring 1964).

319. See notes 21-35, supra.

320. See note 2 and 14, supra.

321. Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

322. 3 Davis, Administrative Law § 25107 (1958).

> gaining momentum. The states in which judicial action has been taken to abolish large chunks of immunity, although some have wavered, are, chronologically, Florida, Colorado, Illinois, New Jersey, California, Michigan, Wisconsin, Alaska, Minnesota, Arizona, Nevada, and Washington. The District of Columbia has also abolished the immunity. The action of these thirteen jurisdictions should make it easier for other states to do the job. One may confidently expect that others will follow. The state courts that have recently considered overruling sovereign immunity but have left the task to the legislature include Utah, Maine, Oklahoma, Ohio, Iowa, and New Mexico. The Oregon court brands immunity as 'not defensible' but is forced to bow to an explicit constitutional provision.
>
> The story of what each court has done is especially interesting. The barriers relate to stare decisis, not to a belief that the immunity doctrine deserves to be continued. The scope of the abolition varies from court to court, and so do the remarks about location of new limits on liability.[323]

These decisions will be examined in order to demonstrate the trend toward sovereign responsibility and to understand any problems involved in judicial abrogation of the doctrine, as opposed to legislative abolition or modification.

Judicial Abrogation of Immunity

Widespread dissatisfaction with the doctrine of immunity and judicial impatience with legislative inaction have led many courts to repudiate the doctrine in whole or in part.[324]

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323. 3 Id. § 25.01.

324. Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963); Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Molitor v. Kaneland Community Unit Dist., 19 Ill.2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Hamilton v. City of Shreveport, 247 La. 784, 174 So.2d 529 (1965) (construing article 3, § 35 of the Louisiana Constitution); Williams v. City of

State court decisions which abolished immunity. Chronologically, the direct attack upon governmental immunity itself began in 1957 with the Supreme Court of Florida in the case of Hargrove v. Town of Cocoa Beach,[325] The court declared that since the judiciary had originated the doctrine, legislative action was not necessary to abolish it, and held that no municipality should have immunity from tort liability, even in its governmental capacity. However, the opinion admonished against construing the decision as imposing liability on municipalities in exercising their judicial, quasi-judicial, legislative, or quasi-legislative functions. The court soon made a judicial retreat by holding that it had not overruled tort immunity as to the state, its counties, or other political entities.[326] In both of these later cases the court said that it was the job of the legislature to abrogate immunity as to the state and its agencies.

Also in 1957 Colorado permitted an action against the State Racing Commission in Colorado Racing Commission v. Brush Racing Association,[327] in which was coined the much-quoted phrase, "In Colorado 'sovereign immunity' may be a proper subject for discussion by students of mythology but finds no haven or refuge in this court." Later the court declared: "The doctrine of sovereign immunity in Colorado is in limbo, only the memory lingers on."[328] These decisions were believed by many to be a judicial abrogation of the doctrine, but three years later the court backtracked by invoking immunity with respect to governmental functions of a county, municipality and school district.[329]

Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); Kelso v. City of Tacoma, 63 Wash.2d 913, 390 P. 2d 2 (1964); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

325. 96 So.2d 130 (Fla. 1957).

326. Buck v. Mclean, 115 So.2d 764 (Fla. 1959); Moreno v. Aldrich, 113 So.2d 406 (Fla. 1959).

327. 136 Colo. 279, 316 P.2d 582 (1957).

328. Stone v. Currigan, 138 Colo. 442, 334 P.2d 740 (1958).

329. Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960); City and County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960); and Tesone v. School Dist. No. RE-2, 384 P.2d 82 (Colo. 1963).

The next case to attempt judicial abrogation of immunity was an Illinois case in 1959.[330] The court prospectively abolished the doctrine as applied to school districts and stated that: "We closed our courtroom doors without legislative help, and we can likewise open them."[331] As to whether this decision will be applied to other governmental units in Illinois, the question has not expressly been decided, although there are several cases in which the court has implied that it would abolish municipal immunity.[332]

Shortly after the Molitor decision, the Illinois legislature enacted five statutes reestablishing sovereign immunity for various governmental entities. Apparently, counties are still immune although a statute declaring counties to be immune was recently declared unconstitutional as violating the prohibition against special legislation.[333]

New Jersey in 1960 took a step forward in discarding the last vestiges of municipal tort immunity by broadening the rule of respondeat superior with respect to agents of municipal corporations. The court brushed aside the question of stare decisis and the objection that this was exclusively a legislative prerogative by saying that: "Judicial and not legislative action closed the courtroom doors, and the same hand can, and in proper circumstances should, reopen them."[334] Another bite into sovereign immunity was taken in New Jersey in McCabe v. New Jersey Turnpike Authority,[335] holding the Turnpike Authority liable when snow and ice fell from the superstructure of a bridge on plaintiff's car. Also, liability was imposed for wrongdoing by a township "in planning, constructing and maintaining the sewer line" in Fagliarone v. Township of North Bergen,[336] but a township was immune from liability be-

330. Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

331. Ibid.

332. Peters v. Bellinger, 22 Ill. App. 2d 105, 159 N.E.2d 528 (1959).

333. Hutchings v. Kraject, 34 Ill.2d 379, 215 N.E.2d 274 (1966). For a criticism of the entire Molitor decision, see Huff, Tom Molitor and the Devine Right of Kings, 37 Chi.-Kent L. Rev. 44 (1960).

334. McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820, 88 A.L.R. 2d 313 (1960).

335. 35 N.J. 26, 170 A.2d 810 (1961).

336. 78 N.J. Super. 154, 188 A.2d 43 (1963).

cause the activity was "governmental" in Kent v. Hamilton Township.[337]

California was the next state to follow the trend of judicial abrogation. In Muskopf v. Corning Hospital District,[338] immunity was abolished as to hospital districts. The court traced the doctrine of immunity and concluded that it is "an anachronism without rational basis and has existed only by force of inertia." In reply to the objection that it was the legislature's duty to abolish it, the court held that it was a court-made rule initially and its "requiem has long been foreshadowed." The California Assembly promptly declared a moratorium on this and other claims similarly situated so that the problems could be analyzed and reasonable provisions made for suits against the government. In 1963 the Assembly, after an exhaustive study by the California Law Revision Commission, enacted a series of laws which set forth the conditions under which public entities and employees are to be liable for their torts.

Michigan followed shortly after California by holding that immunity as to all governmental bodies within the state was abolished in the case of Williams v. City of Detroit,[339] In prospectively overruling the doctrine the court declared: "From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. In this case, we overrule preceding court-made law to the contrary. We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute monarchy which has been productive of great injustice in our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong."[340] Subsequent opinions have made it clear that the Williams decision was limited to the abrogation of municipal immunity only, the tort liability of the state and other subdivisions being controlled by statutory provisions.[341] On the basis of the Sayers decision, the court in 1965 held that the school districts were immune from liability and declared that, despite the holding in Williams, the "...doctrine of governmental immunity in tort actions arising from

337. 82 N.J. Super. 113, 196 A.2d 798 (1964).

338. 55 Cal.2d 211, 359 P.2d 457 (1961).

339. 364 Mich. 231, 111 N.W.2d 1 (1961).

340. Ibid.

341. McDowell v. State Highway Commissioner, 365 Mich. 268, 112 N.W.2d 491 (1962) and Sayers v. School District No. 1, 366 Mich. 217, 114 N.W.2d 191 (1962).

the performance of a governmental function is still with us."[342] By legislative enactment which became effective on July 1, 1965, the Michigan legislature granted immunity to the state, its agencies and subdivisions and enumerated exceptions thereto.

The courts of Wisconsin were next to abolish the doctrine of immunity in Holytz v. City of Milwaukee.[343] After tracing the history of the doctrine of governmental immunity and reviewing the authorities, the court held that ". . . the doctrine of governmental immunity having been engrafted upon the law of this state by judicial decision, we deem that it may be changed or abrogated by judicial provision." The decision was applied to the state, its agencies and local political subdivisions. As to the scope of the change, the court said that the decision "does not broaden the government's obligation so as to make it responsible for all harms to others; it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision. This decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions."

Supplementing the Holytz case in overruling sovereign immunity, the Wisconsin court also holds that purchase of liability insurance constitutes a waiver of immunity.[344] As a result of these decisions, the legislature has enacted statutory provisions which provide a procedure for the bringing of tort actions and limit the amount that can be recovered.

The Alaska Supreme Court is the only state court that has been able to impose sovereign tort liability on historical grounds, as distinguished from policy grounds and an overruling of precedents. Congress in 1884 enacted that the general laws of Oregon should govern the district of Alaska, and at that time a statute of 1862 imposed liability upon cities and other local units in Oregon. The Alaska court accordingly held: "A municipal corporation in Alaska does not enjoy immunity from tort liability, whether the act or omission giving rise to the liability is connected with either a governmental or proprietary function."[345]

342. Picard v. Greisinger, 138 N.W.2d 509 (Mich. 1965) and Myers v. Genesee County, 375 Mich. 1, 133 N.W.2d 190 (1965).

343. 17 Wis.2d 26, 115 N.W.2d 618 (1962).

344. Marshall v. City of Green Bay, 18 Wis.2d 496, 118 N.W.2d 715 (1962) and Wohlleben v. City of Park Falls, 23 Wis.2d 362, 127 N.W.2d 35 (1964).

345. City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962).

The Minnesota court was next in holding that the defense of sovereign immunity was abolished with respect to school districts, municipal corporations and other subdivisions of government.[346] The court prospectively overruled the doctrine but added that "... we do not suggest that discretionary as distinguished from ministerial activities, or judicial, quasi-judicial, legislative, or quasi-legislative functions may not continue to have the benefit of the rule. Nor is it our purpose to abolish sovereign immunity as to the state itself."

In anticipation of legislative action subsequent to its decision, the Minnesota court suggested a number of procedural and substantive proposals for the orderly processing of claims. Among them are: "(1) A requirement for giving prompt notice of the claim after the occurrence of the tort, (2) a reduction in the usual period of limitations, (3) a monetary limit on the amount of liability, (4) the establishment of a special claims court or commission, or provision for trial by the court without a jury, and (5) the continuation of the defense of immunity as to some or all units of government for a limited or indefinite period."[347] Acting upon the views expressed by the court, the 1963 Minnesota legislature enacted statutes which, subject to certain limitations, swept away the doctrine as applied to all political subdivisions and set forth the procedure for presenting claims against the lesser units of government.

In 1963 Arizona abolished the doctrine in Stone v. Arizona Highway Commission.[348] The court declared: "We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled." The court concluded that "...the substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases, those not yet filed which are not barred by the statute of limitations and all future causes of action."[349]

In 1964 Kentucky abolished the doctrine with respect to municipal corporations in Haney v. City of Lexington.[350] The court

346. Spanel v. Mounds View School District No. 621, 118 N.W.2d 795 (Minn. 1962).

347. Ibid.

348. 93 Ariz. 384, 381 P.2d 107 (1963).

349. Ibid.

350. 386 S.W.2d 738 (Ken. 1964); see also City of Louisville v. Chapman, 413 S.W.2d 74 (Ken. 1967).

did not consider the liability of any governmental unit other than that of a municipal corporation and its agents. The court declared that its holding was "...applicable not only to this case, but to all cases which may have arisen within the proper time of limitation."[351]

Nevada in 1963 declared that county immunity was abolished in Rice v. Clark County.[352] In 1965 the legislature enacted laws which waived the immunity of the state and all political subdivisions from liability. Subsequently the court extended the holding in Rice to the state and all subdivisions.[353]

In Washington a statute consenting to suits against the state has been held to abolish immunity of municipalities. "Municipal corporations enjoy their immunity for torts only in so far as they partake of the state's immunity. They have not sovereighty of their own."[354]

State court decisions which refused to abolish immunity. Although most legal scholars have concluded that the trend is toward judicial abrogation of the doctrine, there are several recent state court decisions in the various states in which the courts have refused to abrogate the doctrine, concluding that this is solely a legislative function.

The majority of the Supreme Court in Utah has consistently followed long-standing precedents of sovereign immunity and refused to abolish the doctrine when it examined the question in State of Utah v. Parker,[355] and again in Campbell v. Pack,[356] Later in 1964 the Supreme Court of Utah continued to refuse to abolish the doctrine, declaring that "If this doctrine, so long firmly embedded in the structure of our law, is to be changed, such change should come from the repository of the sovereign power itself, the people, speaking through their chosen representatives in the legislature."[357] Subsequently the legislature did enact laws waiving its sovereign immunity.

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351. Ibid.

352. 79 Nev. 253, 382 P.2d 605 (1963).

353. Walsh v. Clark County School District, 419 P.2d 775 (Nev. 1966).

354. Kelso v. City of Tacoma, 63 Wash.2d 913, 390 P.2d 2 (1964).

355. 13 Utah 2d 65, 368 P.2d 585 (1962).

356. 15 Utah 2d 161, 389 P.2d 465 (1964).

357. Hurst v. Highway Dept., 16 Utah 2d 153, 397 P.2d 71 (1964).

In 1961, the Supreme Judicial Court of Maine refused to abolish the doctrine, declaring that whether governmental immunity from liability for tort should be discarded or destroyed is a policy question for the Legislature and not for the courts.[358]

Two years later, New Mexico also refused to abolish the doctrine in Clark v. Ruidoso-Hondo Valley Hospital.[359] In discussing the cases in which the courts have abolished the doctrine, the New Mexico court said that "The basis of these decisions is that the doctrine of immunity is a court-made rule and should, therefore, be abrogated by the courts, because the reason upon which the entire theory was based is erroneous. These same courts declined to follow their previous holdings, and disposed of stare decisis by saying that the rule of law should not be followed which no longer has a valid basis; that therefore, the entire question should be reexamined. However, Michigan, Florida, Colorado and Washington seem to have had some second thoughts on the subject, to the extent that they apparently have modified their rulings in subsequent cases; in California the legislature suspended the effect of the decision, and in Illinois the legislature promptly reinstated tort immunity as to certain governmental subdivisions. There are, however, many other jurisdictions which have, in recent years, declined to overrule their prior decisions, and continue to follow the rule of sovereign immunity,..." The court concluded: "If the people of this state desire any change in this policy, it can be and should be done through the legislature and not by judicial fiat. The not-too-satisfactory experience in most of those jurisdictions which have attempted to overrule the immunity doctrine by court decision should make it obvious that legislative action on the subject is the preferred solution."[360]

In 1963 the Supreme Court of Missouri was asked to follow the cases from other states which abolished the doctrine. The court refused to do so, declaring that: "While the complexity of modern government may require a relaxation of present rules of absolute nonliability, undoubtedly this is a matter for the legislature to provide in the interest of more complete justice to the individual but under strict regulations and with very definite limitations to protect the public interest."[361] The court concluded by saying that "...whatever is done to change the doctrine ...should be done by the legislature and not by the courts."

358. Nelson v. Maine Turnpike Authority, 157 Me. 174, 170 A.2d 687 (1961).

359. 22 N.M. 9, 380 P.2d 168 (1963).

360. Ibid.

361. Fette v. City of St. Louis, 366 S.W.2d 446 (Missuori 1963).

The Supreme Court of Oklahoma also refused to abolish the doctrine in Chicago, Rock Island and Pacific Railroad Company v. Board of County Commissioners of the County of Stephens.[362] In Boyer v. Iowa High School Athletic Association,[363] the Supreme Court of Iowa, after carefully considering the decisions in other states which abolished the doctrine, concluded that legislative action was a better solution and refused to abolish the doctrine. The West Virginia Supreme Court of Appeals reached the same conclusion and stated that "...this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."[364]

In Fetzer v. Minot Park District,[365] the Supreme Court of North Dakota declared that: "The courts cannot legislate, regardless of how much we might desire to do so. Our power is limited to passing on law enacted by the Legislature, and, if the Legislature fails to act, we cannot change the law by judicial decision." On this basis the court refused to abolish the doctrine. In Maryland, when asked to overrule its prior decisions and abolish sovereign immunity, the Court of Appeals of Maryland refused to do so, saying that: "If there is to be a change, we think the Legislature should make it."[366]

In the New Hampshire case of Gossler v. City of Manchester,[367] the court ruled that any expansion of the scope of municipal liability is a matter for legislative rather than judicial determination. In refusing to abolish the doctrine, the Supreme Court of South Dakota declared that: "Judicial abrogation in itself would make for uncertainties and would not...diminish inequalities."[368]

362. 389 P.2d 476 (Okla. 1964).

363. 256 Iowa 337, 127 N.E.2d 606 (1964).

364. Cunningham v. County Court of Wood County, 148 W.Va. 303, 134 S.E.2d 725 (1964).

365. 138 N.W.2d 601 (N.D. 1965).

366. Weisner v. Board of Education of Montgomery County, 237 Md. 391, 206 A.2d 560 (1965).

367. 221 A.2d 242 (N.H. 1966).

368. Conway v. Humbert, 145 N.W.2d 524 (S.D. 1966).

Summary. Thirteen jurisdictions have taken judicial action to abolish, in whole or in part, the doctrine of sovereign immunity. The signs are that the movement is still in its early stages, that the momentum for overruling is strong, and that other states will probably follow this movement. Yet despite this trend or movement, many jurisdictions, in considering whether or not some portion of sovereign immunity should be overruled, have decided to leave the question to the legislatures. These decisions were usually by divided courts and this deference by the judiciary to the legislature should not be taken for granted because similar intimations by several courts, when ignored repeatedly by the state legislatures, have finally led to the judicial conviction that the initiative had to be undertaken by court decision.[369]

A most significant fact that is shown by a review of the above cases is that in the many opinions, including concurring and dissenting opinions, hardly a word has been written in favor of the doctrine itself. It appears that a majority of those who have considered the questions, both those who favor and those who oppose judicial abrogation of the doctrine, assume that the doctrine should be abolished. The main debate is over the question whether judges or legislators should do the job. The point has been summarized by saying that the demise of the inconsistencies and injustices of governmental immunity ". . . is now clearly foreordained. The real issue is who will preside at the wake -- courts or legislatures."[370]

369. The latest state court decision abrogating the doctrine was the Supreme Court of Arkansas in the case of Parrish v. City of Little Rock, 244 Ark. 1239 (1968). "However, the Court felt that even though it might agree that the present rule of municipal immunity from tort actions should be replaced with a stricter, more complete rule of responsibility, it was a matter of public policy and therefore, for consideration for the Legislature, not the Court. Kirksey v. City of Fort Smith, 227 Ark. 630, 300 S.W.2d 257 (1957). The legislature's broad investigative powers to determine facts and its greater flexibility in dealing with complex problems indicate a preference for a solution by statutory action. Despite the Court's invitation for legislative action ten years ago there has quite understandably been no comprehensive legislative solution, or action on this troublesome question . . . . Considerations of public policy are not and never have been for determination by the Legislature alone. Especially is this so when the individual's rights are put in question by governmental activity as here. We are now of the opinion that re-examination of the principle of governmental immunity from tort action is the duty of this Court and should be undertaken at this time." Id. at 1242.

LEGISLATIVE APPROACHES TO CHANGING THE DOCTRINE

Apparently no state legislature has acted to change the general rule of sovereign immunity except after a state court has done so. All states have responded to judicial abrogation of the doctrine, with the exception of Arizona, in one statutory form or another. For those state legislatures, such as the Colorado General Assembly, which are considering a change in the doctrine, without being faced with a court ruling abolishing the common law rule of immunity, seven alternative approaches are available. These seven approaches are listed below.

1. Take no legislative action;

2. Enact the immunity rule as applied to all governmental entities, whether engaged in governmental or proprietary functions;

3. Enact legislation which waives all immunity of governmental entities and declares that liability shall be determined as if the entity were a private person;

4. Provide for the purchase of liability insurance by all governmental entities and waive the immunity up to the extent of the coverage so obtained;

5. Enact legislation which reaffirms the immunity rule in general and sets out exceptions where the entities are to be liable;

6. Enact legislation which waives the immunity of certain entities, retaining immunity for the remainder; or

7. Adopt the approach wherein the specific liabilities and immunities of all governmental entities are set out in the legislation.

370. Van Alstyne, The Decline of Governmental Immunity, State Government, 36 (Winter 1966). In addition to the cases cited above which refused to abrogate the doctrine, leaving such action to the Legislatures, see Maffei v. Incorp. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959); Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966).

These seven approaches are evaluated here for the purpose of demonstrating the advantages and disadvantages of each approach and the experience in the various states under each of the different approaches.

1. Take no legislative action and wait for abolishment of immunity by decision of the Supreme Court.

Immunity in general has been abolished by judicial decision in California, Arizona, Illinois, Michigan and Wisconsin, and to a limited extent in Florida, New Jersey, Minnesota, Kentucky, Nevada, and Washington.[371] In disregarding the sovereign immunity rule, which they regard as unjust and outmoded, these courts appear to be motivated by a desire to provide just recompense for those injured by government. They have usually justified judicial abrogation of the rule on the ground that it was originally judicially created and since "We closed our courtroom doors without legislative help, . . . we can likewise open them."[372]

These courts have declined to follow their previous holdings that, because the immunity rule has existed for such a long period of time, only the legislature can now change it. They have disposed of stare decisis by saying that the rule of law should not be followed when it no longer has a valid basis. Some feel that this is the best method of change, believing that since the doctrine was originally court-made it should now be abolished by the courts.[373]

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371. See note 324, supra.

372. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

373. A reading of the opinions in the various cases abolishing immunity suggests the conclusion that the courts, aware of their responsibility for having originally created the rule, are attempting to rectify their error, but at the same time are attempting to force legislatures into action fixing governmental responsibility. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1, 11 (1961). Government liability, they assert, is the modern trend. The majority of state courts, however, holding that the immunity question is a policy matter to be resolved by the legislature, do not accept this view. See Annot. 60 A.L.R.2d 1198, 1199-2200 (1958). A game of quasi-legal basketball could exist, wherein the courts, hoping for legislative action defining governmental responsibility, are reluctant to act, while members of the legislature, feeling that since the rule was judicially created the judiciary should assume the responsibility in modifying it, with responsibility being tossed back and forth between judges and legislators, with no visible effort on the part of either to secure a decisive result.

Critics of the decisions abrogating immunity contend that such decisions violate the separation of powers principle by usurping the legislature's prerogative to determine public policy.[374] Further, judicial abrogation appears to be a slow and tortuous process, and not nearly as satisfactory a method of solving the immunity problem as legislative enactment of a carefully drawn ggvernmental responsibility statute.[375] Indeed, in almost every instance where immunity has been judicially abolished, the situation has been satisfactorily resolved only through subsequent legislative action defining governmental responsibility, such action being necessary to safeguard the interests of both government and the injured individual.[376] In addition, some courts have

374. See the dissenting opinions in Haney v. City of Lexington, 386 S.W.2d 738, 743 (Ky. 1964), and Parrish v. City of Little Rock, 244 Ark. 1258, 1268 (1968).

375. It is even conceded by courts abolishing immunity that the legislature is the logical agency to accomplish abolition, since it alone is in a position to supply the necessary corrective legislation. The legislature is also in a position to declare a logical and consistent philosophy respecting the liability of all governmental units. Judicial agencies, because of the nature of their role, cannot satisfactorily do this. For instance, some courts make their rulings applicable only to the governmental unit involved in the instant case, whereas other courts render broad rulings affecting all units. Occasionally, rulings are so vague and confused that subsequent rulings are necessary to clarify the judicial position. Sometimes, in view of the state-local legal relationship, decisions are illogical and inconsistent. For instance, courts of Michigan, Kentucky, and Florida hold municipalities liable, but not the state and counties; and the Minnesota Supreme Court holds all local units liable, but not their parent, the state. In contrast, in the states of New York and Washington, where the legislature has waived the state's sovereign immunity, the state and local units alike are held accountable.

376. Since judicial abrogation, some state legislatures, such as that of Illinois, have restored considerable immunity for local governmental entities. Legislative restoration of immunity may suggest that the legislature favors it as public policy. On the other hand, through abrogation of the rule of local immunity, the courts are at least placing the duty of determining governmental responsibility on the legislature.

modified or receded from their original rulings abrogating immunity.[377]

In Illinois, the legislature promptly reinstated tort immunity as to certain governmental units after the decision in Molitor v. Kaneland Community Unit Dist. No. 302.[378] In Michigan, after a decision abolishing immunity,[379] the legislature in 1965 enacted legislation which granted immunity to the state, its agencies and subdivisions and enumerated exceptions thereto.[380] In the wake of a decision in Wisconsin which abolished immunity,[381] the legislature quickly enacted legislation which provided a pro-

377. This is particularly true in the Michigan case of Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961). Although one justice did note that the decision applied to municipalities only, it was certainly not apparent from the major opinion. Subsequent decisions, however, made it clear that Williams abrogated municipal immunity only. See Sayers v. School Dist. No. 1, 366 Mich. 217, 114 N.W.2d 191 (1962); McDowell v. State Highway Comm'n, 365 Mich. 268, 112 N.W.2d 491 (1961). See notes 339 to 342, supra, and related discussion in text. See also Colorado Racing Comm'n v. Brush Racing Association, 136 Colo. 279, 316 P.2d 582 (1957) (court adopted), and Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960) (court retreated); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) (court adopted), and Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962) (court retreated).

378. See note 372, supra. Immediately following judicial abrogation, the Illinois General Assembly enacted a series of acts granting immunity to a number of local governmental units. The Illinois Supreme Court, however, voided one of the acts granting immunity to such districts, because it violated Article IV § 22, of the Illinois Constitution which forbids special legislation granting immunity to any corporation. See Harvey v. Clyde Park Dist., 32 Ill.2d 60, 203 N.E.2d 573 (1965). Following this decision, the legislature repealed the previous acts and enacted the Local Governmental and Governmental Employees Tort Immunity Act, approved August 13, 1965 (House Bill No. 1863). This Act, which grants limited immunity to all local governmental units eliminates the objection raised by the Harvey case. See also notes 330-334, supra, and related discussion in text.

379. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

380. Mich. Public Acts 170 (1964), Mich. Stat. Ann. §§ 3.996 (107) (Supp. 1965).

381. Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

cedure for claims and limited the amount of recovery.[382] Minnesota restored school district and drainage district immunity for a five-year period ending January, 1968.[383]

As a result of court action in California,[384] the state was deluged with suits. In the face of such an increase in claims, the California legislature in 1961 passed legislation requiring a two-year moratorium on claims.[385] After a two-year moratorium study period, the California legislature in 1963 enacted legislation by which sovereign immunity was re-established and exceptions made thereto.[386]

In Arizona, a similar increase in claims was experienced. A survey, complete through August 1, 1965, reveals that, since the court decision abolishing immunity,[387] 49 lawsuits were filed against the state and its entities asking for more than $9,177,000. There was much displeasure with the decision but legislative action has not followed to correct the situation.[388]

These legislative reactions to judicial decisions which abolished the immunity rule serve to focus attention upon the need for legislative development of appropriate procedures for processing liability claims and suits efficiently and for funding the liabilities without undue strain upon governmental fiscal resources. Noteworthy in this connection also is the fact that in some states

382. Wis. Stat. Ann. § 895.43 (1965).

383. Minn. Stat. Ann. §§ 466.12 and 466.13 (1963).

384. Muskopf v. Corning Hospital District, 55 Cal.2d 211, 359 P. 2d 457 (1961).

385. Calif. Session Laws, ch. 1404 (1961).

386. Calif. Session Laws, ch. 1681 et seq. (1963).

387. Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963).

388. Heinz R. Hink & David C. Schutter, "The Need for a Legislative Solution to Government Tort Liability in Arizona", Vol. 5, No. 4, Public Affairs Bulletin, p. 2, Bureau of Government Research, Ariz. State Univ. (1966). The Kentucky Legislature also has not taken action to define government responsibility, although the decision in Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964) did cause the legislature to authorize a study of the immunity rule. See Ky. Legislative Research Commission, Governmental Immunity, Research Report No. 30 (1965).

mandates to abrogate have been delayed for a period to allow enactment of legislation providing the necessary arrangements for governmental responsibility. The Minnesota Supreme Court suggested guidelines for legislative action and delayed operation of its mandate until the end of the next legislative session.[389] All this experience with judicial abrogation of immunity may well confirm the validity of one writer's observation that "adequate reformation can be achieved only by legislation."[390] However, although general agreement exists that the immunity problem can most satisfactorily be resolved by legislative action, most state legislatures have neglected to act. As one dissenting Iowa Justice has observed, when the matter of modifying immunity is left to the legislature, nothing happens.[391] Are courts therefore justified in overruling the doctrine as a means of forcing legislative action? Judicial abrogation, it must be admitted, has usually produced subsequent legislative action.

389. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292-94, 118 N.W.2d 795, 803-4 (1962).

390. Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41, 56 (1959). "State legislatures, which alone can effectively solve the problem of governmental responsibility, have neglected their obligation to act; and some courts by abrogation have forced them to face the problem. In this respect the principal contribution of the judicial abrogation movement will very likely be its influence on legislative consideration of the problem. Such consideration is necessary; legislative help is needed to fix the legal responsibility of the various governmental units with due regard for the position they occupy in the total governmental structure. In overturning immunity, the courts seem clearly to be determining public policy, usually the sole prerogative of the legislature. But the legislature has the last word: it alone can vest or divest the courts with jurisdiction to hear tort suits against governmental units; it alone can appropriate funds to satisfy tort judgments; and, finally, it alone can enact laws defining governmental responsibility, laws which when enacted will be binding on the courts. Whether governmental liability, now asserted by some courts as the 'modern trend' will become the rule in most states, remains to be seen. Judging by remedial legislation enacted in some states where judicial abrogation has occurred, its likelihood is certainly not evident. In the long run, however, authority to determine the outcome appears to rest, not with the courts, but with the legislature." Vanlandingham, Local Governmental Immunity Re-examined, 61 N.W.U.L. Rev. 263 (1966).

391. Boyer v. Iowa High School Athletic Ass'n, 127 N.W.2d 606, 617 (Iowa 1964).

Upon surveying what had happened in states where courts had abrogated immunity, many state courts refused to abrogate the doctrine, concluding that it would be more appropriate for the change, if any, to emanate from the legislature.[392] The Supreme Court of Missouri, in 1964, declined to discard the immunity rule, reasoning that, if judicial abrogation required subsequent legislation, the whole matter should be left to the legislature.[393]

Whether or not the Supreme Court of Colorado will refute, change or otherwise amend the rule of governmental immunity is, of course, not known. To this date the majority of the court has consistently upheld the doctrine and reaffirmed the position that any change in the rule should be a legislative matter. A change in the thinking of the court as a result of decisions in other states, a change in the composition of the court itself, or impatience by the court for action by the legislature, could result in a change of position by the court.

2. Enact the immunity rule as applied to all governmental entities; whether engaged in governmental or proprietary functions.

Courts and legislatures have advanced a number of arguments in defense of the doctrine of sovereign immunity. One argument expresses a concern that the unlimited liability of the state and its political subdivisions would have an adverse effect on the proper conduct of governmental services and activities and that immunity is necessary to protect the government from a rash of litigation and from unnecessary expensive settlements. Another argument against state liability concerns the fiscal integrity of the state and other public bodies; that unlimited liability could lead to very serious consequences, including the risk of fiscal bankruptcy. It is said that there would be a real danger to the fiscal stability of government, and normal services might be disrupted, since claims could not be expected and could not be budgeted.

There is little doubt that, if it desired to do so, the legislature could enact a statute giving full governmental immunity to the state and other entities. However, the injustice and confusion inherent in the doctrine is so manifest that this action is not seriously considered anywhere. Almost all legal scholars, and students of government generally, have for years condemned the principle of governmental immunity and urged its

392. See notes 355 through 368, supra, and related discussion in text.

393. Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963).

abolition.[394] Formerly justified as good public policy because it prevented diversion of public funds to satisfy tort judgments, immunity is now frequently condemned because it is at variance with modern concepts of social justice.[395] Payment of liability claims should not be viewed as diversion of public funds, but rather as a legitimate part of the cost of performing public functions.[396] Undoubtedly, immunity is unjust, since it causes the individual harmed by government to bear costs which should be borne by society. Indeed, it appears that the rule on non-liability, by denying the individual just recompense for a government-inflicted injury, violates the spirit of due process guaranteed by the fourteenth amendment to the United States Constitution and by similar provisions contained in state constitutions.[397]

The view that government should always be immune and should never use public funds to redress injuries to private persons is an extreme view. At the opposite extreme is the view which holds that government should always be liable for wrongs which it inflicts. These extreme positions are the exception. Very few states have adopted either of the extreme positions (complete immunity or unlimited liability) because there are many alternatives

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394. See note 2 and 14, supra; Davis, Administrative Law 451 (1951).

395. Determining whether any financial burden is bearable necessarily depends upon social policy. The trend of present-day policy, reflected in workmen's compensation statutes, the tort doctrine of strict liability, child labor acts, and warranties, is based upon the concept that liability should be imposed on those best able to bear the burdens of liability -- which is often society at large. See Prosser, Torts § 74, at 509 (3rd ed. 1964). Also, contrary to the fears of many, statistical studies and judicial opinions indicate that the financial burden of liability does not seem prohibitive. Note, The Utah Governmental Act: An Analysis, 120 U. of Utah L. Rev. 122 (1967).

396. See Blachly and Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 Law & Comtemp. Prob. 213 (1942); Molitor v. Kaneland Community Unit Dist. No. 302, 11 Ill.2d 11, 22-23, 163 N.E.2d 89, 94-95 (1959). Usually, purchase of public liability insurance is not considered to constitute diversion of public funds.

397. See concurring opinion of C. J. Moore in Ace Flying Serv. Inc. v. Colo. Department of Agriculture, 136 Colo. 19, 28, 314 P.2d 278, 282 (1957).

to an either-or proposition. A fair and open-minded approach to the problem of public liability should proceed not from a starting point of either complete immunity or unlimited liability, but with questions of liability to what extent, under what circumstances, and subject to what conditions, in order to take into account the legitimate interests of both the citizen and his government. Thus the problems raised by the doctrine of sovereign immunity are how to reconcile two spheres of interest that are in competition with each other. First, the interest of the individual citizen, who through no fault of his own sustains an injury as the result of governmental action or omission; and second, the interest of all citizens collectively as taxpayers to be protected from exorbitant or frivolous claims against the public treasury.

In the first approach to consideration of sovereign immunity legislation discussed above, in which no action is taken by the legislature and the determination of whether the doctrine should be abolished or modified is left to the judiciary, no consideration is given to the sphere of interest of all citizens collectively as taxpayers to be protected. In the second approach to consideration of sovereign immunity legislation, in which the legislature declares that government is always immune, no consideration is given to the sphere of interest of the individual citizen. The other five approaches discussed below deal with alternatives to these two positions and attempt to resolve the conflicting interests between government and the citizen who is injured by government.

3. Enact legislation which waives all immunity of governmental entities and declares that liability shall be determined as if the entity were a private person.

This is essentially the approach taken by New York and the United States. By statute in 1929,[398] New York generally placed public agencies on the same footing as private persons with respect to tort liability and this statute was construed sixteen years after its enactment to waive immunity of all local entities.[399] The liability of the state is a direct liability and is not dependent upon any determination that the officer or employee who actually caused the harm would be personally liable. There are no limitations on the state's liability contained in the Court of Claims Act. There is no limitation on the amount that can be recovered in a particular case and there is no limitation on the kind of torts for which recovery is permitted. Nonetheless, the courts have created some immunities from liability by judicial decision. This liability of the state is determined by the Court of Claims without a jury.

398. N.Y. Ct. Cl. Act § 1 et seq. (1963).

399. Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

The United States government has been subject to tort liability since 1946 when it enacted the Federal Tort Claims Act. The essential provisions of this act are found in 28 U.S.C. § 1346 (b) and 2671-2680.[400] These statutes impose liability on the United States for negligent or wrongful acts of officers or employees of the United States in the same manner and to the same extent as a private individual under like circumstances. The language of the act imposes liability directly on the United States and does not require any finding that the responsible officer or employee would be personally liable.

The Federal Tort Claims Act serves as a general waiver of immunity in suits arising from the negligence of government employees. The act neither repealed existing remedies nor created new causes of action; but served as a waiver of the privilege from tort suits allowed the sovereign which could now be pleaded to the same extent as against private persons, subject to the limitations contained in the act. It covers claims against departments, agencies, and corporations, whether or not empowered to sue and be sued, but excepts contractors with the Federal government.

Basically the Federal Tort Claims Act authorizes claims, "or suits on claims, against the United States on account of damages to or loss of property or an account of personal injury or death caused by negligent or wrongful act or omission of an employee of the government while acting within the scope of his employment or office,[401] which, under the laws of the place where such injuries were inflicted, would give rise to a cause of action against a private individual,"[402] except for interest prior to judgment, or for punitive damages. If a claimant elects to sue the government instead of a tortfeasor employee, or obtains an award or settlement against the government, the judgment will constitute a complete bar to the right of the claimant against the employee.

A number of immunities are provided in 28 U.S.C. § 2680. The most important immunity is that which provides that the United States is not liable on any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."[403] The Federal Tort Claims Act thus provides some stat-

400. Ch. 753, 60 Stat. 842 (1946) (codified in scattered section of 28 U.S.C.).

401. 28 U.S.C.A. § 921: 8 F.C.A. Tit. 28, § 921.

402. 1 A.L.R.2d 222 (1948).

403. 28 U.S.C. § 2680 (a).

utory immunities which reduce the scope of liability of the federal government under the act. This is lacking in the New York Court of Claims Act. Otherwise, the two statutes are essentially the same.

The main criticism of this type of approach is that the nature of governmental and public activities and functions is not comparable to private activities and responsibilities. Public agencies necessarily engage in a broad spectrum of activities having no private counterpart, which often involve relatively high degrees of exposure to injury-producing events, and which the government cannot voluntarily terminate since they are performed as a matter of public duty. Private persons and corporations, on the other hand, are ordinarily free to withdraw from activities which entail undue risks of liability. As the California Law Revision Commission has pointed out: ". . . Private persons do not make law. Private persons do not issue or revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency."[404] These differences suggest that it might not be wise to treat public and private entities alike for tort liability purposes.

In order to bring some fairness both to the government and the citizen who is injured by government negligence when faced with tort claims exemplifying the differences discussed above, the courts have felt constrained to develop new lines of judicially recognized tort immunity in order to avoid the logical consequences of the statutory language. Thus the courts have formulated rules which give immunity to public agencies when acting in a "discretionary" or "policy-making" manner and when conducting purely "governmental" activities. The decision as to whether an act is "governmental" or "proprietary", or whether it is a "discretionary" or "ministerial" function always rests with the courts. This approach, in effect, delegates to the courts the responsibility for formulating public policy. This in turn leads to unpredictability and confusion in the law, which, so far as possible, should be clarified and simplified so that persons affected thereby may with some degree of assurance arrange their affairs accordingly. It is interesting to note that none of the recent legislative programs resulting from judicial abrogation of governmental immunity has followed the New York approach.

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404. Cal. Law Revision Comm'n, A Study Relating to Sovereign Immunity, p. 269 (1963).

4. Provide for the purchase of liability insurance by all governmental entities and waive the immunity up to the extent of the coverage so obtained, and/or provide limitations on the amount that can be recovered.

This approach places governmental tort liability on a par with private tort liability, but limits the amount of damages recoverable from the public entity. This is essentially the approach taken by Minnesota in 1963.[405] The Minnesota statute authorizes the purchase of liability insurance and constitutes a waiver of immunity to the extent of the insurance coverage. This approach has also been adopted in several other states, including Idaho, Indiana, Iowa, Montana, New Mexico, North Dakota, New Hampshire, Oregon, and Vermont.[406]

The main criticism of this approach is that it creates unpredictability in the law, since it assumes continued judicial development of degrees of immunity or liability like the New York law. In addition, it is said that any dollar limitation is arbitrary and bound to be unfair to some claimants since such limits will usually have no rational relationship to the amount of actual damages sustained. On the other hand, this approach does eliminate to a considerable degree the danger of the catastrophe judgment, and provides a sound basis for rational fiscal planning and the computation of insurance premiums.[407] The provision for the purchase of insurance ought to be stated in mandatory language to have proper effect. If the provision for the purchase of insurance is permissive, as it is in Idaho, Indiana and other states, the purchase by some but not all of the public entities may result in an unfair and discriminatory law.

Closely related to this approach is the approach adopted in several states, such as Kentucky, North Carolina, Wisconsin, Illinois, and Nevada, in which a limit has been placed on the amount of damages which can be recovered against the state or other political entity without regard to whether or not there is any insurance coverage. This is similar to the approach in the "wrongful death statute" in Colorado.

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405. Minn. Laws 1963, Ch. 798 § 2.

406. Idaho Code, § 41-3501 et seq. (1962); Ind. Stat. Ann. § 39-1819 (Burns 1965); Iowa Code § 517.1 (1966); Mont. Rev. Code § 83-701 et seq. (1947, Supp. 1965); N.M. Stat. Ann. § 5-6-18 et seq. (Supp. 1966); N.D. Rev. Code § 39-01-08 (1960, Supp. 1965); N.H. Rev. Stat. Ann. § 412:3 (1955, as amended 1961); Ore. Rev. Stat. § 243.110 (1965); Vt. Stat. Ann. T. 29 § 1403 et seq. (1959).

407. Van Alstyne, The Decline of Governmental Immunity, State Government, p. 33 (Winter 1966).

Kentucky has been liable for the negligence of its officers and employees since 1946. The liability is limited, however, for no damages are awarded for pain or suffering, and the total amount that may be recovered upon any claim is $10,000. The legislature has set up an administrative Board of Claims, which consists of the members of the state's Workmen's Compensation Board, with jurisdiction to hear and allow claims for damages resulting from governmental negligence. The Board's findings of fact, where based on substantial evidence, are conclusive upon review by the courts and the awards are enforceable as court judgments.[408]

In 1951, North Carolina imposed liability upon the state government for the negligence of its officers and employees. The Industrial Commission was authorized to hear and determine tort claims against the state, in a manner similar to that in Kentucky. The Commission determination may be appealed on questions of law but findings of fact are conclusive if supported by substantial evidence. The amount of damages awarded cannot exceed the amount of $12,000.[409]

The Wisconsin Legislature in 1963 provided a procedure for bringing tort actions against political corporations, governmental subdivisions or agencies, and governmental officers and employees. The amount of recovery cannot exceed $25,000.[410] Tort claims in Illinois are within the jurisdiction of the Court of Claims which has the power to determine all claims against the state. The determination of the Court of Claims is final and conclusive and awards for damages for torts may be granted only up to $25,000.[411] In 1965 the legislature of Nevada enacted laws which waived the immunity of the state and all political subdivisions and consented to have its liability determined in accordance with the same rules of law as are applied to individuals and corporations. The waiver of immunity is subject to the conditions and limitations as set forth in the statute and an award for damages in a tort action may not exceed the sum of $25,000.[412]

408. Ken. Rev. Stat. § 44-070 et seq. (1962).

409. N.C. Gen. Stat. § 143.291 (1964, as amended 1965).

410. Wis. Stat. Ann. § 895.43 (1965).

411. Ill. Ann. Stat. ch. 37, § 439.1 et seq. (Smith-Hurd Supp. 1966).

412. Nev. Rev. Stat. § 41.035 (1965).

5. Enact legislation which reaffirms the immunity rule in general and sets out broad exceptions where the entities are to be liable.

This approach is essentially the one adopted by the Michigan legislature in 1964,[413] and by the Utah legislature in 1965.[414] Section 3 of the Utah Immunity Act initially grants immunity to all governmental entities for injuries resulting from the discharge of a governmental function. Sections 5 through 9 then proceed to waive that immunity for enumerated types of public activities. Section 10 generally waives immunity for negligent acts or omissions by employees; nevertheless it reinstates immunity for certain types of employee-caused injuries through exceptions to that general waiver.[415] The final provision of the act sets forth the requirements for the purchase of liability insurance by governmental entities, allowing all entities to purchase such insurance for risks created by the act and setting minimum amounts of coverage.[416] The approach of both Michigan and Utah is to codify the common law rule of sovereign immunity by declaring public entities immune when acting in a "governmental" capacity but liable when acting in a "proprietary" capacity. Specific exceptions to the immunity rule have been devised to accompany the general principle. For example, liability is authorized without regard for the governmental-proprietary distinction, in cases arising from highway defects, dangerous or defective conditions of public buildings, and negligent operation of governmentally-owned vehicles.

The distinction between "governmental" and "proprietary" functions is thus given statutory sanction. However, no exact

413. Mich. Public Acts 1964, ch. 170; Mich. Stat. Ann. § 3.996 (1) - (15) (1948, as amended 1964).

414. Laws of Utah 1965, ch. 139, § 1 et seq.; Utah Code Ann. § 63-30-1 to 34 (Supp. 1965).

415. Utah Code Ann. §§ 63-30-10 (1) - (11) (Supp. 1965) excepts the following from liability: discretionary acts, certain intentional torts, license and permit issuance on demand, improper inspection, institution or prosecution of any judicial or administrative proceeding, misrepresentation, riots, and civil disturbances, taxation, activities of the Utah National Guard, incarceration or legal confinement, and natural conditions of state lands.

416. See Utah Code Ann. § 63-30-34 (Supp. 1965). This section limits recovery to the minimum amounts set by § 29 or the amount of insurance procured by the entity, whichever is larger. Section 29 limits recovery for personal injury to $100,000 per person and $300,000 per accident. Property damages are limited to $50,000 per accident.

definition or explanation as to what constitutes a "governmental" or "proprietary" function is given in the statutes. This statutory treatment in effect constitutes a general delegation to the courts of the power to delineate in case by case decision-making exactly what activities and functions of government are "governmental" and what activities are "proprietary". This approach has been criticized because it leads to unpredictability since the courts are continually expanding liability by interpreting "governmental" activities as constituting "proprietary" activities for which the public entities are not immune.[417]

This creates a serious problem because there is no certainty regarding immunities and liabilities and from the time a new liability is created by court decision until this area of liability can be covered by the purchase of liability insurance there is no insurance coverage or protection. Lack of coverage during this interim period poses a serious threat to many entities. Unanticipated liabilities involving large verdicts are not taken into account in this approach to the problem. The approach leaves in the hands of the judiciary the responsibility for balancing policy considerations and striking a practical solution to issues which are essentially political in nature and thus particularly within the competence and experience of legislators.

For the above reasons, it has been suggested that the Utah Immunity Act be amended to specifically provide for coverage of proprietary functions and that the governmental-proprietary distinction be abolished by the legislature.[418]

6. Enact legislation which waives the immunity of certain entities, retaining immunity for the remainder.

This is essentially the approach taken by the state of Illinois in response to the Molitor case in which governmental immunity of local public bodies was judicially abolished.[419] Subsequent to the Molitor decision, the Illinois legislature passed several statutes which reestablished sovereign immunity for various political subdivision. For example, park districts were declared to be wholly immune from tort liability; others, such as school districts, were only liable to a limited extent (up to $10,000); and counties were made liable only in specific circumstances.[420]

417. Van Alstyne, op. cit. note 407, at 34.

418. Note, The Utah Governmental Immunity Act: An Analysis, 120 Utah L. Rev. 127-132 (1967).

419. Molitor v. Kaneland Community School Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

420. See notes 330 to 333 and note 378, supra.

There appears to be a grave constitutional problem inherent in this type of legislation since it could very well be held to be "special" legislation. There appears to be no logical basis for distinguishing between governmental entities, "either from the perspective of the injured party, or from the point of view of ability to insure against liability."[421]

The constitutional objections to this approach were borne out in several recent decisions of the Illinois Supreme Court in which it has held several of these immunity statutes to be unconstitutional as special legislation. The latest case was Hutchings v. Kraject,[422] in which a statute declaring counties to be immune was declared unconstitutional as violating the prohibition against special legislation.

7. Adopt the approach wherein the specific liabilities and immunities of all governmental entities are set out in the statute.

California was the first state to adopt comprehensive legislation in response to judicial abrogation of the sovereign immunity doctrine by the Muskopf case.[423] This approach seeks to ensure legislative control of the future development of the rules of liability and immunity.[424] As a general rule it is declared that public entities are liable in tort only to the extent declared by statute. The statute then proceeds to spell out in detail the circumstances in which liability will be recognized, not by reference to the "governmental" or "proprietary" nature of the particular activity, but by practical criteria.[425]

There are two very important considerations, one legal and one financial, which speak very strongly in favor of the Califor-

421. Van Alstyne, op. cit. note 407, at 34.

422. 34 Ill. 2d 379, 215 N.E.2d 274 (1966). See notes 330 to 333 and note 378, supra.

423. Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457 (1961).

424. It is suggested that in California governmental immunity is entirely statutory. Van Alstyne, California Government Tort Liability § 5.6 (1964).

425. Claims and Actions Against Public Entities and Public Employees (California Tort Claims Act), Cal. Gov't Code §§ 810-996.6. This Act was enacted after a two-year moratorium on the effect of the Muskopf case, during which time a study was made on the need for sovereign immunity: 5 Cal. Law Revision Comm'n, Reports, Recommendations and Studies (1963).

nia approach. First, in terms of legal draftsmanship, it is far more difficult to clearly define the exceptions to the general rule of liability than it is to retain, or where judicially abolished, to re-establish immunity and then set forth exceptions according to which public entities are liable. Second, the financial consideration is found in the task of obtaining insurance against governmental liability. Experience in other states has shown that insurance coverage is more expensive to obtain where liability is the general rule and immunity the exception. In situations, such as in the California statute, where immunity is the general rule and the areas of liability are set forth by way of exceptions, the risk to which the entities are exposed are more clearly defined and this lends itself to a more accurate ascertainment as to what the risks actually are. This should result in lower premiums paid for the coverage had.

The approach taken by California is thought to be more readily adaptable to the realities of public administration because it focuses attention on the facts rather than abstract ideas. It thus seeks to postulate statutory policy upon experience rather than theory alone, and hence should be more readily capable of alteration where need exists without damage to the underlying basic policy. Should experience prove that a change or amendment would be necessary or advantageous, based upon applicable policy considerations which are made by the legislature, the legislature can make that change by statutory enactment. The advantage of this approach is that it is susceptible to change or amendment whenever that is found to be necessary. Another advantage of this approach is that it should avoid uncertainties as to legal rights and duties. Because of the comprehensiveness and detail inherent in this approach it is thought that unnecessary litigation will be reduced.[426]

The approach taken by California has been criticized because it is thought that the complexity of the statutory pattern which has been developed along pragmatic lines will tend to encourage litigation rather than out of court settlements. It is also criticized because the comprehensiveness of the statute reduces flexibility by narrowing the range of judicial alternatives available under the statute, as compared with the common law.[427] This very idea is also used in support of this approach. Indeed, this approach takes away from the courts any chance to make a policy determination in this area. One of the main reasons for the adoption of this statutory approach in California was to take away from the courts the policy determination power it had there-

426. Cal. Law Revision Comm'n, A Study Relationg to Sovereign Immunity, p. 271 (1963).

427. Van Alstyne, op. cit. note 407, at 35.

tofore exercised when deciding whether a particular activity was "governmental" or "proprietary". This decision is now in the hands of the California Legislature.

Summary. For a legislature faced with the task of formulating legislation with respect to the doctrine of sovereign immunity, there are several alternatives open to it in considering a solution to the problem. The legislature may choose to adopt any one of the following courses of action: (1) take no legislative action; (2) make the state entirely immune; (3) make the state entirely liable; (4) make the state either entirely immune or entirely liable, with some exceptions to the general rule; (5) waive immunity up to a certain amount; (6) waive immunity of only a limited number of jurisdictions; or (7) attempt to spell out in detail both the liability and immunity of public entities.

The legislative solution appropriate for one state may not be desirable for another. There are many factors that must be taken into consideration in determining what the policy should be in a particular state. In short, the extent to which liability should be accepted or refused depends upon a careful and conscientious evaluation of competing policy considerations in light of the special circumstances which may be relevant in each state.

COMMITTEE PROCEDURE AND ACTION

Introduction

Previous attempts at adopting legislation in the area of sovereign immunity in Colorado in an effort to abolish or modify the doctrine have not been successful, except for the adoption of a law in 1949 making the state and other governmental units liable for injury caused by the operation of government owned motor vehicles, and several other statutes which impose liability on public entities. However, as was shown earlier in this report, numerous other jurisdictions have recently changed the doctrine, either by judicial decision or by legislative action, and there now appears to be a trend toward modifying or abolishing it. In addition, much criticism has been leveled at the doctrine by legal writers and scholars.

In the light of this trend and criticism, Colorado legislators and various interest groups have considered the problems attendant to governmental immunity to be of serious and immediate concern. This concern was expressed in the Forty-sixth General Assembly by the introduction of House Joint Resolution No. 1023 which directed the Legislative Council to make "a study of the problem of governmental civil immunity with a view toward developing comprehensive legislation to define and limit the areas of immunity and to provide procedures for compensation to those affected and to balance the public and private interest involved." The content of that study resolution was adopted by the General Assembly in Senate Joint Resolution No. 42. In conformity with the provisions of S.J.R. No. 42 the Committee on Sovereign Immunity was appointed by the Legislative Council to conduct such study.

Statement of the problem. The problem involved in relation to legislative consideration of the rule of governmental immunity lies in weighing the need for compensation for individual injury against the necessity of preserving public funds for general use. Basic philosophical considerations as to the nature and purpose of government, its relationship to the individual citizen and the spreading of the risk of governmental activities are involved.

Arguments for immunity. In the earliest expression of the sovereign immunity rule an unincorporated county was relieved of liability for damages on the grounds that (1) the community was unincorporated and thus did not have funds to pay damages, and (2) that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. In further justification of the rule it has been stated that (1) the doctrine rests on public policy, (2) it is absurd to speak of a wrong committed by an entire people, (3) whatever the state does must be lawful, (4) an agent of the state is always outside of the scope of his authority and employment when he commits any wrongful act,

(5) public funds should not be diverted to compensate for private injuries, (6) inconveniences and embarrassment would descend upon the government if it should be subject to liability, (7) there is a lack of precedent, (8) there will be an infinity of actions and spurious claims, (9) a municipality derives no profit from the exercise of governmental functions, which are solely for the public benefit and thus there is no fund from which to compensate for private injuries, (10) in the performance of duties public officers are agents of the state and not of the corporation, so that the doctrine of respondeat superior does not apply, and (11) cities and counties cannot carry on their government if money for public use is diverted to making good the torts of employees.

Arguments against immunity. Critics of the doctrine point to the injustice of making a private individual suffer for wrongs inflicted, in effect, by the people as a whole through the government as their agent. They argue that the state is morally obligated, as a simple act of justice, to compensate persons who have suffered at its hands. Although a state cannot be sued without consent, it should not act with impunity, for a rule of law which denies all relief for negligent or arbitrary action implicitly sanctions it. In addition, these critics insist the burden should be distributed amongst all the members of society by forcing the government to make compensation for its wrongs and if necessary, providing sources of revenue to finance such compensation. The current of criticism has been that the torts of public employees are properly to be regarded as a cost of the administration of government, which should be distributed by taxes to the general public, and that the purchase of liability insurance adequately serves to provide compensation for the injured who fall within its protection.

In theory then, the controversy is as to whether the burden of injuries inflicted by government should be borne by the injured individual or by society as a whole. If it is determined that the interests of justice are best served by spreading the burden to the whole of society by removing or modifying the immunity of government, the practical questions then arise of how best to administer and finance such a policy and at the same time preserve the fiscal integrity of individual governmental entities so that they can carry on the business of government. The crucial question seems to be whether or not the immunity of governments should be waived in particular instances or abolished altogether and, if the doctrine is abolished or limited, how a citizen's claim should be adjudicated with the least inconvenience and the greatest equity, both to the citizen and to the public.

Purpose of sovereign immunity study. The purpose of the study on sovereign immunity then is to explore the implications of possible alternative methods of providing governmental tort liability or immunity in the light of existing statutory provisions and of related case law developments both in Colorado and other states in an attempt to identify and suggest appropriate applica-

tions of policy considerations deemed pertinent to the solution of the problem posed for the legislature.

To accomplish the purposes set forth in the study resolution (Senate Joint Resolution No. 42, Forty-sixth General Assembly, 1967), the Legislative Council Committee on Sovereign Immunity held thirteen meetings from June 9, 1967 to September 19, 1968. To aid the committee in its deliberations, representatives of various departments of state government (Colorado Department of Highways, Insurance Department, Attorney General's Office, Division of Local Government), representatives of various local governmental entities, and representatives of the insurance industry, were consulted by the committee. In addition, two questionnaires were used by the committee to obtain comments and suggestions from interested persons on the proposals the committee had under consideration.

Early in its deliberations, the committee determined that any approach which attempts to comprehensively deal with the subject of sovereign immunity should be based upon fundamental policy considerations designed to accomplish two objects or to solve two problems: (1) to clearly set forth the relevant substantive liability problems, and to delineate the kinds of acts or omissions for which public entities are or are not to be immune; and (2) to clearly set forth the policy considerations relevant to the financial administration of government tort liability and the procedural handling of governmental tort liability claims. If the public entities are to be held responsible for some or all of its acts of omissions, the approach must provide some judicial or administrative means for determining and enforcing that liability.

Policy Considerations Relevant to Legislative Approach to Sovereign Immunity

As indicated earlier in this report, there are seven alternative legislative approaches available to the legislature: (1) take no legislative action; (2) make the state entirely immune; (3) make the state entirely liable; (4) make the state either entirely immune or liable, with some exceptions to the general rule; (5) waive immunity up to a certain amount; (6) waive immunity for particular jurisdictions and maintain immunity for the remainder; or (7) attempt to spell out in detail both the liability and immunity of public entities. The advantages and disadvantages of each approach and the experience in the various states which have adopted one of the particular approaches were explored earlier in this report.[428] Each of these alternatives was considered by the

428. See pages 108 to 125.

committee at some point during the study, as will be discussed below.[429]

Need for legislative action. At its first meeting, the committee heard from Associate Justice Edward E. Pringle of the Colorado Supreme Court. Justice Pringle explained that, to date, the majority of the court feels that any change, modification, or abolition of the doctrine of sovereign immunity should come from the legislature. Since the General Assembly has acquiesced in the doctrine for so many years, it should be the responsibility of the legislature, not the court, to decide whether to modify or abolish the doctrine. Justice Pringle explained that a minority of the court believes that the court should abolish the doctrine, since it came into existence through judicial, not legislative, action. The main debate is not over whether the doctrine should be abolished, but over the question of whether it should be abolished by the court or the legislature.

The disadvantages of taking no legislative action were discussed earlier in this report.[430] It was there indicated that there was general agreement that adequate reformation of the doctrine can be achieved only by legislation. Yet in the face of continued legislative neglect or inaction, several state courts have abolished the doctrine. This abolishment has, in almost every instance, led to the subsequent enactment of legislation to adequately deal with the problems of sovereign immunity. Whether or not the Supreme Court of Colorado will refute, change or otherwise modify the rule is, of course, not known. A change in the thinking of the court as a result of decisions in other states, a change in the composition of the court itself, or impatience by the court for action by the legislature, could result in a change of position by the court.

The committee determined that to take no legislative action and to wait for abolishment of the doctrine by the Supreme Court would not be wise, just or practicable. The committee decided that a statutory solution to the problem was needed to give direction and bring some degree of consistency and uniformity to the applicable statutory and common law principles. To take no legislative action would simply leave in the courts the power through judicial decision to modify or abolish the doctrine as it saw fit. The failure of the General Assembly to take action, in other words, would constitute a decision to permit the future evolution of the doctrine to be guided by judicial conceptions of sound public policy on a case-by-case approach. Because of the uncertainty that would result from this approach, and because the determina-

429. See Minutes of Meeting, pp. 2 to 6, August 17, 1967.

430. See notes 371 to 393, supra, and related discussion in text.

tion of public policy is particularly the prerogative of the legislature, the committee concluded that to take no action at all would be unwise and this alternative was rejected. The committee thus recommended that a legislative proposal be adopted by the committee.

Open end/closed end legislative approach. The problem faced by the committee was thus a question of how and when, not whether, the doctrine should be changed or abolished. The problem was one of determining the sphere within which government is immune and need not answer for the consequences of its action and the sphere within which it is liable. The committee determined that there are two general approaches that may be employed in drafting legislation -- the open end and the closed end approaches. Open end refers to bills that would abolish or retain immunity across the board, comprehensively. Closed end refers to legislation that would abolish immunity, subject to certain exceptions and limitations. This method can involve either totally establishing governmental liability and then listing exceptions to it, or totally establishing governmental immunity (reaffirming sovereign immunity) and then listing exceptions to that.[431]

Open end -- retain immunity. With respect to the first approach, that of retaining the present law of immunity, the committee felt that such an approach was undesirable. Under the present system the courts are continually expanding governmental liability by interpreting governmental activities as constituting proprietary functions for which the entities are not immune. This creates a serious problem because there is no certainty regarding immunities and liabilities and from the time a new liability is created by the courts until this area of liability can be covered by the purchase of liability insurance there is no insurance coverage or protection. Lack of coverage during this interim period poses a serious threat to many entities. It was agreed that if legislation with respect to sovereign immunity is not enacted, the courts will continue to chip away at the doctrine or abolish it entirely. For these reasons, the committee agreed that to retain the present rule of immunity would be undesirable.[432]

Open end -- blanket waiver of immunity. The committee observed that the federal government and several states have by statute or court decision declared that government is not immune from liability for its torts and that the liability is to be determined as if the government were a private person. The difficulty with this approach is that government is fundamentally different from private persons. In most jurisdictions where there has been a blanket waiver of immunity, the courts have recognized

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431. Minutes of Meeting, Nov. 15, 1967, p. 1.

432. Minutes of Meeting, Aug. 17, 1967, pp. 3, 4.

that the liability of government cannot be unlimited and they have worked out limits of liability on a case by case basis over a period of years. If no limits on governmental liability are specified, the courts will have to define the limits of such liability. This, in effect, is an abdication of legislative responsibility.

Under this process, the extent of governmental liability cannot be determined with certainty. Many cases must be tried and processed through the courts, many of which may result in the government defendant not being held liable. The financial stability of many public entities may also be left unprotected because of the unavailability of insurance at rates that they can afford to pay, resulting from the unknown potential liability.

Few persons would contend that government should be an insurer of all injuries sustained by private persons as a result of governmental activity, even though such a policy would spread the losses occasioned thereby over the largest possible base. The committee believes that the basic problem is to determine how far it is desirable and socially expedient to permit the loss-distributing function of tort law to apply to public entities, without thereby unduly interfering with the effective functioning of such entities for their own publicly approved ends. The blanket waiver of immunity approach tends to resolve this problem by ignoring it. For these reasons, the committee rejected this approach as being undesirable.

Closed end approaches. With the rejection of the two open end approaches discussed above, the committee determined that it could adopt either a statute in which liability was the general rule, with exceptions, or a statute in which immunity was the general rule, with exceptions. In considering which of these two approaches would be more readily adaptable to Colorado law and which would be the best approach, the committee directed its attention to the following areas: (1) the approach that would be the easiest to draft; (2) the effect each approach would have on the availability of insurance and the cost thereof; (3) the possible effect each approach would have on the performance of duties by public officials and employees; and (4) the approach which would allow the most flexibility for future change.

In terms of legal draftsmanship, the committee felt that it would be far more difficult to clearly define the exceptions to liability than it would be to retain immunity and then set forth exceptions according to which public entities can be sued. Thus the committee concluded that it would be easier to draft a bill in which immunity is the general rule, with exceptions for those areas wherein liability should attach to public entities.

With respect to the financial consideration pertaining to the availability and cost of insurance, the committee found that experience in other states has shown that coverage is more expensive to obtain where liability is made the principle and immunity

the exception. In situations where immunity becomes the principle and the areas of liability are set forth by way of exceptions, the risk is more clearly defined and lends itself to more accurate assessment, which should result in lower premiums for the coverage had. If the limits of potential liability are known, public entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance.

A statute imposing liability with specific exceptions for immunity would provide the public entities with little basis upon which to budget for the payment of claims and judgments for damages, for they would be faced with a vast area of unforeseen situations, any of which could result in costly litigation and a possible damage judgment. Such a statute could greatly expand the amount of litigation and the attendant expense. Moreover, the cost of insurance under such a statute would probably be greater than under a statute which provides for immunity except to the extent provided by law, since an insurance company would demand a premium designed to protect against the indefinite area of liability that would exist under a statute imposing liability with specified exceptions.

Accordingly, the committee decided to adopt a statute which provides that public entities are immune from liability unless they are declared to be liable by other statutory provision. The committee felt that this approach 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.

It is thought by some that a legislative approach in which liability is determined to be the general rule will dampen the zeal, interest and enthusiasm of public officials and employees in the performance of their duties and functions. This arises from the desire to protect themselves from possible suit, when the law is not specific as to their liability or immunity for certain acts. With liability the general rule, their exposure to suits is greatly increased. The result of this may be a lack of morale and enthusiasm among public employees. On the other hand, if immunity is the general rule, a problem could arise out of the proper performance of duty for it is possible that a misguided public official could abuse his office. If immunity were complete an official could injure individuals by his actions under the protection of the law. However, this problem seems to be more theoretical than actual and the committee thought the best approach would be for immunity to be the general rule.

The committee concluded that making immunity the general rule will provide the needed flexibility in the statute. The committee recognizes that the subject of sovereign immunity is so vast that it is nearly impossible to spell out in detail all areas of activity in which either immunity or liability of public entities and its employees is to be applied. Many areas of activity

will require attention in future years and it can be anticipated that recommendations may be submitted to subsequent legislative sessions to deal with these remaining problems. Therefore the committee felt it necessary that a statute be drafted which will allow for the addition of new areas of immunity or liability as experience proves desirable. By providing that liability is an exception to the general rule of immunity, additional liability may be imposed by the legislature within carefully drafted limits, should further study or experience in future years demonstrate that such liability is justified.

Other approaches. The committee considered and rejected the approach whereby each type of governmental unit is or may be treated separately. The committee agreed that all units of government should be treated similarly, as long as there is provision for insurance or arrangements based on ability to pay, for it makes little difference to an injured person what type of governmental unit caused the injury. It appears to be unfair to make an individual's right to recover damages for injury dependent on whether it was the state or some other political subdivision or governmental unit which was responsible.[433]

The approaches which involve the authorization to purchase insurance and provisions for the waiver of immunity up to the limits of insurance coverage and/or statutory limits on the amount of recovery that may be had against a public entity, are considered under a later sub-heading in this report.

Utah sovereign immunity bill. The committee, at its first meeting, decided that it should start with a particular philosophy or proposal on sovereign immunity so that the comments received from those concerned would be focused on a single proposal rather than directed to the whole problem in general terms. The committee agreed to begin by considering the recently enacted Utah Governmental Immunity Act, which is contained herein as Appendix A, since the act spelled out a number of provisions and exceptions which the committee wished to thoroughly explore.[434] Without committee endorsement or approval, this bill was sent to several interested persons and groups in an attempt to solicit comments and suggestions.

The Utah bill served as a starting point for discussion of what ought and what ought not to be included in any sovereign immunity bill the committee might eventually wish to propose or endorse. Most of those who responded to the request for comments

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433. Minutes of Meeting, June 9, 1967, pp. 1, 2.

434. The Utah Governmental Immunity Act is discussed earlier in this report. See notes 414 to 416, supra, and related discussion.

and suggestions on the Utah bill also appeared before the committee at its second meeting on July 28, 1967.[435] Various sections of the Utah bill were discussed in detail and there were many suggestions for improvement and suggestions on how the bill could be adapted to Colorado's situation.

Committee discussion on the Utah bill pointed out one of the most basic decisions that had to be made by the committee in its consideration of sovereign immunity legislation. That decision involved a determination as to whether the courts should decide the immunities and liabilities of governmental entities or whether that decision should be made by the legislature. In either case, the committee agreed that it must be careful to formulate language which differentiates between the two approaches.

The committee found that the Utah bill maintains the distinction between governmental and proprietary functions and vests in the courts a determination whether a particular activity is governmental or proprietary. The Utah bill provides for this distinction in Section 3. Sovereign immunity is reaffirmed with respect to governmental functions, while entities are not immune with respect to proprietary functions. There is no exact definition or clear-cut distinction between governmental and proprietary and, under the Utah bill, the determination is made on the basis of the facts in a specific case. The New York legislation, although taking a different philosophical approach, also maintains this distinction. Under this type of statute, the determination and application of sovereign immunity is left in the hands of the court.[436]

The committee found that the California legislation, unlike the New York and Utah approach, seeks to keep control of the problem in the hands of the legislature. Although the New York legislation has made governmental entities liable to the same extent as private individuals, there are certain areas of governmental activities which bear no resemblance to the activities of a private person and in which the government entities may remain immune. Under the New York law the recognition of these areas that should remain immune has been left in the hands of the court. Under the Utah bill, the courts are left to determine whether an activity is governmental or proprietary. On the other hand, in California, the decision as to what areas of governmental activity should be immune or liable remains in the legislature and not in the courts.[437]

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435. See Minutes of Meeting, July 28, 1967, for comments on the Utah Governmental Immunity Act.

436. Minutes of Meeting, August 17, 1967, p. 4.

437. Ibid.

The committee was in general agreement that it should attempt to avoid the use of the hard-to-define terms, "proprietary" and "governmental", and that the distinction be abolished in any legislation the committee might propose. Little will be accomplished in a statute without abolishing the governmental-proprietary distinction. The areas of liability should be set forth in the statute, such as was done in the California statute. Immunity should be preserved as to all other functions so that there are no unknown areas of liability. The advantages of this approach, as already indicated, are that new areas of liability can be added to the list as experience indicates, and insurance companies would know with some degree of certainty the areas of liability.[438]

California statute. In view of the consensus of the committee that (1) some legislation is needed with respect to the sovereign immunity doctrine, and (2) the liabilities and immunities of governmental units under the doctrine should be made a matter of statutory determination, the committee decided that the California statutory approach should be followed.[439] Therefore, the committee directed that a Colorado draft of the California statute be prepared for committee consideration.[440] The next two meetings of the committee were devoted to a consideration and discussion of the specific provisions of the California statute.[441]

In light of the committee discussion of the provisions of the California statute, the committee concluded that its complexity and comprehensiveness made its adaption to Colorado law an extremely difficult and cumbersome process. In addition, the form of the California statute had been almost entirely abandoned. The committee was in agreement, however, that certain substantive provisions and concepts of the California statute should be retained. The committee therefore concluded that a simpler form of statute, embodying several of the principles of the Utah and California statutes, but adapted more to Colorado's needs, would be easier to understand. With this in mind, the committee decided to draft its own bill in light of the committee discussion concerning various policy considerations relevant to the proper legislative approach, policy considerations relevant to the substantive aspects of liability and immunity in specific tort situations, policy consider-

438. Minutes of Meeting, July 28, 1967, p. 8.

439. The California Governmental Immunity Act. See notes to ,,supra, and related discussion in text.

440. Minutes of Meeting, September 21, 1967, p. 6.

441. Minutes of Meeting, October 20, 1967, and Minutes of Meeting, October 25, 1967.

ations relevant to the financial administration of government tort liability, and policy considerations relevant to the procedural handling of government tort liability claims.[442]

Policy Considerations Relevant to the Substantive Law of Immunity or Liability

The committee felt that it was necessary to agree upon the policies it wished to express in a statute regarding specific tort situations before considering a draft bill. The committee thus attempted to determine what acts of negligence it wanted to cover, or what types of claims it wanted to include for which there would be a waiver of immunity. With this policy determination, it was felt that a consideration of the draft bill would be more meaningful because the committee would have an idea of what it wanted and what to look for, based upon the agreed specific policy considerations to be expressed in the bill. Therefore, the committee examined areas of possible tort liability and suggested avenues for appropriate legislative action consistent with the relevant policy considerations.

Scope of immunity and liability. The committee agreed that it should be the policy of the statute not to narrow the present common law on liability nor to expand the present common law on immunity. It should be the intent of the statute not to undo the present law, unless otherwise specifically so stated in the act. The statute should assure that the doctrine is not imposed in those cases where it did not exist before, unless the statute specifically so provides. The statute should be designed to narrow the application of the doctrine and not to permit the expansion of the doctrine.[443]

Automobile accidents. The committee agreed that, with respect to injuries arising from automobile accidents caused by the negligent operation of government-owned motor vehicles, the defense of sovereign immunity should not be available to a public entity. The committee agreed that there should be an exception for emergency vehicles. Thus, if an injury is caused by the operation of an emergency vehicle and its operation does not fall within the provisions of the exception as expressed in 13-5-4 (2) and (3), C.R.S. 1963, the defense of sovereign immunity should not apply. If, however, the operation of the emergency vehicle is within the provisions of the exception, sovereign immunity will apply.[444]

442. Minutes of Meeting, November 15, 1967, p. 6.

443. Minutes of Meeting, November 15, 1967, p. 2.

444. Ibid.

The committee also felt that there may be circumstances wherein the operator may sometimes be individually liable, i.e., sovereign immunity would not be available to him personally. This would occur when the negligence is outside of the scope of his employment. In other words, if the operator's actions constitute gross negligence, they are outside of the scope of employment and the exception for the operation of emergency vehicles does not apply. On the other hand, if the operator's actions do not constitute gross negligence, they are within the scope of employment and the exception. Under these circumstances, sovereign immunity would apply.

Hospitals and jails. The committee agreed that sovereign immunity should not be available as a defense to injuries arising from the negligent operation of a hospital or the negligent performance of hospital activities. The committee also agreed that this policy should be applied to the operation of jails.[445]

Public buildings. The committee agreed that public entities should be liable to the same extent as private persons for injuries caused by the dangerous conditions of public buildings.[446]

Roads and highways. With respect to liability or immunity for injuries caused by the negligent construction, operation, or maintenance of public roads, or by road defects which constitute a dangerous condition, the committee found that the present law is in conflict. A county is presently immune from liability. On the other hand, a city is presently liable for injuries caused by defective streets within the city limits, if it had proper and sufficient notice of the defect and failed to correct it.

The committee agreed that the liability of the municipalities should be expanded to include the counties and the state on a logical basis. However, the committee encountered much difficulty in determining the extent to which this expansion should take place, since it is recognized that there are certain types of roads or conditions of roads which probably ought not to cause the imposition of the rule of liability on the public entity.

The committee first thought that perhaps a distinction could be drawn between injuries caused by road defects that were latent and road defects that were patent. In the case of patent defects, or defects which are plainly visible or which can be discovered by such an inspection as would be made in the exercise of ordinary care and prudence, the entity should be liable for injuries resulting therefrom. It is to be presumed that the entity has notice of the patent defect. Failure to act when presumptive

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445. Ibid.

446. Id, at p. 4.

notice exists will result in liability for injuries caused thereby. In the case of latent or hidden defects, one which could not be discovered by a reasonably careful inspection using ordinary care, the entity will be immune, unless it had actual notice of the defect in which case it will be held liable.

The committee agreed that where a patent dangerous road condition exists and the entity has notice of it or should have notice of it, the condition should be properly marked or the public properly warned of the condition. If the condition is not properly marked to warn the public, the entity will be liable for injuries resulting therefrom. Of course, in the case of latent defects if the entity does not have notice, either actual or presumptive, it will not be liable.

The committee, however, felt that it is arguable whether the state or county should be required to repair defects or to provide proper markings or warnings of their existence in order to avoid liability. The vast number of miles of state highways and roads would impose a tremendous obligation on the state if it were to meet this requirement. In other words, it is arguable whether liability should be the rule with respect to all state roads, since there are some state roads where liability should not be the rule. The problem faced by the committee was one of classifying and defining those highways and roads where immunity applies and where it does not apply. The committee felt that this classification, once agreed upon, would serve to impose varying degrees of liability depending upon the classification of the road.

The committee made several suggestions with respect to an appropriate classification. It was first suggested that perhaps the state roads could be classified and a distinction made between paved and unpaved state highways and roads. On paved roads, when the state has notice of a defect and fails to act as required to avoid liability, the state would be liable for injuries caused by dangerous conditions and defects. On unpaved roads the state would not be so liable. It was also suggested that a distinction might be made by the use of traffic count or use, with a different rule of liability attaching to each kind of classification. It was suggested that all backroads and jeep-roads be excluded from that classification which would impose liability, but that not all non-surface roads would necessarily have to be treated the same.

Another suggested approach was to waive immunity as to all roads and highways and to devise some method of protecting the state and other public entities from liability in unusual situations. It was suggested that perhaps the department of highways or other responsible public entity should be required to post warning signs when there are unusual or dangerous conditions on the particular highways. Persons who have notice of the dangerous condition and yet proceed to travel on the highway would be considered to have assumed the risk of any injury that may occur to

them as a result of the dangerous condition warned against. Another suggestion was that the construction standards used to classify the primary and secondary roads of the federal interstate highway system and the standards used to classify state highways and roads in Colorado could be used to classify roads for the purposes of sovereign immunity.

The committee agreed that there must be a reasonable basis upon which to make such a classification and that the classification system must be based on standards which are related to the waiver of sovereign immunity. The system cannot be a completely arbitrary classification, because such a classification might be open to constitutional attack on the ground that it is in violation of the equal protection clause of the constitution. The committee agreed that any attempt to classify by enumeration would have to be supported by good and substantial reasons due to the Colorado Supreme Court decisions concerning classifications.

To aid the committee in its attempt to arrive at a reasonable classification system, the Colorado Department of Highways was consulted for its recommendations. Mr. Joseph Montano, Chief Highway Counsel, reported that the state highways are classified as follows: (1) Interstate System; (2) Federal Primary System; (3) Federal Secondary System; (4) Highways that are state highways but are not on either the Interstate, Primary or Secondary systems; and (5) Urban extensions of the Federal Primary System. Mr. Montano reported that the Interstate, Primary and Urban Extensions are all paved; portions of the Secondary System are paved, others are not; portions of the system which are neither a part of the Interstate, Primary or Secondary are paved, others are not paved.

Mr. Montano reported that as of the year 1967, 64.33 percent of the annual vehicle miles traveled on all public streets, roads, and highways were traveled on the state system. Of this figure the breakdown of the percentage of vehicle miles traveled on state highways was as follows:

HIGHWAY CLASSIFICATION	MILES OF HIGHWAY	% OF ANNUAL VEHICLE MILES TRAVELED
Interstate	948.2	20.54 %
Federal-aid Primary	3434.7	33.19 %
Federal-aid Secondary	4189.7	9.97 %
Other state highways	102.9	.63 %
ALL state highways	8675.5	64.33 %

In light of this information, it was suggested that perhaps the defense of immunity could be waived with respect to injuries occurring on the Interstate, Federal Primary, and Urban Extension systems, since these are all paved highways. With respect to the Federal Secondary system, the committee attempted to develop some

classification system. It was first suggested that counties could be classified for the purpose of waiving immunity, i.e., the defense of immunity would be waived for damages for injuries sustained on the Federal Secondary highways in particular classes of counties.

The Department of Highways reported that there appeared to be no realistic way to sub-classify secondary and other state highways which would provide a meaningful distinction for the committee's purposes. It was reported that any attempt to classify the state highways on a car count basis would not be very practical because the conditions of the various highways do not vary to any great extent. In addition, there is no realistic manner in which to categorize the highways by maintenance standards since the department is charged with the duty of maintaining all highways. Consequently, the department instructs its maintenance personnel to maintain all highways in the best manner possible.

The most important consideration in determining which state highways should not be included in the sovereign immunity waiver is the fact that the Department of Highways must devote a majority of its time to design, construction, maintenance, and supervision of those highways which carry the vast majority of the traveling public. With this in mind, the committee concluded that the best way to classify the highways is by the use of the various construction standards, i.e., Federal Primary, Interstate, etc. With respect to the Federal Secondary and other state highway systems, the committee determined that immunity should be waived only for the paved highways which are a part thereof. Therefore, all paved roads should come under the waiver of immunity provisions.

Public parks, recreational facilities, etc. With respect to the liability of public entities for injuries caused by dangerous conditions in parks, recreational facilities, etc., the committee originally considered and then rejected the idea that a distinction be made between parks within the corporate limits of a city and parks outside the corporate limits, with liability attached to the former but not the latter. The committee agreed that in this area, with certain exceptions, there should be no immunity.

The committee concluded that a distinction should be made between (1) injuries caused by negligence in the construction, maintenance, failure to maintain, etc. of artificial, man-made objects (swing sets, buildings, etc.) and (2) injuries caused by the natural conditions of a park (the Flat Irons in Boulder or the Red Rocks west of Denver). In other words, ordinary negligence is sifficient to impose liability for injuries caused by the dangerous condition of artificial objects. For injuries caused by natural dangerous conditions, immunity should be retained.

If a facility is constructed or built, it must be maintained at the risk of being liable for a failure to do so. If there is property which was not constructed, but is natural and unimproved,

a public entity is not required to maintain it and cannot be held liable for failure to maintain it. In this case, sovereign immunity is applicable. In short, this means that sovereign immunity does not apply with respect to man-made objects and does apply to natural objects.

Water, sewer, trash, and other proprietary activities. The committee determined that the doctrine of immunity should not apply to those activities which are determined to be proprietary in nature and that the liability of an entity when engaged in these functions should be determined as if it were a private corporation or individual. These functions include but are not limited to the following: water, sewer, trash and waste disposal, electric and gas utilities, swimming pools, etc.

Liability and immunity of public employees. The committee agreed to include in the statute the concept of respondeat superior wherein the entity is liable when the employee is liable, and the entity is not liable when the employee is not liable. Thus vicarious liability is imposed on the public entity for the tortious acts and omissions of its employees. In the absence of a statute, a public entity should not be held liable for an employee's negligence where the employee himself would be immune. In order to impose liability on the entity it is necessary to show that the employee's negligence was committed in the scope of his employment under circumstances where he would be personally liable.

The committee recognized that there may be acts of employees where the employee should be liable without also imposing liability on the entity. This would be an exception to the general rule of respondeat superior. These exceptions may include such acts as intentional torts, gross negligence, fraud, malice, and false arrest. These acts could be considered to be outside of the employee's scope of authority, and thus the employee would be personally liable without liability being imposed on the entity. All acts of employees, unless excepted or otherwise enumerated, should be considered to be within the scope of authority.

It was also recognized by the committee that there may be certain acts of employees that should remain immune from the imposition of liability. These acts may include the adoption or failure to adopt or enforce a law; the issuance, denial, suspension or revocation of a permit, license, etc.; inspection of property; the institution or prosecution of judicial or administrative proceedings; and other types of discretionary actions which public officials are called upon to perform.

Defense of public employee. The committee agreed that a public entity should be required to assume the defense costs of its employees, whether such defense is assumed by the public entity or not, when they were acting within the scope of their employment and a claim is pressed against them for alleged injuries.

The public entity should also be required to pay all judgments or settlements of claims against its public employees in circumstances where the defense of sovereign immunity is waived as to the public entity. The public entity, however, should not be liable where it is not made a party defendant in an action and is not notified of the existence of the action within a specified time after the commencement of the action.

The committee concluded that the public entity should have discretion as to whether or not it will assume the defense of its public employee. This is necessary in order to avoid a conflict of interest situation. The public entity should be required, where it is made a co-defendant with its public employee, to notify such employee whether or not it will assume his defense. Where the entity is not made a co-defendant but is notified of the existence of the action within a specified time, it should also notify the employee whether or not it will assume his defense.

If the public entity decides to defend the employee and it is determined that the employee was acting within the scope of his authority and employment, the entity will be liable for the judgment. If it is determined by the court that the employee was acting outside of the scope of his employment, the employee, subject to an agreement with the entity, should be required to reimburse the entity for reasonable attorney's fees. In addition, the entity should not compromise or settle claims against its employees until it is established that sovereign immunity has been waived.

The committee also concluded that when the entity fails or refuses to defend one of its employees, it will be liable to said employee for reasonable defense costs and/or the settlement or judgment costs if it is subsequently determined respectively that the employee was acting within the scope of his employment and the claim arose out of circumstances wherein the defense of sovereign immunity has been waived as to the public entity. If the court determines that the employee was not within the scope of his employment then the entity is neither liable for costs of defense nor costs of the judgment or settlement.

The above approach was favored by the committee although it considered an alternative approach. The alternative to the above policy is the approach wherein there is no requirement that the entity defend its employees from claims arising out of acts or omissions within the scope of employment. Under the alternative approach, the entity could refuse to defend and even though a court subsequently establishes that the employee was within the scope of authority the entity would still not be liable for the defense cost. The arguments in favor of not requiring the entities to defend are that (1) it would probably not encourage as many law suits, (2) it would probably cost less money, and (3) it would encourage responsibility on the part of public employees. The argument in favor of requiring the public entities to defend their

employees is that the problems created by the case of Liber v. Flor would not arise again.

The committee emphasized that any provision in the statute which requires the public entity to defend should not be construed to be a waiver of immunity in situations where the sovereign immunity rule would otherwise be applicable. The provision should not be interpreted as requiring the entity to pay all claims whether or not sovereign immunity exists.

Defenses. The general rule of any statute should be that sovereign immunity is retained, except as waived by the statute or other provision of law. Thus, if sovereign immunity is not waived by statutory provision, sovereign immunity shall be available to a public entity as a defense to an action for injuries. Where sovereign immunity is abrogated as a defense, the liability of the public entity should be determined in the same manner as if the public entity were a private person. All defenses available to private persons are also available to public entities.

Policy Considerations Relevant to Financial Administration of Governmental Tort Liability

The committee felt that the practical fiscal consequences which might foreseeably flow from any enlargement of tort responsibility deserved to be analyzed for at least two reasons. In the first place, the interests of justice demand that provision be made for something more than a mere theoretical liability which an injured plaintiff is authorized to assert. Assurance should be furnished that meritorious tort claims, when proven, will actually be paid. A second basis for concern relates to the potential repercussions upon the financial health of the public entity found to be liable. The public interest demands assurance that prospective, as well as actual, tort liabilities will not disrupt the orderly administration of public finances nor interfere with the diligent performance of public functions.

Insurance -- waiver to extent of coverage. The committee agreed that one of the specific policy considerations should be that sovereign immunity is waived to the extent of insurance coverage obtained by a public entity. This should be so regardless of whether the entity would otherwise be liable or immune. Thus, if a public entity obtains insurance to protect against liability for injury, then such public entity should be deemed to have waived the defense of sovereign immunity as to the particular injury or injuries insured against and to the extent of the amount of insurance provided for the particular injury or injuries. If the defense of sovereign immunity would otherwise be applicable to the entity, then the amount of recovery should be limited to the amount of recovery against the insurer. The committee felt that by providing that recovery be limited to what is recoverable against the insurer, the situation could be avoided where the en-

tity would have to pay an amount to make up the difference between the amount of insurance coverage and the amount the insurer actually pays.

Insurance to cover liabilities created under statute. One of the major concerns of the committee was whether any risks or liabilities were being created by waiving sovereign immunity which could not be adequately insured against. The question was whether or not the state and political subdivisions could purchase liability insurance at reasonable rates to cover any new exposures created by any sovereign immunity legislation.

In this regard, the September 21, 1967, meeting was devoted to a discussion of the insurance aspects of sovereign immunity legislation. The committee consulted with Mr. Richard Barnes, Commissioner of Insurance, who had contacted the insurance people in New York, Utah and California to determine what problems had been encountered in those states with respect to the purchase of insurance to cover their risks. In addition, the committee consulted with Mr. Cecil Munson, Assistant Vice President of Pacific Indemnity Group, who was responsible for drafting the insurance policies his company uses for governmental liability coverage in California. Mr. Munson's jurisdiction also includes Illinois, Minnesota, and Utah, all of which have statutes on governmental immunity and liability.

Mr. Barnes reported that he had contacted the Commissioner of Insurance in Utah and had solicited his comments on the experience in that state subsequent to the enactment of the Utah bill. Mr. Barnes said that in Utah various companies are competing for bids for insurance coverage by the local governments. On the state level, only the Highway Department is insured. Mr. Barnes stated that in his opinion insurance could be obtained in Colorado for any of the risks created by the Utah bill.

Mr. Munson stated that the insurance companies have been able to provide the coverage desired by the public entities in California. He felt there would be no serious problems involved in providing adequate insurance coverage in Colorado if the state chooses to follow the California approach. In California, premiums are kept down considerably because of the specification of liabilities and immunities. Mr. Munson stated that the more liability the statute imposes, the higher the cost for the coverage.

In explaining what the insurance companies would look for in establishing rates, Mr. Munson stated that insurance could be obtained from several companies which are competitive in the field and they would look at the total exposure of the entity in establishing the insurance rates. The company looks at the loss rates for each entity in determining the insurance rate. The company also looks at the areas of liability and immunity when writing a policy.

Mr. Munson estimated that a policy in California of $50,000 per person and $100,000 per occurrence for bodily injury and $10,000 to $25,000 for property damage would cost between $8,000 and $9,000 per year, excluding automobile coverage. It was noted that this is approximately the amount the entities in Colorado are paying now with the immunity rule in effect. Asked what the premiums would be assuming the immunity rule were repealed altogether, Mr. Munson replied that the cost would be approximately 25 percent more.

Mr. Munson said that the approach in Utah of limiting the amount of insurance that may be purchased and limiting any judgment to that amount was a good approach to follow. Mr. Munson also stated that providing for a standard policy which would be required to cover everything under the statute was a good idea because it would avoid many loopholes, would benefit the buyers, and many good insurance companies will write standard policies. He also commented that there does not appear to be any great problems in getting a policy without too many riders in it.

As to whether there would be any substantial savings in cost if limitations on the amount of damages which could be recovered were written into the statute and assuming these limitations were fairly high, Mr. Munson stated that there would be a savings, but added that there are almost always limits on liability. If there were no limits in the statute and the statute completely waived sovereign immunity, no insurance company would cover this kind of risk.

Limitation on maximum amount of recovery. The committee agreed that a limitation on the amount of recovery when there is liability should be set forth in the statute. Thus, the state or other public entity would be liable up to the statutory maximum. The committee originally agreed that the limits should be set at $100,000 per person, and $1,000,000 per occurrence. Although the $1,000,000 may seem high, some entities are presently liable in areas where there is no limitation at all. When viewed from this perspective, the $1,000,000 limitation is really reducing the potential liability of a public entity. The policy behind the limitations is to give some degree of protection to the entity, even though basically waiving immunity and allowing more people to sue for injuries caused by governmental negligence.

At the August 15, 1968 meeting, the committee consulted with representatives of the Department of Insurance. The committee determined, upon information furnished by the department, that the difference in the cost of purchasing insurance with limits set at $100,000 - $1,000,000, and with limits set at $100,000 - $3,000,000, was not great enough to make a substantial difference. There being no substantial reason for not increasing the limit to $3,000,000 per occurrence, the committee decided to establish the limits at $100,000 per person and $3,000,000 per occurrence.

Authority to obtain insurance. The committee concluded that all types of public entities should be expressly authorized to insure themselves against liability. It is desirable to make clear that a public entity's authority to insure is as broad as its potential liability. Likewise, all public entities should be expressly authorized to purchase insurance to cover the liability of their officers, agents, and employees for torts committed in the scope of their public employment. Not only should public entities be authorized to insure against any liability, but they also should be authorized to insure against the expense of defending claims, whether or not liability exists on such claims.

The committee determined that public entities should be expressly authorized to insure either by purchasing commercial liability insurance or by adopting a program of self-insurance through the establishment of financial reserves, or by any combination of the two methods. Full insurance coverage from a commercial insurer may be deemed practically indispensable by many entities. Others, however, may determine that adequate protection at the lowest possible cost can be provided through a program of self-insurance, or a combination of self-insurance plus an excess coverage policy purchased from a commercial carrier.

The committee concluded that public entities should be authorized to purchase insurance only from an insurer authorized to do business in this state and deemed by the state purchasing agent, or the appropriate governing body of the public entity, to be responsible and financially sound considering the extent of the coverage required.

The committee does not recommend at this time that all public entities, other than the state, be required to provide insurance covering their liability or the liability of their officers, agents, and employees. The state, however, should be required to provide insurance.

Payment of judgments. To ensure that public entities have both the duty and capacity to pay tort judgments for which they are liable and, at the same time, to protect them against the disruptive financial consequences of large tort judgments, the committee concluded that all public entities should have a statutory duty to pay tort judgments for which they are liable. Judgments against public entities, unlike those against private persons, ordinarily cannot be satisfied by execution or other legal process against the assets of the judgment debtor, for public property and funds are generally exempt from execution. However, when a statutory duty is imposed to pay tort judgments, it will be clear not only that such entities have authority to pay such judgments, but also that the judgment creditor may bring an action pursuant to Rule 106 of the Colorado Rules of Civil Procedure to compel the public entity to pay the judgment.

Accordingly, a public entity should be required to pay any judgment to the extent funds are available in the fiscal year in which the judgment is final. The judgment may be paid out of any funds that are available to the entity from (1) a self-insurance reserve fund, (2) funds that are unappropriated for any other purpose, and (3) funds appropriated for the current fiscal year for the payment of such judgments and not previously encumbered.

If the judgment cannot be paid in full in the fiscal year in which it becomes final, the public entity should be required to pay the balance of the judgment in the ensuing fiscal year by levying a tax sufficient to discharge the judgment. The committee determined that in no event should be levy exceed ten mills, exclusive of existing mill levies. The public entity should continue to levy such tax, not to exceed ten mills, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until the judgment is discharged.

Policy Considerations Relevant to Procedural Handling of Governmental Tort Liability Claims

Notice -- filing of claim. The committee determined that any person claiming to have suffered an injury by a public entity or an employee thereof should be required to file a written notice with the entity within six months after the date the injury is known or should have been known by the exercise of reasonable diligence. The committee decided that a claim for injury should be considered to accrue on the date the injury is known or should have been known by the exercise of reasonable diligence. The committee considered and rejected a suggestion that the claim be considered to accrue from the time the injury is sustained. The committee also considered and rejected a suggestion that the claimant be required to file a written notice within three months.

The notice should be presented to the attorney general when the claim is against the state or an employee thereof. When the claim is against any other public entity or an employee thereof, the notice should be presented to the governing body of the public entity or the attorney representing the public entity.

Statute of limitations. The committee concluded that there should be a two year statute of limitations with respect to tort actions. An action based on tort should be commenced within two years after the accrual of such action, or be forever barred.

Compromise and settlement. The committee decided to vest in the administrative officers of a public entity the discretionary authority to compromise or settle claims.

Colorado Governmental Immunity Act

The committee drafted a bill embodying the policy considerations discussed above. This bill, without committee endorsement or approval, was sent to all municipalities, counties, and school districts in an attempt to solicit comments and suggestions. The committee devoted four meetings to a consideration of the draft bill in light of the various policy considerations and the suggestions from interested persons. This bill is contained in the committee report.

APPENDIX A

UTAH GOVERNMENT IMMUNITY ACT

63-30-1. Short title. --This act shall be known and may be cited as the "Utah Governmental Immunity Act."

An Act relating to the immunity of the state, its agencies and political subdivision from actions at law; providing for exemption thereto, for the purchase of liability insurance, and for the payment of claims and judgments.

63-30-2. Definitions. --As used in this act:

(1) The word "state" shall mean the state of Utah or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof;

(2) The words "political subdivision" shall mean any county, city, town, school district, special improvement or taxing district, or any other political subdivision or public corporation;

(3) The words "governmental entity" shall mean and include the state and its political subdivisions as defined herein;

(4) The word "employee" shall mean and include any officer, employee or servant of a governmental entity;

(5) The word "claim" shall mean any claim brought against a governmental entity or its employee as permitted by this act;

(6) The word "injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

63-30-3. Immunity of governmental entities from suit. --Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function.

63-30-4. Act provisions not construed as admission or denial of liability - Effect of waiver of immunity. --Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities are concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

63-30-5. Waiver of immunity as to contractual obligation. --Immunity from suit of all governmental entities is waived as to any contractual obligation.

63-30-6. Waiver of immunity as to actions involving property. --Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

63-30-7. Waiver of immunity for injury from negligent operation of motor vehicles--Exception. --Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment while in the scope of his employment; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of section 41-6-14, Utah Code Annotated 1953, as amended by chapter 86, Laws of Utah, 1961.

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures. --Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement - Exception. --Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee - Exceptions. --Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or
(2) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of rights of privacy, or civil rights, or
(3) arises out of 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, or
(4) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or
(5) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause, or
(6) arises out of a misrepresentation by said employee whether or not such is negligent or intentional, or
(7) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances, or
(8) arises out of or in connection with the collection of an assessment of taxes, or
(9) arises out of the activities of the Utah National Guard, or
(10) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement, or
(11) arises from any natural condition on state lands or the result of any activity authorized by the state land board.

63-30-11. Claim for injury - Claimant's petition for relief. --Any person having a claim for injury to person or property against a governmental entity or its employee may petition said entity for any appropriate relief including the award of money damages.

63-30-12. Claim against state or agency - Notice to attorney general and agency - Time for filing. --A claim against the state or any agency thereof as defined herein shall be forever barred unless notice thereof is filed with the attorney general of the state of Utah and the agency concerned within one year after the cause of action arises.

63-30-13. Claim against political subdivision - Time for filing notice - Claim against city or town for injury on highways, bridges, or other structures. --A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises; provided, however, that any claim filed against a city or incorporated town under section 63-30-8 shall be governed by the provisions of section 10-7-77, Utah Code Annotated, 1953.

63-30-14. Claim for injury - Approval or denial by governmental entity or insurance carrier within ninety days. --Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim.

63-30-15. Denial of claim for injury - Authority and time for filing action against governmental entity. --If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances where immunity from suit has been waived as in this act provided. Said action must be commenced within one year after denial or the denial period as specified herein.

63-30-16. Jurisdiction of district courts over actions - Application of Rules of Civil Procedure. --The district courts shall have exclusive original jurisdiction over any action brought under this act and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this act.

63-30-17. Venue of actions. --Actions against the state may be brought in the county in which the cause of action arose or in Salt Lake County. Actions against a county may be brought in the county in which the cause of action arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county. Said leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which said political subdivision is located or in the county in which the cause of action arose.

63-30-18. Compromise and settlement of actions. --The governmental entity, after conferring with its legal officer or other legal counsel if it has no such officer, may compromise and settle any action as to the damages or other relief sought.

63-30-19. Undertaking required of plaintiff in action. --At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of $300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

63-30-20. Judgment against governmental entity bars action against employee. --Judgment against a governmental entity in an action brought under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim.

63-30-21. Claims by other governmental entities prohibited. --Notwithstanding any other provision of this act, no claim hereunder shall be brought by the United States or by any other state, territory, nation or governmental entity.

63-30-22. Exemplary or punitive damages prohibited - Governmental entity exempt from execution, attachment or garnishment. --No judgment shall be rendered against the governmental entity for exemplary or punitive damages; nor shall execution, attachment or garnishment issue against the governmental entity.

63-30-23. Payment of claim or judgment against state - Presentment for payment. --Any claim approved by the state as defined herein or any final judgment obtained against the state shall be presented to the office, agency, institution or other instrumentality involved for payment if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then said judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in section 63-6-10, Utah Code Annotated, 1953.

63-30-24. Payment of claim or judgment against political subdivision - Procedure by governing body. --Any claim approved by a political subdivision or any final judgment obtained against a political subdivision shall be submitted to the governing body thereof to be paid forthwith from the general funds of said political subdivision unless said funds are appropriated to some other use or restricted by law or contract for other purposes.

63-30-25. Payment of claim or judgment against political subdivision - Installment payments. --If the subdivision is unable to pay the claim or award during the current fiscal year it may pay the claim or award in not more than ten ensuing annual installments of equal size or in such other installments as are agreeable to the claimant.

63-30-26. Reserve funds for payment of claims or purchase of insurance created by political subdivisions. --Any political subdivision may create and maintain a reserve fund or may jointly with one or more other political subdivisions make contributions to a joint reserve fund, for the purpose of making payment of claims against the co-operating subdivisions when they become payable pursuant to this act, or for the purpose of purchasing liability insurance to protect the co-operating subdivisions from any or all risks created by this act.

63-30-27. Tax levy by political subdivisions for payment of claims or judgments or insurance premiums. --Notwithstanding any provision of law to the contrary all political subdivisions shall have authority to levy an annual property tax in the amount necessary to pay any claims, settlements, or judgments secured pursuant to the provisions hereof, or to pay the costs to defend against same, or for the purpose of establishing and maintaining a reserve fund for the payment of such claims, settlements or judgments as may be reasonably anticipated, or to pay the premium for such insurance as herein authorized, even though as a result of such levy the maximum levy as otherwise restricted by law is exceeded thereby; provided, that in no event shall such levy exceed one-half mill nor shall the revenues derived therefrom be used for any other purpose than those stipulated herein.

63-30-28. Liability insurance - Purchase by governmental entity authorized. --Any governmental entity within the state of Utah may purchase insurance against any risk which may arise as a result of the application of this act.

63-30-29. Liability insurance - Required policy provisions. --Every policy or contract of insurance purchased by a governmental entity as permitted under the provisions of this chapter shall provide:

(a) In respect to bodily injury liability that the insurance carrier shall pay on behalf of the insured governmental entity all sums which the insured would in the absence of the defense of governmental immunity be legally obligated to pay as damages because of bodily injury, sickness or disease, including death resulting therefrom, sustained by any person, caused by accident, and arising out of the ownership, maintenance and use of automobiles, or arising out of the ownership, maintenance or use of premises, and all operations necessary or incidental thereto, or in respect to other operations and caused by accident subject to a limit, exclusive of interest and costs, of not less than $100,000 because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than $300,000 because of bodily injury or death of two or more persons in any one accident.

(b) In respect to property damage liability that the insurance carrier shall pay on behalf of the insured governmental entity all sums which the insured would in the absence of the defense of governmental immunity be legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident, and arising out of the ownership, maintenance or use of premises, and all operations necessary or incidental thereto, or in respect to other operations and caused by accident to a limit of not less than $50,000 because of injury to or destruction of property others in any one accident.

63-30-30. Liability Insurance - Provision for waiver of sovereign immunity defense and for payment by insurer required in policy. --Every contract or policy of insurance purchased under the terms of this act for any or all risks created by this act shall include a provision or endorsement by which the insurer agrees not to assert the defense of sovereign immunity, and to pay all sums for which it would otherwise be liable under its contract or policy of insurance.

63-30-31. Liability insurance - Construction of policy not in compliance with act. --Any insurance policy, rider or endorsement hereafter issued and purchased to insure against any risk which may arise as a result of the application of this act, which contains any condition or provision not in compliance with the requirements of the act, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or endorsement been in full compliance with this act, provided the policy is otherwise valid.

63-30-32. Liability insurance - Purchase of policy from lowest and best bidder required. --No contract or policy of insurance may be purchased under this chapter or renewed under this act except upon public bid to be let to the lowest and best bidder.

63-30-33. Liability insurance - Insurance for employees authorized. --A governmental entity may insure any or all of its employees against all or any part of his liability for injury or damage resulting from a negligent act or omission in the scope of his employment regardless of whether or not said entity is immune from suit for said act or omission, and any expenditure for such insurance is herewith declared to be for a public purpose.

63-30-34. Liability insurance - Judgment or award over limits of insurance policy reduced. --If any judgment or award against a governmental entity under sections 63-30-7, 63-30-8, 63-30-9, and 63-30-10 exceeds the minimum amounts for bodily injury and property damage liability specified in section 63-30-29, the court shall reduce the amount of said judgment or award to a sum equal to said minimum requirements unless the governmental entity has secured insurance coverage in excess of said minimum requirements in which event the court shall reduce the amount of said judgment or award to a sum equal to the applicable limits provided in the insurance policy.

APPENDIX B

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September 16, 1968

Mr. Lyle C. Kyle, Director
Colorado Legislative Counsel
Room 341, State Capitol
Denver, Colorado 80203

RE: Proposed Sovereign Immunity Legislation

Dear Lyle:

I have now reviewed with the American Insurance Association the rough draft of the captioned legislation dated August 12, 1968. On the whole, we believe that this draft is quite good.

However, we continue to be concerned with Section 9 (5) dealing with the accrual of the cause of action. As that section now stands, we believe it to be obscure as to precise meaning and that, if enacted as it stands, would be a potential source of considerable litigation. Conceivably, as the section is now drafted, an injury could remain undiscovered for six years, a claimant then discover or claim to have discovered the injury thus making the cause of action accrue a month or so short of six years, and the claimant would then have an additional two years to commence litigation. This would certainly seem to controvert the present six year statute of limitations for personal injury or property damage now existing in the State of Colorado. It would almost seem that it would be less costly to the state and other governmental entities involved to leave out the proposed Section 9 (5) altogether.

We also note that Section 15 (2) (c) and Section 16 (2) (c) contain provisions leaving the determination as to the responsibility of an insurance company

to the State Purchasing Agent or appropriate governing body of the governmental subdivision. We could easily see where such a provision could lead to favoritism and pressure in the purchase of insurance coverage. We would believe that the insurance should be obtainable from any duly authorized insurance company which meets the requirements of the Colorado Insurance Commissioner.

Yours very truly,

Martin J. Andrew, Legislative Representative
American Insurance Association

MJA/bd

cc: Senators Hahn, Chairman, Saunders and
Representatives Braden, Cole, Edmonds, Grimshaw, Lamb,
Sack and Safran