M I N U T E S

SPECIAL COMMITTEE ON GOVERNMENTAL IMMUNITY

October 2, 1975

Members Present

Senator Donn Everett, Chairman
Representative John Hayes, Vice-Chairman
Representative Richard Walker
Representative David Mikesic

Staff Present

Walt Smiley, Legislative Research Department
Arden Ensley, Revisor of Statutes Office
Art Griggs, Revisor of Statutes Office

Conferees

John Martin, Attorney General's Office
Ernie Mosher, League of Kansas Municipalities
Barkley Clark Mayor of Lawrence, Kansas
Larry Barry, Insurance Commissioner's Office
Mike Malone, Insurance Commissioner's Office
Eugene Riling, Kansas Trial Lawyers Association
Jerry Palmer, Kansas Trial Lawyer's Association
Paul Clark, Kansas Trial Lawyer's Association
Larry McGrath, Kansas Trial Lawyer's Association

Morning Session

The Chairman called the meeting to order, and asked staff to review the history of governmental immunity in Kansas. It was noted that the Legislative Budget Committee felt that the proper approach to governmental immunity is a decision which should be made by attorneys, so a special committee composed of attorneys was requested and subsequently appointed.

Staff noted that Brown v. Wichita State University, 217 K. 279, did not destroy governmental immunity in Kansas; the courts

and the legislature are still immune under certain conditions. It was stated that under Brown, a new definition of governmental functions, as distinct from proprietary functions, may evolve. While Brown mentioned a tort claims act, it was noted that the court may have had in mind the federal tort claims act (28 USCA Secs. 2671 et. seq.). In response to a question, staff replied that no Tenth Circuit decision appears to be applicable to Kansas; however, U.S. Supreme Court cases on the federal tort claims act are abundant. The federal courts have construed variously the term "discretionary act of an employee". It was noted that if a lid is placed on total amount of damages claimable, under Brown, such limitation could not vary among governmental units -- it would have to apply uniformly to all levels and branches of government.

Staff distributed copies of a draft bill. (A copy is in Committee notebooks.) The Chairman noted that he had requested such draft be drawn-up prior to the meeting. Staff then reviewed and summarized the draft. The summary is appended as Attachment I.

The following briefly noted Committee discussion of the Revisor's draft:

Section 3. The Committee discussed alternative rationales for exempting interest prior to judgement. It was stated that this may be a cost economizing measure. After further discussion, the Committee appeared to agree that a governmental entity should not be liable for interest prior to judgement.

Section 4. Staff discussed implications of Indian Towing Co. v. U.S., 350 US 61, 100 L.Ed. 48, and Dalehite v. U.S., 346 U.S. 15, 73 S.CT. 956, 97 L. Ed. 1427. A Committee member inquired about the terminology in subsection (c). Staff agreed to check this out.

Section 5. There was some discussion of where claims should be filed in cases involving, for example, joint city-county agencies, and other local units of government.

Committee and staff reviewed remaining sections of the bill.

The Chairman then introduced Mr. John Martin of the Attorney General's staff. Mr. Martin expressed concern for the claim filing procedure under the draft bill. He said that the federal act allows agency heads to settle claims under $25,000, and for claims over that amount an agency head may settle the claim with the Attorney General's approval. Claims against the state should be handled in a manner similar to claims against businesses, according to Mr. Martin. Because a business would always consult with their general counsel, he felt that the state, in matters of claims settlement, should always concsult with the Attorney General. He pointed out that any failure to settle the claim would always result in litigation, and thus the Attorney General would become involved. Also, without a central clearing agency, no state agency

will know what other state agencies are doing with respect to claim settlements. Mr. Martin felt that two decisions must be made with respect to claims: the amount of the claim allowed; and whether the claim is in the purview agency.

In response to a question, Mr. Martin noted that if the statewide district attorney bill passes, counties may be left with no county counselor. Thus it would be uncertain who would handle claims cases for the counties. He indicated that there are similar problems with respect to other local political subdivisions.

In response to another question, Mr. Martin noted that venue for claims against state agencies should be filed under the Code of Civil Procedure. He felt that the head of the state agency should be named as defendant in any such law suit. Mr. Martin pointed out that the Shawnee County District Court gains expertise in the area of administrative law because venue for litigation involving many state agencies is vested in that court. He noted that this is not the case with torts, as every district court is involved in torts litigation.

In Mr. Martin's view, it will be the court which has the final decision as to what the state is liable for, so the legislature should not attempt to laundry list what the state's liabilities -- this only leads to more litigation and to more attempts to clarify and further decline the list.

The Chairman then noted that several state agencies should be invited to testify at the next meeting of the Special Committee. Such agencies should include the Department of Transportation, Department of Social and Rehabilitation Services, Board of Regents (and especially the K.U. Medical Center), Department of Corrections, and the Department of Administration. He also indicated that the Attorney General should be invited to make any suggestions he feels relevant.

The Committee returned to Section 4 of the draft, and discussed which acts should be considered discretionary and which acts should be considered negligent. With regard to the former, staff noted that the U.S. Supreme Court has held that discretion involves both a policy judgement and a decision. It was also noted that Section 4(a) makes explicit reference to "discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused." A Committee member noted that it appears to be inconsistent to have a list of areas where governmental entities are immune without also having a list of areas where governmental entities are liable. Several alternative solutions were discussed.

In response to a question, staff noted that each political subdivision may provide its own method of claim settlement under this draft.

After further discussion, the Committee appeared to agree that the Attorney General should have no say in initial claim settlement, because he would necessarily be defending the state in subsequent litigation. The Committee then instructed staff to consider

for the next draft the creation of a state claims commission to determine claim settlements, with the Attorney General and the claimant to appear before such commission; if no agreement is reached or if the claim is denied, the remedy would be litigation. State agnecy heads would be allowed to settle small claims (under $3,000), with the advice of the Attorney General. All claims against the state would be filed with the claims commission.

Afternoon Session

The Chairman introduced Mr. Larry Barry of the Insurance Commissioner's Office. Mr. Barry noted that the Commissioner's staff became involved in this issue at the request of Speaker McGill. Mr. Barry emphasized that a tort claims act is only one approach to the governmental immunity issue. He then introduced Mr. Mike Mullen, also of the Insurance Commissioner's Office.

Mr. Mullen emphasized that he was not advocating the Insurance Commissioner's draft to the exclusion of other proposals. He said that he intended only to explain the tort claims approach.

After briefly reviewing the history of sovereign immunity, Mr. Mullen noted that Brown struck down K.S.A. 46-901 and 902, on the grounds that these sections were too broad. He noted that the court, in Brown, recognized the authority of the legislature in the field of governmental immunity. (217 K. 279,293.) Mr. Mullen stated that, in his opinion, K.S.A. 46-901 and 902 did not sufficiently restrict governmental immunity, and thus the court struck down the section. He felt that legislation could be drafted to define "governmental" functions. If consistency could be maintained in such legislation, he said, legislation would be upheld by the court. An alternative is a tort claims act, which in Mr. Mullen's view, would defer to the court's judgment in the matter of settling claims. Mr. Mullen pointed out that the Insurance Commissioner's draft takes the position that governmental immunity is justified, and those activities which have been declared "governmental" by the Kansas Supreme Court are declared in the draft to be immune from liability. Activities not yet delcared to be immune remain subject to a court determination under this draft, Mr. Mullen noted. He stressed that this approach will minimize state exposure to liability. He further noted that the Insurance Commissioner's draft derives from the New Jersey act, which was taken from the California act, which in turn derived from the Federal Tort Claims Procedure Act (28 USCA Secs. 2671 et seq.).

Mr. Mullen emphasized that the Kansas Court has not said it will determine immunity on a case-by-case basis regardless of legislative activity; rather, if legislation follows existing case law, such legislation may be upheld. He stressed that this may not be the only valid approach. Mr. Mullen further noted that an order of the Kansas Supreme Court, filed October 2, 1975, specified the issues to be heard on reargument in Brown v. Wichita State University. He noted that the Court had requested arguments specifically on the point of the scope of legislative power to regulate or restrict the liability of the state or its political subdivision for tortious acts of public employees.

In relation to the Insurance Commissioner's draft, Mr. Mullen noted that Sections 2 through 7 are not taken verbatim from case law, but rather case law was used to indicate policy direction. In response to a question, Mr. Barry noted that the discretionary-nondiscretionary terminology does not fit Kansas case law. He suggested such dichotomy would add confusion unless the terms were very well defined, or were synonymous with "governmental". He noted that the Attorney General's duties were beyond the scope of the Insurance Commissioner's comments; however, he felt the Attorney General has an important role to play in governmental immunity.

In response to a question, Mr. Barry indicated that a state tort claims procedure act should deal with municipalities. As to whether a particular set of facts fits within the "governmental" or "proprietary" classifications, he said that the court will make that decision.

The Chairman then introduced Mr. Ernie Mosher of the League of Kansas Municipalities. Mr. Mosher read from a statement which was affirmed by League delegates in late September, 1975. A copy of this statement may be found as Attachment II.

Mr. Mosher supported 1974 S.B. 463 which passed the Senate and was recommended out of House Judiciary Committee. Mr. Mosher also indicated the League's support for 1975 S.B. 586, noting that the same approach to governmental immunity was employed in both bills. It was Mr. Mosher's view that municipalities would be better off with immunity in all areas except where specified by the legislature. In this way, he felt that local units of government can plan and budget for their liability.

Mr. Mosher stated in response to a question that he had no figures as to the number of suits filed against cities. It was his opinion, however, that few large claims are outstanding which are not subject to insurance. Mr. Mosher then introduced Mr. Barkley Clark, Mayor of Lawrence.

Mr. Clark noted that, in his opinion, K.S.A. 46-901 was not comprehensive, but was more like a negative reaction to Carroll v. Kittle (203 K. 841,457 P2d 21). He noted that existing Kansas case law created difficulties in distinguishing "proprietary" functions from "governmental" functions. Mr. Clark felt that Brown essentially stated that governmental immunity cannot apply differently to different levels of government. Citing the Federal and the California tort claims acts, Mr. Clark noted that the discretionary/ministerial approach to governmental immunity yields a large body of case law. In his view, the governmental/proprietary distinction should be abolished, and all governmental activities should be immune from liability, except for situations to be determined by policy criteria. This approach would rule out governmental/proprietary considerations. He felt that it is unacceptable for one method of determining liability to apply to the state, and another method to apply to cities and other local units of government.

Mr. Clark noted that Illinois has had a similar legislative history concerning the governmental immunity issue. He further noted that about 15 states have implemented tort claims acts during the last 15 years.

In response to a question, Mr. Clark noted that an employee's abuse of discretion is treated the same as an intentional tort in the Revisor's draft. Mr. Clark felt that this is a reasonable approach. In reference to Section 4 of the draft, Mr. Clark felt that subsections (a) and (d) were the most important. In response to another question, Mr. Clark indicated that continued use of the governmental/proprietary distinction will lead to aberrations, and that to employ such terms allows the courts the final decisions on immunity or liability. He felt that the strongest argument against the continued use of such distinction appears in Brown at page 297. He felt there was a danger in confusing "governmental entity" with "governmental/proprietary". It was his view that, while the court may uphold the governmental/proprietary distinction, the court had recognized that the distinction was irrational.

Mr. Clark noted that no state had completely abolished governmental immunity on the basis of the equal protection or due process arguments. He noted that other states have rationally and clearly delineated the areas of governmental immunity, while still leaving some discretion to the courts. However, he indicated there was some questions as to whether torts incurred in the failure to enforce or in the enforcement of city ordinances should be immune.

Mr. Clark felt that the most difficult task for the present Committee is to identify the key threshold areas where governmental immunity or liability should exist.

Mr. Clark noted that the procedural aspects of a tort claims act are very important, due to budgetary considerations of local governments.

In response to a question, Mr. Clark commented that establishing a ceiling on state tort claims settlements could be found reasonable, if such ceilings were part of an overall package to allow governmental bodies to budget and plan for the future.

The Chairman then introduced Mr. Eugene Riling, Chairman of the Governmental Immunity Subcommittee of the Kansas Trial Lawyers Association. Mr. Riling, in turn, introduced Mr. Jerry Palmer, Mr. Paul Clark, and Mr. Larry McGrath, all of the KTLA. A copy of the KTLA presentation is appended as Attachment III.

Mr. McGrath noted that in the years 1968 and 1969, there were 10,000 claims allowed against the federal government, and $25 million were paid out. Approximately one-third of those claims involved aircraft, and one-third motor vehicles. About 84% were settled administratively. He noted that in 1974, Kansas paid out $175,000 in claims. Mr. McGrath noted that the KTLA

recommends: the Attorney General handle all claims under a tort claims act; the AG should have authority to settle claims up to $25,000; and a tort claim fund should be established, financed by a two-mill statewide levy. Mr. McGrath indicated that this would build a $15 million fund, which would be sufficient to handle a catastrophe, and which is a reasonable figure, considering the $1.3 million price tag on insurance when there was $175,000 paid out in actual claims. That is, the $15 million fund will generate approximately $1 million in interest, which should be sufficient to pay all claims against the state.

In response to a question, Mr. McGrath indicated that KTLA proposal may be burdensome to the Attorney General's staff. However, he pointed out that an independent claims commission would similarly be burdened, especially if municipal claims are to be processed by the commission. One way to alleviate this burden, he noted, may be to set limitations on the size of claims allowed.

A Committee member pointed out that a two-mill levy is substantial-- most cities do not pay claims sufficient to justify a levy of that size. Mr. McGrath pointed out that the purpose of the levy is to build a fund; once $15 million was accumulated, no levy would be necessary because of the interest borne on $15 million.

The Chairman thanked the Committee members and conferees for their attendance. He then announced that the next Committee meeting would be on October 29.

Prepared by Walt Smiley

Approved by Committee on:

_____
(Date)

GOVERNMENTAL IMMUNITY BILL

Section by Section Summary

Section 1. Name of act.

Section 2. Definitions.

Section 3. This section is comparable to Section 28 USC 2674 of the federal act. Under this section the state and political subdivisions, except as provided otherwise in the act, are made liable for tortious acts of their employees and officers in the same manner and to the same extent as private individuals under like circumstances. The purpose is not to create new causes of action but to accept liability under circumstances that would bring private liability into existence.

Section 4. This section is comparable to Section 2680 of the federal tort claims act -- it lists exceptions to the liability imposed by Section 3. Subsection (a) should be closely inspected and understood -- it is a broad exception to the rule of liability. Since the subsection is patterned from the federal act, there has been much judicial interpretation of the language of subsection (a). There have been several U.S. Supreme Court cases interpreting this section.

Section 4(d). This subsection deviates from the federal act in that it does not include an amendment which was added to the federal act in 1974. The amendment added a proviso to that subsection which provides that with regards to acts or omissions of investigative or law enforcement officers, the federal tort claims act shall apply to any claim arising on or after the effective date of the amendment, out of assult, battery, false imprisonment, false arrest, abuse of process or malicious prosecution.

Section 5. The first two subsections here provide that all claims under this act must be presented to the governmental entity within 180 days. There is no comparable provision under the federal act. This is an example of a condition of recovery several states have imposed; however, such a provision is not without controversy. Such provision has been challenged on equal protection grounds as an unreasonable classification. The state courts seem to split on whether or not there is a rational basis for the statutory requirements of notice. For instance, Idaho upheld such a requirement, stating that whereas a private tortfeasor is normally immediately aware of an "incident" involving potential liability, the claim filing statute is usually the only sure and certain means by which the state or its subdivisions may be alerted to potential liability. California and Utah also have upheld such a requirement. Michigan, Nevada and most recently Washington, have rejected such a requirement.

Section 5(c). This provides what information is to be provided in presenting a claim.

Section 6. This section is comparable to §2675 of the federal act. It requires a claimant to first submit a claim to the state or municipality and have it considered by that entity before a court action may be commenced. Further procedure may need to be spelled out here. Section 5 provides the claim be filed with the Secretary of State, for state claims, and this Section (Section 6) contemplates possible administrative settlement of the claim. Thus what is missing is the procedure to get a notice of claim filed pursuant to Section 5 to the agency involved for possible settlement. Section 11 provides that the AG, with the concurrence of the head of the affected agency, may settle or compromise claims.

It might well be noted that the last sentence of subsection (a) exempts claims involving third-party complaint, cross-claim or counterclaim from the provisions of this subsection. If I correctly understand this provision, it does not revive claims which would be barred by the failure to give notice of claim within 180 days as required by Section 5, but rather only the provisions of the subsection, relating to denial or final disposition of a claim by the involved agency, are not applicable to third-party complaint, cross-claims and counterclaims.

Subsection (b) prohibits a court action claim in an amount greater than the claim that was presented to the involved entity, unless the increased amount is based on newly discovered evidence or other intervening facts.

Subsection (c) prohibits use of evidence of a settlement to show liability or amount of damages in any action. This is similar to K.S.A. 60-452 which provides:

> "Evidence that a person has, in compromise or from humanitarian motives furnished or offered or promised to furnish money, or any other thing, act or service to another who has sustained or claims to have sustained loss or damage, is inadmissible to prove his liability for loss or damage of any part of it."

Section 7. Provides that when a tort claim has been denied by a governmental entity, then such person may commence an action, the district court being the court with jurisdiction to hear such action. Venue and other procedural matters are governed by the code of civil procedure.

Section 8. This section provides for a statute of limitations for actions authorized by this act. The wording of subsection (a) is similar to §2401 of the federal act. Subsection (b) is identical to subsection (b) of K.S.A. 60-513, which is the general statute of limitations section for torts in the code of civil procedure.

Section 9. This section is comparable to subsection (a) of §2679 of the federal act. Many instrumentalities of the state, when created by statute, are given the power to sue and be sued, this section spells out that notwithstanding their power to sue and be sued, actions against such instrumentality for tort shall be commenced pursuant to this act.

Section 10. Subsection (a) of this section is comparable to §2676 of the federal act; it provides that if a claimant recovers a judgment against a governmental entity pursuant to this act, such judgment will bar any action against the employee whose act or omission gave rise to the claim.

Subsection (b) has no counterpart in the federal act; it is really the other side of the situation addressed in subsection (a). Colorado has a comparable provision. This subsection spells out that when a judgment is had against an employee, that judgment bars a suit against the government for the same subject matter.

Section 11. This section is patterned after Section 2672 of the federal act. It provides that claims against the state may be compromised or settled by the AG with the concurrence of the department head whose employee was involved, subject to the term of any insurance.

Subsection (b) provides that claims against a municipality may be compromised by the governing body of the municipality or as otherwise provided by such governing body.

Subsection (c) is practically identical to language of the federal act. It provides that acceptance of a settlement is a complete release of any claim. Consideration here might be given to authorizing the adoption of rules and regulations to further define procedures for compromises or settlement since no details are provided by this subsection. The federal act authorizes the AG to adopt such rules.

Section 12. This section addresses the manner in which tort claims will be paid. Subsection (b) declares that such claims shall be paid only from funds appropriated and budgeted therefor.

Subsection (c) provides that if the state had not appropriated sufficient funds to pay all claims in any year, then the state shall appropriate sufficient funds therefor in the next year at, not to exceed for all claims, 3% of all general fund appropriations.

Subsection (d) provides that if a municipality does not have sufficient funds to pay claims under this act, then it shall levy a tax therefor -- up to 2 mills. If the two-mill levy is insufficeint to pay all claims, the funds from the levy are to be annually prorated to the outstanding claim holders.

ATTACHMENT II

GOVERNMENTAL IMMUNITY

Position Statement Adopted at the 65th Annual City Convention of the League of Kansas Municipalities
September 23, 1975

Many of the functions, services and activities of cities, by their nature, would expose cities to a wide variety and multiplicity of claims, in comparison with private business and other public agencies, if governmental immunity from tort liability was completely removed. Cities should not be liable for any activity for which the state or other governments are immune. Inconsistent rules of the doctrine need to be changed and clear guidelines established to fairly balance public concern for the injured citizen with the essential performance of governmental services. The general rule should be immunity, with liability existing only when prescribed by law. State laws extending areas of liability beyond that declared by existing statutes or court decisions should be staged, and reasonable limits as to the amount of liability established, so that affected units may provide for financing the cost.

ATTACHMENT II

KANSAS TRIAL LAWYERS ASSOCIATION

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October 2, 1975

The Honorable Donn Everett, Chairman
Special Interim Legislative Committee
on Governmental Immunity
Kansas Legislature
Capitol Building
Topeka, Kansas 66612

Dear Mr. Chairman:

The enclosed materials were prepared by members of the Kansas Trial Lawyers Association Committee on Legislation to supplement testimony presented on October 2, 1975 by this Association to your Special Committee on Governmental Immunity. In addition, we will prepare and distribute to members of your Committee a comprehensive position paper on a Kansas Tort Claims Act by November 1, 1975.

The Kansas Trial Lawyers Association would welcome any requests by you for further information or materials. Further, John E. Shamberg, of Schnider, Shamberg & May, Chartered of Shawnee Mission, Kansas, and Patrick F. Kelly of Render, Kamas & Kelly of Wichita, Kansas, will be pleased to assist your Committee if requested to do so. Mr. Shamberg argued Carroll v. Kittle before the Kansas Supreme Court, and Mr. Kelly served on the Kansas Judicial Council Advisory Committee on Governmental Immunity which conducted exhaustive studies between 1970 and 1972, culminating in a proposed state tort claims act.

Please feel free to contact our offices if we may be of assistance to you or your Committee.

With best regards,

KANSAS TRIAL LAWYERS ASSOCIATION

Carol Duffy McDowell

Carol Duffy McDowell
Executive Director

CC: Members of Special Legislative Interim Committee on Governmental Immunity.

TESTIMONY PRESENTED TO THE

SPECIAL LEGISLATIVE INTERIM COMMITTEE

ON GOVERNMENTAL IMMUNITY

PRESENTED BY

THE KANSAS TRIAL LAWYERS ASSOCIATION

OCTOBER 2, 1975

TESTIMONY PRESENTED TO THE

SPECIAL LEGISLATIVE INTERIM COMMITTEE

ON GOVERNMENTAL IMMUNITY BY THE

KANSAS TRIAL LAWYERS ASSOCIATION

October 2, 1975
Topeka, Kansas

I. An Historical Analysis of the Doctrine of Governmental Immunity, In Kansas and Nationally.

Prepared by Jerry R. Palmer
420 West 33rd Street
Topeka, Kansas 66611

II. A Comparative Analysis of Federal and State Tort Claims Acts.

Prepared by Paul W. Clark
Clark & Lykins
434 Topeka Avenue
Topeka, Kansas 66603

III. Recommendations for a Kansas Tort Claims Act.

Prepared by Larry B. McGrath
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AN HISTORICAL ANALYSIS OF THE DOCTRINE OF GOVERNMENTAL IMMUNITY, IN KANSAS AND NATIONALLY

Jerry R. Palmer

I. Origins.

A. Roman Law.

B. English Common Law.

"The King can do no wrong." Thus,

> Since the sovereign is the source and creator of all law and can alter or abolish any rule of law that it has prescribed, it cannot be bound by or subject to the law which it itself has created nor is it bound by any law which it has not created.
>
> This 16th Century concept of the State had the effect of denying all citizens any legal remedy against the sovereign.

C. Chief Justice Marshall tacitly recognized the above rule in Cohens v. Virginia, 19 U.S. 264 (1821).

D. The later rationale, added by Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349 (1907), was:

> "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."

E. Kansas' first clear recognition of the doctrine came in Eikenberry v. Bazaar, 22 Kan. 389 (1879).

F. Wendler v. Great Bend, 191 Kan. 753 (1957), defined the doctrine in Kansas as a rule of convenience from the harrassment of suit against the State.

II. The Fall.

A. Legal scholars have been increasingly critical of the above decisions; the substantial genesis of this criticism being a series of articles by Yale Professor Borchard, commencing in 1924.

B. The First Kansas article on the subject was written by Professor Blade and appeared in the University of Kansas Law Review in 1968.

C. The Kansas Supreme Court had also been critical of these decision but reluctantly held onto the doctrine. See, Justice Schroeder's opinion in Wendler v. Great Bend, 191 Kan. 753 (1957).

D. In 1969 the Kansas Supreme Court struck down the doctrine in respect to proprietary functions in Carroll v. Kittle, 203 Kan. 841 (1969), requiring the Legislature to enact K.S.A. 46-901, 902.

E. In June of this year, the Court held the present Kansas statute unconstitutional in Brown v. Wichita State University.

F. The clear trend from 1957, when the Florida Supreme Court first attacked the doctrine, to date, has been for judicial abolition of the judicially created doctrine of sovereign immunity.

G. Almost as clear has been the trend in various state legislatures to reinstate the doctrine with some exceptions covering the most obvious requirements of justice.

III. The functional Distinctions.

A. The Federal Tort Claims Act (1945) is the fountainhead of the horizontal approach; distinguishing between discretionary and ministerial functions.

B. The other, vertical distinction distinguishes between governmental and proprietary functions and nuisances.

C. Sometimes there is also a laundry list approach such as in the New Jersey Act, i.e., the State is liable for this ... but not that ...

IV. The Basic Compensation Issue.

A. The rights of an injured person to be compensated for a loss or injury caused by the negligence of another, even if the tortfeasor is government.

B. The economically threatening position of those claimants to the governmental unit, and the understandable reaction of any personality to seek immunity from suit if it were but their choice to make.

C. The lack of examples of bankrupt governmental entities resulting from the absence of sovereign immunity --

1. U.S. Tort Claims Act.
2. Corporate liability.

D. Brown makes a plea to the Legislature to adopt some uniform method of compensating the victims of torts caused by government employees; recognizing the right of the government to govern.

This approach is best suited to the discretionary v. ministerial distinction, under which there is a large body of federal law to assist in the application.

E. The vices of the present system are enumerated in Brown.

1. It depends on which kind of governmental unit injures you as to whether you can recover. (The majority said that this distinction is "forced, unreal" ... "not only baffling, but arbitrary, discriminatory and unreasonable.")

2. The convenience of the government's immunity from suit is no justification for denial of compensation to an individual for actual damages. The threat of multiple suits is shrugged off as grounds for the preservation of immunity.

3. Exempting classified governmental units is as vicious as exempting charities.

4. The Court will not be constrained to attack the validity of any immunity statute on Constitutional grounds.

5. Governments are equal within Kansas in their proprietary activities.

The proprietary v. governmental distinction, even though shadowy and without "much rhyme or reason", has some "validity".

6. The Court has stated as legitimate distinctions:
   - "The state is not now exposed to liability as to legislative or judicial action or inaction."
   - "Nor is the state liable in matters involving official judgment or discretion."

- Exposure to liability of governments must be determined in conjunction with the background of the total facts and circumstances, on a case by case basis.

- In the absence of legislation addressed to immunity in the form of an appropriate Tort Claims Act, "we will proceed case by case".

A COMPARATIVE ANALYSIS OF FEDERAL AND STATE TORT CLAIMS ACTS

Paul W. Clark

As of 1972, 16 states as well as the United States had Tort Claims Acts: Alabama, Alaska, California, Colorado, Hawaii, Idaho, Iowa, Nebraska, Nevada, North Carolina, Oregon, Rhode Island, Texas, Utah, Vermont and Washington.

The following is intended to summarize the ways in which the various Tort Claims Acts have dealt with major variables.

I. Application:

A. The state and all its agencies, boards, universities, departments, employees and subdivisions to include counties, cities, townships, municipalities, etc.

1. A government employee does not include an independent contractor employed by the designated government entity.

- This is essentially the same provision as the U.S. Tort Claims Act and all states having Tort Claims Acts.

II. Liability:

A. The Government entity is liable to the same extent as a private individual under the same circumstances.

1. Interest prior to judgment and punitive damages is an exception.

- U.S. Tort Claims Act; Alabama, Colorado, Hawaii, Idaho, Iowa, Nebraska, Nevada, North Carolina, Oregon, Rhode Island, Texas, Utah, Vermont, and Washington.

2. Workmen's Comp., Military Veterans Law are not repealed and remain exclusive remedies.

- U.S. Code and essentially all of those states having a Tort Claims Act.

III. Exclusions:

A. An act or ommission by an employee of the government entity exercising due care in the execution of a statute or a regulation.

- The U.S. Tort Claims Act; Alaska, California Colorado, Hawaii, Idaho, Nebraska, Nevada, Vermont.

B. Assessment or collection of any tax.

- U.S. Tort Claims Act and all states having Tort Claims Acts.

C. Any claim for false arrest, assault and battery, malicious prosecution, etc.

- U.S. Tort Claims Act; all states having an act speak of each of these various torts, some with more restrictive provisions than others, some states not exempting false arrest, and some states not exempting false arrest, but placing a burden upon complainant of showing willful and wanton neglignece before recovery might be had.

D. Actions of the National Guard in time of war.

E. Quarantine or acts related thereto are expempt in the majority of states having a Tort Claims Act.

F. Any claim arising in respect to the assessment or collections of any tax or the detention of any goods or merchandise by any officer of the law.

- U.S. Tort Claims Act; all of those states having a Tort Claims Act.

IV. Notice Requirements:

- A few states place a definite time limit ranging from 180 days up to one year; other states have no limit.

- There are exceptions in most states to the definite notice requirements including a showing of actual knowledge by the state of the incident giving rise to the cause of action, inability of the claimant due to illness or other incapacity such as imprisonment, and a number of other exceptions.

V. Filing:

A. With whom:

1. California: a special board has been created.

2. Colorado: the Attorney General or other public entity if other than the state.

3. Hawaii: pleadings on Attorney General within 2 years; no notice requirement.

4. Idaho: Secretary of State or local entity.

5. Iowa: State Comptroller.

6. Nebraska: Secretary of State Claims Board.

7. Oregon: Attorney General or agency involved.

8. Texas: Notice must go to the government entity.

9. Utah: Attorney General.

10. U.S.: agency, with certain limitations.

B. When:

1. Two years in the majority of states after the action arose or was discovered.

2. Those states having notice requirements usually set an additional period of 6 months after denial of the claim by the appropriate government entity.

3. Other exceptions exist such as minority or other incapacity.

VI. Funding:

- U.S. provides for the agency involved up to a certain extent, then the Attorney General up to a certain extent, then a special appropriation.

- Some legislatures authorize various agencies to purchase insurance; others appropriate and budget for such proceedings and some states limit the amount of recovery. For example:

  Nevada-$25,000; North Carolina-$20,000; Oregon-$300,000; Texas-$100,000 with $300,000 per occurrence; Rhode Island-$50,000, governmental function, no limit on propriatary functions; and Utah-$100,000.

- Virtually all the states and the federal govern-

ment have a provision providing for the Attorney General to either make the settlement or approve the settlement once made.

VII. Satisfaction of Judgment:

- All states with a Tort Claims Act and the U.S. Tort Claims Act provide in essence that a judgment or settlement with the government or its employee and the claimant is a bar to a suit by the claimant against either the government or its employee.

VIII. Comparative Negligence:

- Provisions for comparative negligence are written into the New Jersey Act; other acts simply provide that the rules of civil procedure prevail, as well as other applicable civil law.

IX. Jurisdiction:

- The majority of state acts provide for the claim to be brought in the county where the cause of action arose.

- Some acts provide for a court trial, others for trial by jury, and some give a specially created administrative board full power.

STATE	IMMUNITY	LIABILITY	REMEDY
ABAMA	Constitutional prohibition Art. I, § 14		State Board of A nt
ALASKA		Waiver Alaska Stat. § 09.50.250 *et seq.*	Judicial
ARIZONA	Court decision	Substantive tort immunity abolished by court decision (*Stone v. Ariz. Hwy. Comm.*, 93 Ariz. 384, 381 P.2d 107 (1963))	Judicial Administrative § 12-821 to § 12-826 Ariz. Rev. St. Anno.
ARKANSAS	Constitutional prohibition Art. 5, § 20		Ark. St. State Claims Commission § 13.1401 *et seq.* Administrative Determination Final
CALIFORNIA	Cal. Govt. Code Legis. waiver § 810 *et seq.*	Acts of employees, independ. contractors, failure to perform Stat. duties, dangerous conditions of public prop.	Judicial
COLORADO	482 P2d 968 (1971) *Evans v. Bd. of County Comm. of the County of El Paso.*	Sovereign immunity abrogated as of 7/1/72 only. Recognized to extent of legislative enactment. Colo. L. 1971, C 323—governmental immunity Act.	Colorado Claims Comm. Judicial
CONNECTICUT	Immune	Hwy. defects § 13a-144, § 52-556 operation of motor vehicles C.G.S.A. § 13a-144, 52-556	Claim Comm. admin. determinations final if claim is $250 or less —if more than, then require legis. approval
DELAWARE	Immune unless waived by Legis.	Art. 1, § 9, Del. Cons't. suits may be brought acc'd. to negligent by law 18 Del. C. § 6501 *et seq.* Liable to extent of Insurance	Legislative
FLORIDA	State immune but Hw'y Dept. liable for trespass, *State Road Dept. v. Harvey* 142 So. 2d 773 Fla. (1962).	May be waived by legis., Fla. Const., Art. 10, § 13 (1968)	Exc. F.S.A. 768.14 waiver of sovereign immunity counterclaim in suit by state.
GEORIGA	Immune, *Nat'l Distrib. Co. v. Oxford*, 103 Ga. App. 72, 118 So. 2d. 274 (1961)		Claims Advisory Ga. Code Annot'd., § 47-504 *et seq.*
HAWAII	Waived by Hawaii Laws, § 662-1 *et seq.* (1968)		Judicial—provision for administrative settlement
IDAHO	Immune unless waived by stat. 79 Idaho 233 (1957), Board of Examiners Idaho Cons't., Art. 4 § 18.	Idaho Code, § 41-3501 *et seq.* Auth. to purchase Gen'l. Liab. Ins. Waiver of Immun. to extent of insurance	Judicial to extent of insurance administrative
ILLINOIS	Mandatory cons't provision, Art. IV. § 26, 299 Ill. App. 316, 20 N.E. 2d 130 (1939)		37 Ill. Anno. St. § 439.1 *et seq.*, Court of Claims (Admin) given juris. over tort claims against state, determin. final
INDIANA	State immun., officers person. liable, 258 Ind. 452, 151 N.E. 2d 697 (1958), State immune only as to governmental functions, 251 N.E. 2d 30 (1969).	In. Stat. Ann. § 39-1819, may purchase liab. ins. for vehicles or other prop., waived to extent of coverage—liable for proprietary function.	Judicial
IOWA	Waived by Iowa Code, § 25A.4 (1967)	Non-liability for discretionary functions § 25A.4	Administrative Proceeding—Judicial
KANSAS	Immune	For Hwy. defects, purchase of auto liab. ins. authorized, waiver to extent of ins., Kan. Stat. Ann., § 12-2602 (1904)	Insurance
KENTUCKY	Immune but recovery provided through adm. Bd. of Claims	No recovery through adm. Bd. for pain or suffering	Bd. of Claims, admin, determin. final, Ky. Rev. Stat. § 44.055 (1962)
LOUSISIANA	Immun. unless waived by Legis. Park & Rec. Auth. State Univ. & College School Bd. exempted from possible waiver of immunity Const. Art. 3 § 35	Hwy. defects 154 So. 2d 439 (1963), La. Rev. Stat. § 13.1501 *et seq.* procedure for claims v. state where immun. otherwise waived	Legislative
MAINE	Immune unless waived by Legis.	Maine Rev. Stat. Ch. 17, 1451 (1964) Liab. of Towns & Counties for defects in State Hwys.	Legislative
MARYLAND	Immune, 180 Md. 584, 26 A. 2d 547 (1942) common law principle		
MISSOURI	Immune 353 S.W. 2d 645 (1962)		V.A.M.S. § 33.130 Procedure for processing claims against State.

STATE	IMMUNITY	LIABILITY	REME
MONTANA	Immune, 118 Mont. 65, 162 P.2d 772 (1945) Immunity recognized 480 P.2d 830 (1971)	To extent of insur. coverage, Mont. Rev. Code § 83-701 *et seq.*	Judicial to extent of ins. coverage, Bd. of Examiners, Mont. Rev. Code §§ 82-1113
NEBRASKA	Immune, 174 Neb. 515, 118 N.W. 2d 643 (1962). Neb. Rev. Stat. Ann., §§ 24-319 (1956) waiver of Immun. from suit only		Legislative
NEVADA	Immun. waived by Nev. Stats. Ann. § 41.031 et seq. —immun. preserved for discretionary acts, acts or omissions in execution of a stat. or reg.	Limitation of maximum $25,000 in tort, no pun. damages auth. to purchase liab. ins.	Judicial, Admin. determination up to $1,000
NEW HAMPSIHRE	Common Law Immun. 97 N.H. 278, 80 A. 2d 342 (1952) 108 N.H. 187 230 A. 2d 750 (1967)		Legis.
NEW MEXICO	Immune. 69 N.M. 145, 364 P.2d 853 (1961)	N.M. Stat. Ann. §§ 5-6-18 *et seq.*, auth. to purch. liab. ins., waiver to extent of coverage	Insurance
NEW YORK	Ct. of Claims Act. § 8 (1963) Stat. Waiver of Immun.		Judicial Ct. of Claims
NORTH CAROLINA	Immune from suit but see § 143-291 of N.C. Code Ann.		Industrial Comm. can bring claims v. State, § 143-291, with limit of $15,000
NORTH DAKOTA	Immune Const. § 22 suit may be brought against state in such manner, in such courts and in such cases as the Legis. Assembly may, by law, direct. (No such legis. enacted).	Waiver to extent of coverage § 39-01-08 state to purch. ins. for motor vehicles & aircraft	Insurance
OHIO	Immune unless stat. waived, 172 Ohio St. 303, 175 N.E. 2d 725 (1961) Const. Art. 1 § 16 suits may be brought v. State in such courts and in such manner as may be provided by law. (Not self-executing)		Sundry claims board with jurisdiction limit of $1,000 R.C. § 115.35 (claims v. State, money appropriated by legislature)
OKLAHOMA	Immune	State vehicles may be insured, 47 Okl. St. Ann. § 157.1 Ins. Co. may not set up defense of sovereign immunity	Insurance
OREGON	Waived by Stat., Ore. Rev. Stat., § 30.260 *et seq.*	General liability with certain specified exceptions	Judicial (certain notice requirements to State agencies involved)
PENNSYLVANIA	Immune, 410 Pa. 571, 190 A. 2d 111, (1963) Pa. Const. Art. 3, § 26. No bill shall be passed providing for the payment of any claim against the commonwealth.	Auth. purchase of auto liab. ins., 71 P.S. § 634	Insurance
RHODE ISLAND	Immunity waived by § 9.31-1 et seq. (1970) Pub. Laws 1970 § 9.31-1 et seq.	Limitation $50,000 govt. functions	Judicial
SOUTH CAROLINA	Gennerally immune excepted as provided in S.C. governmental motor vehicle Tort Claims Act Code 1962 § 10-2621	For negligence operation of motor vehicle § 10-2621 to 10-2625 (1968) Lims: $10,000 pers. injury; $5,000 prop. loss	Judicial
SOUTH DAKOTA	Generally immune, 122 N.W. 2d 83 (1963) 145 N.W. 2d 524 (1966) S.D. Const. Art. III, § 27 The Legislature shall direct by law in what manner and in what courts suits may be brought against the State		Administrative Procedure S.D.C.L. § 21-32-1 *et seq.* Judiciary provides advisory findings for Legislature
TENNESSEE	Immune, 368 S.W. 2d 69 (1963) Const. Art. I Sec. 17—Suits may be brought against such courts as the Legis. may by law direct. Actions v. State prohibited by Code § 20:1702	Highway Dept. and auto negligence to be paid through determination of Adm. Bd. of Claims	Bd. of Claims, Admin. Determination final § 9-801 *et seq.*
TEXAS	Immunity waiver by Title 110a, Art. 6.252-19		Judicial—Provision for administrative settlement
UTAH	Stat. waiver of immunity Utah Code § 63-30-1		Judicial

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

*1972 comparison; subject to change by legislative bodies and court systems.

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
ALABAMA	Municipalities Counties	Gov't Functions	Defects in streets and sidewalks	Judicial
ALASKA	Municipalities		Tort liab. in exercise of either proprietary or functions	Judicial
ARIZONA	Municipalities	Gov't Functions	Liab. for streets and sidewalks, drainage construction and repair	Judicial
ARKANSAS	Subdivisions	Abolished tort Immun. for municip's. *Parish v. Pitts*, 244 Ark. 2139, 429 S.W. 2d 45 (1968)		Judicial
CALIFORNIA	Political Subdivisions	Legis. waiver	Same as for State	Judicial—may purchase liability ins., does not expand liability
COLORADO	Political Subdivisions	Waived in certain situations L. 1971, c. 323	Same as state	Procedures established by L. 1971, c. 323.
CONNECTICUT	Political Subdivisions	Gov't. Functions	Highway defects § 13a-149	
DELAWARE	Political Subdivisions	Gov't. Functions		
FLORIDA	Counties Municipalities	Immune, *Kaulakis v. Boyd.*, 138 So. 2d 505 (Fla. 1962).	Neglig. Performance of Gov't function	Judicial—Cities only
GEORIGA	Municipalities	Immune, 92 Ga. App. 216 (1955) Municip. corps. not liable for torts of officers discharge of duty Ga. Code Annot'd. § 69-307 (1957) Not liable for street defects (§ 69-303).	Waived to extent of Insurance Coverage	Judicial to extend of insurance coverage
HAWAII	Subdivisions		Liable for neglig. acts 388 P. 2d 214 (1963)	Judicial
IDAHO	Municipalities	Non-Gov't. Functions, 79 Idaho 499, 321 P.2d 559 (1958) Waiver of Immun. to extent of insurance		Judicial to extent of insurance Administrative
ILLINOIS	School district	Abrogated by ct. decision, 18 Ill, 2d 11, 163 N.E. 2d 89, (1959)—applies to all municip. corps.		Judicial
INDIANA	Political subdivisions	Abrogated by ct. decision, 239 N.E. 2d, 160 (Ind. Ct. App. 1968)		Judicial
IOWA	Cities Counties	Not liable under doctrine of respondeat superior neglig. acts of employees Immune, 245 Iowa, 310, 60 N.W. 2d 562 (1953)	Cities liable when neglig. due to municip. corp. and not employee	Judicial
KANSAS	Political subdivisions Towns and Counties	For gov't. Functions, 88 Kan. 722, 366 P. 2d 246 (1961)	Street defects, authorization to purchase liab. ins., § 12-2601 (1964)	Judicial Insurance
KENTUCKY	Municipalities		For neglig., 386 S.W. 2d 738 (Ky. 1964)	Judicial
LOUSISIANA	Municipalities	For gov't functions 124 So. 2d 249 (La. 1960)	Street defects 114 So. 2d 62 (1959)	Judicial
MAINE	Municipalities Towns & Counties	Immune, 157 Me. 521, 174 A. 2d 660 (1961)		Judicial
MARYLAND	Political Subdivision	Immune, 230 Md. 504, 187 A.2d. 856 (1963)		
MISSOURI	Political subdivisions	For gov't functions, 366 S.W. 2d 446 (1963)		
MONTANA	County City	For gov't functions, 112 Mont. 70, 112 P.2d 1068 (1941)	For neglig. in discharge of proprietary functions, 101 Mont. 462, 54 P.2d 379 (1936)	Judicial
NEBRASKA	Political subdivisions Cities Public bodies Municipalities Counties Townships	For gov't functions, 166 Neb. 145, 88 N.W. 2d 235 (1958); *cf.* 187 N.W. 2d 290 (1971)	For neglig. operation of motor vehicles, 160 N.W. 2d 805 (Neb. 1968) For street, highway & sidewalk defects Neb. Rev. Stat. Ann., §§ 24-319 (1956)	

STATE	POLITICAL SUBDIVISION	IMMUNITY	LIABILITY	REMEDY
EVADA	Agencies, dept. pol. subdivisions Counties	Same as state	Same as state Neglig. operation of Road, 382 P. 2d 605 (1963)	Same as S Judicial
NEW HAMPSHIRE	Political subdivisions	Neglig. performance of gov't functions	For street & highway defects	Judicial
NEW MEXICO	Political subdivisions	For gov't functions, 72 N.M. 9, 380 P.2d 168 (1963) See also N.M.S.A. 14-9-7 municipality liable in certain instances (tort by officer in execution of municipal orders)	To extent of insurance	Insurance
NEW YORK	Political subdivisions		For torts 177 N.Y.S. 2d 744 (1958)	Judicial
NORTH CAROLINA	Political subdivisions	For gov't functions, 260 N.C. 69, 131 S.E. 2d 900 (1963)	Auth. for ins. waiver to extent of ins., N.C. Gen. Stat., § 153-9.44	Insurance (counties only).
NORTH DAKOTA ..	Political subdivisions	For gov't functions, 68 N.W. 2d 114 (1955) 189 N.W. 2d 675 (1971)	For street defects, auth. to purchase ins. for motor vehicles	
OHIO	Political subdivisions	For gov't functions	Proprietary functions only	Judicial (Proprietary functions only)
OKLAHOMA	Municipal corps.		See 11 Okl. St. Ann. § 1751	Judicial Provision for Admin. settlement
OREGON	Same as state	Same as state	Same as state	Same as state
PENNSYLVANIA ..	Townships Cities Counties	Immune	Auth. to purchase gen'l pub. liab. ins., 53 P. S. § 37403.57	Insurance
RHODE ISLAND ..	Political subdivision Cities Towns	Same as state	Same as state	Same as state
SOUTH CAROLINA	Political subdivision Counties Municipalities Municip. corps,	Generally immune	Same as state	Same as state
SOUTH DAKOTA ..	Political subdivisions	Immune, 77 S.D. 322, 91 N.W. 2d 606 (1958) Governmental only	Proprietary functions	
TENNESSEE	Political subdivisions	Immune for gov't functions, 50 Tenn. App. 532 362 S.W. 2d 813 (1962)		
TEXAS	Cities Counties Municipalities	For gov't functions, 371 S.W. 2d 767 (1963)	Neglig. operation of motor vehicle—lims. same as state	Provision for administrative settlement
UTAH	Counties Municipalities	Legis. Waiver	Same as state	Judicial, may purchase liability ins.
VERMONT	Political subdivisions	Gov't functions 122 Vt. 284 171 A. 2d 58	Proprietary Functions	Judicial
VIRGINIA	Political subdivisions	Gov't functions 203 Va. 551, 125 S.E. 2d 808 (1962)	Proprietory functions	Judicial
WASHINGTON ...	Political subdivisions Municipal Corps.	General waiver by Statute R.C.W.A. § 4.96.010 *et seq.*	Gen'l liability for torts	Judicial—Provision for Admin. Settlement
WEST VIRGINIA ..	Political subdivisions Counties & Municipalities	Performance of duties imposed by law. 122 S.E. 2d 177 (1961)	For street & sidewalk defects Municip's permitted to buy auto ins.	Judicial Insurance
WYOMING	Cities Town	For gov't functions	Authorizes to purchase gen'l liability ins.—waiver to extent of coverage	Insurance
WISCONSIN	All.	Statutory waiver with exceptions Wisc. Stat. Ann. § 893.43 *et seq.*	Same	Judicial

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