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A Statutory Approach to Governmental Liability in Florida

Osmond C. Howe Jr.

A STATUTORY APPROACH TO GOVERNMENTAL LIABILITY IN FLORIDA

The state of Florida and its political subdivisions cannot be sued without their consent. This proposition, usually termed "sovereign immunity," can be traced to the medieval English theory that "the King can do no wrong."[1] The result of its application in Florida, as in most other states, has been to disallow suits by persons tortiously injured by public entities. Adequate recovery for injuries inflicted by the state is the exception rather than the rule. Only when special provisions have been made by legislatures, either waiving the immunity or appropriating special relief, has the doctrine of sovereign immunity been circumvented and compensation received from the state. Yet, there is some doubt whether the historical relationship of the king to his people justifies sovereign immunity in its modern form.

As early as the mid-thirteenth century the king could not be sued *eo nomine* in his own courts.[2] This did not mean that relief was unavailable from the government; certain devices emerged for obtaining relief. Suits against the king were in the form of petitions and required his consent, but those writs against an officer or agency of the crown did not. Most scholars feel that the requirement of consent was not because the king was above the law, rather it was felt to be illogical that he would issue a writ against himself.[3] Actually the king was considered thoroughly just and equitable and was not privileged to do wrong.[4] The king was required to do equity. Even though a prerogative existed with the crown, relief was readily available.[5]

1. I BLACKSTONE, COMMENTARIES 239, 241-42 (1899). Blackstone has attributed the maxim that "the King can do no wrong" to the royal prerogative, which he defines as "that special preeminence which the King hath over and above all other persons, and out of the course of the common law, in right of his royal dignity. . . . The law ascribes to the King the attribute of sovereignty." See generally 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 518 (1909); Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957). See also Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 n.1 (1961) and authorities cited therein. The detailed operation of the doctrine of sovereign immunity in Florida may be found in *Davis, Claims Against Public Entities*, in FLORIDA CIVIL PRACTICE BEFORE TRIAL 215 (1963).

2. See Jaffee, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-3 (1963).

3. *Id.* at 3-9.

4. See Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, n.2 (1924); Jaffee, *supra* note 2, at 3-4.

5. 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 8 (3d ed. 1944). "[T]he king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects." Thus it has been argued that the maxim "the King can do no wrong" originally meant precisely the contrary.

Nevertheless, in time this required consent became overgeneralized into the broad modern concept of governmental sovereign immunity.

How this immunity of the king from the jurisdiction of the king's own courts[6] came to be applied in the United States of America, where the royal prerogative is unknown, has been called one of the mysteries of legal evolution.[7] The restrictions placed upon relief available against public officials in this country may have developed from the desire of the king to supervise his own officials, to protect their discretion, and to follow different policies from those approved by the courts.[8] Nevertheless, these concepts, to a great extent, have shaped our judicial and legislative attitudes toward disallowing suits against the sovereign governments.[9]

Unlike the feudal kings, the modern sovereigns have expanded their activities to provide many services that had long been exclusively private undertakings. Moreover, the production and sale of electrical power, control of pollution, immunization from disease, construction of modern highways and bridges, control of mosquito and flood waters, maintenance of ports, operation of hospitals, and numerous other functions were essentially unknown responsibilities of governments until relatively recent times. Because governments, whether federal, state, or municipal possess this immunity from judicial suit, such relief for injuries is available only if the activity causing the injury was undertaken by private enterprise. Such a situation has left a serious hiatus in the administration of justice to the injured claimant.

Before 1946[10] an individual who suffered injury by the fault or negligence of the federal government was faced squarely with this

6. Borchard, *supra* note 4, at 4. "Nothing seems more clear than this immunity of the King from the jurisdiction of the King's courts was purely personal."

7. *Id.* at 4 (suggesting that none of the criteria for its origin and existence have ever existed in this country).

8. Jaffee, *supra* note 2, at 3.

9. The first case to hold that local governmental units were not liable for tort was Russell v. Men of Devon, 100 Eng. Rep. 359 (1788) in which an action was dismissed against an unincorporated county. The court found no fund out of which the judgment could be paid and held, "[I]t is better that an individual should sustain an injury than that the public should suffer an inconvenience." *Id.* at 362. This rule was adopted first in Massachusetts in Mower v. Inhabitants of Leicester, 9 Mass. 237, 239 (1812).

10. The initial attempt to adopt a comprehensive federal act came with the establishment of the Court of Claims in 1885, which possessed jurisdiction over all claims founded upon any law of Congress or upon any contract express or implied. The Supreme Court, by construction, entirely excluded tort claims from their jurisdiction. Since that time three unsuccessful attempts were made by Congress in 1929, 1940, and 1942 to pass a general tort claims law until the passage of the present act. An excellent review of the legislative history of the Federal Tort Claims Act appears in a Comment, 56 YALE L.J. 535 (1947). See also *Report*

historical immunity of the sovereign. Although no judicial action would lie against the federal government, relief was available in the form of a special bill sought through Congress. Even though theoretically a just procedure, it became apparent that such a system of legislative relief was wholly inadequate and tended only to divert the attentions of Congress from the conduct of national affairs.[11]

In 1946 the Federal Tort Claims Act was passed as an attempt to provide for the administration of tort claims against the federal government.[12] The FTCA waived the necessity for consent in all cases involving the negligent or wrongful acts or omissions of the Government or its officers, other than in those actions specifically excepted.[13] In line with the gradual recognition of the expanded role of Government and the added responsibilities thus imposed, the FTCA waived the immunity of the United States relating to tort claims "in the same manner and to the same extent as a private individual under like circumstances."[14]

New York was the only state to enact a general waiver of sovereign immunity preceding the FTCA; its legislature waived all tort immunity at the state level in 1929.[15] Since the FTCA, however, there have been numerous state court decisions[16] and state statutes[17] that

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of the Joint Committee on the Organization of Congress To Accompany S. 2177. SEN. REP. No. 1400, 79th Cong., 2d Sess. 30 (1946).

11. The recommendation of the Joint Committee on Reorganization of Congress that the United States should consent to be sued in tort was presented under the heading: "More Efficient Use of Congressional Time." See Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L. REV. 1325, 1329 (1954).

12.The Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.) [hereinafter referred to as FTCA].

13. 28 U.S.C. §2680 (1964).

14. 28 U.S.C. §2674 (1964).

15. N.Y. CT. CL. ACT §8 (the liability thereunder has been curtailed to some extent by legislative modifications in an effort to meet special problems, and has been judicially construed to provide some immunity for "purely governmental" functions. See Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958).

16. *E.g.*, New York (Bernardine v. City of New York, 249 N.Y. 361, 62 N.E.2d 604 (1945) (local entities only)); Florida (Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (local entities only)); Illinois (Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 88 (1959) (local entities only)); California (Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (all public entities)); Michigan (Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961)); Minnesota (Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962)); Wisconsin (Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)). See also Hernandez v. County of Yuma, 91 Ariz. 35, 369 P.2d 271 (1962) (Arizona may be preparing to eliminate the doctrine of immunity).

17. Illinois (37 ILL. ANN. STAT. §§439.1-.25 (Smith-Hurd Supp. 1961)) (state

indicate a gradual recognition of the necessity of tort liability in various areas of municipal, county, and even state governmental activity.[18] This trend toward increased governmental liability since the FTCA, however, has developed in varying degrees[19] and without any uniform approach by the several states that have faced the issue.

The reasons for the preservation or abolition of a state's sovereign immunity vary with the peculiar circumstances existing within each state. Although initially the antiquity of the immunity doctrine seemed to fully account for its existence in this country, more recently it has been preserved for more practical considerations. It has been argued that to abolish any immunity would destroy the efficient administration of the states, hinder the public welfare, and endanger the public safety. Specifically, many state legislatures have feared the prohibitive cost of undertaking any major steps toward allowing recovery from public entities. Other state courts have based their restraint upon the policy of maintaining the separation of powers[20] and have been apprehensive of overturning a well-established doctrine without being able to provide any adequate general guidelines.

The sterile attitude of some state legislatures has forced a few courts to assume the responsibility of establishing the liability of tortious public entities, their officers, and employees.[21] Still other state courts were motivated by the inadequacies of sporadic and piecemeal statutory waivers that were frequently confusing and contra-

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only); Washington (WASH. STAT. 1961, ch. 136) (state only); Kentucky (KY. REV. STAT. §44.070) (state negligence only); North Carolina (N.C. GEN. STAT. §143-291) (state negligence only); Alaska (ALASKA COMP. LAWS ANN. §56-2-2) (local entities only, as construed in City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962)); ALASKA COMP. LAWS ANN. §§56-7-1 to -10 (Supp. 1957) (state only); Hawaii (HAWAII REV. LAWS §§245 A-1 to -17 Supp. 1963)) (state only). See also Utah and Nevada, which perhaps enacted waiver legislation in 1965 but were unavailable at time of writing.

18. *E.g.*, FLA. STAT. §455.06 (1965) (granting authority to counties, state agencies, and certain political subdivisions to purchase liability insurance); FLA. STAT. §232.43 (1965) (insuring students engaged in athletic activities); FLA. STAT. §234.03 (1965) (liability insurance covering school bus transportation).

19. Most statutes allowing purchase of insurance limit the recovery to the maximum amount of such insurance. Also punitive damages have not been allowed in Florida. See Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965), 18 U. FLA. L. REV. 173.

20. This contention was discarded by the California court in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) when the court stated, "The doctrine of governmental immunity was originally court made." *Id.* 55 Cal. 2d at 218, 359 P.2d at 461, 11 Cal. Rptr. at 93.

21. See cases cited *supra* note 16.

dictory.[22] The reasoning of these latter courts was best expressed by Justice Traynor in *Muskopf v. Corning Hospital District*:[23]

> The rule of governmental immunity for tort is an anachronism without rational basis, and has existed only by the force of inertia . . . .
>
> None of the reasons for its continuance can withstand analysis. No one defends governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality. . . . The illogical and inequitable extreme is reached in this case: we are asked to affirm a rule that denies recovery to one injured in a county or hospital district hospital, although recovery may be had by one injured in a city and county hospital.

Despite such efforts by the bench, the desirability of judicial change in this area is questionable. A case-by-case approach would not only invite frequent and expensive litigation that could largely be avoided by a comprehensive tort claims act, but it would also leave in the hands of the judiciary the responsibility for balancing policy considerations and striking a practical solution to issues that are essentially political in nature and thus particularly within the competence and experience of legislators.[24] The major obstacles to a legislative approach arise in delineating the policy and scope of liability and in providing for the increased liability that will inevitably ensue upon financially unprepared political subdivisions of the state. Following the *Muskopf* decision, the California Legislature instituted a two-year moratorium of the liability imposed by the abolition of governmental immunity in that case.[25] This was done to provide enough time for formulation of an acceptable approach that would

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22. CAL. LAW REVISION COMM'N, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY: NUMBER 1 — TORT LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES, 4 REPORTS, RECOMMENDATIONS & STUDIES 807 n.5 (1963) [hereinafter cited as 4 REPORTS, RECOMMENDATIONS & STUDIES].

23. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

24. *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 94.

25. CAL. CIV. CODE §1404 (1961). This legislation suspended the effect of the decisions in *Muskopf* and Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) in which it was stated that the doctrine of discretionary immunity, which protects public employees from liability for their discretionary acts, might not protect public entities from liability in all situations in which the employees are immune. Such suspension would continue until the ninety-first day after the adjournment of the 1963 Regular Session of the Legislature. At that time, unless legislative action should be taken, the state and other public entities in California would have been liable for their torts under conditions set forth in those cases.

allow full recovery without placing an oppressive administrative and financial burden on its public entities. As a result of their efforts, the California Legislature enacted a comprehensive tort claims act,[26] which will be reviewed in detail later.

THE PRESENT SITUATION IN FLORIDA

In 1957, the Florida Supreme Court in *Hargrove v. Town of Cocoa Beach*[27] promulgated a fresh attitude toward municipal liability in this country. The court allowed recovery against the city for an injury negligently inflicted by a city employee who was acting within the scope of his employment.[28] It ignored any distinction between governmental and proprietary functions. More recently the Florida court has allowed recovery from a municipality as the result of an intentional tort.[29] Although certain limitations remain,[30] the effect of these decisions is to abolish the doctrine of sovereign tort immunity in suits against Florida's municipal corporations.

Above the municipal level, however, the doctrine remains firmly entrenched. The courts have consistently held that counties and other public entities, unlike municipal corporations, are organized as political subdivisions[31] of the state and constitute agencies of the state government and share the state's immunity from suit in tort.[32] Historically, the application of this doctrine has promoted an inadequate and unjust relationship between the modern public entity and its citizens.

In 1939, the First District Court of Appeal in *Buck v. McLean*[33] refused to allow recovery when a paying spectator at a high school baseball game was injured by a foul ball. The county board of

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26. CAL. GOV'T CODE §§810-970.6.

27. 96 So. 2d 130 (Fla. 1957).

28. In *Hargrove* a prisoner died of smoke suffocation after being locked in a jail that was left unattended by the city jailer.

29. City of Miami v. Simpson, 172 So. 2d 435 (Fla. 1965), 18 U. FLA. L. REV. 173.

30. The Supreme Court of Florida has specifically preserved municipal immunity for the exercise of legislative, judicial, quasi-legislative, and quasi-judicial functions. These exceptions were illustrated in such cases as Akin v. City of Miami, 65 So. 2d 54 (Fla. 1953); Elrod v. City of Daytona Beach, 132 Fla. 24, 180 So. 378 (1938).

31. *But see* FLA. STAT. §1.01 (10) (1965). The words "public body," "body politic," or "political sub-division" include counties, *cities, towns, villages,* special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.

32. See Butts v. County of Dade, 178 So. 2d 592, 594 (Fla. 1965); Kaulakis v. Boyd, 138 So. 2d 505, 507 (Fla. 1962).

33. 115 So. 2d 764 (1st D.C.A. Fla. 1959).

public instruction owned the park and had negligently allowed the protective screen to deteriorate. The district court held that the state's immunity from suit is absolute and that county boards of public instruction are agencies of the state, clothed with the same degree of immunity as the state. The court recognized: "It is a harsh doctrine indeed which leaves one without remedy for wrong suffered by him through the negligence of a state agent or employee committed while performing a proprietary function, but under similar circumstances imposes liability on everyone else engaged in the performance of similar functions."[34] In spite of its empathy for the plaintiff's situation, the court maintained that any change must come either by constitutional amendment or appropriate legislation or both.[35] In *Rabin v. Lake Worth Drainage District*,[36] when a landowner's crop was damaged as a result of a chemical herbicide used by the drainage district, the landowner was precluded from recovery because while acting in its governmental capacity as a public corporation the district was immune from responsibility.

The denial of relief in such cases is consistent because suits against the state are barred by the Florida Constitution unless specifically authorized by statute. Section 22 of article III of the Florida Constitution states that provisions for suing the state for existing or future liabilities must be made by general law. "[T]he purpose of this section has been interpreted to leave the Legislature untrammeled as to 'all liabilities now existing or hereinafter originating' but to limit the method of the exercise of this power to the passage of general rather than special or local laws."[37] Thus, the legislature could authorize suits to be brought against the state or individual state agency while limiting the class of actions that may be brought so long as such classification is reasonable and qualifies as a general law. The Florida Supreme Court in distinguishing a general from a special or local law has stated: "A statute which relates to persons or things as a class is a general law, while a statute which relates to particular

34. Buck v. McLean, 115 So. 2d 764, 768 (1st D.C.A. Fla. 1959).

35. *Ibid.* The court recognized that other state courts had abrogated the sovereignty of their county school districts, but felt compelled to follow the established law of their own jurisdictions. Earlier in Richter v. Board of Pub. Instruction of Dade County, 91 So. 2d 795 (Fla. 1957), the Supreme Court of Florida had denied recovery against the defendant school board for the alleged tortious death of a pupil enrolled in a Dade County public school. The court also recognized FLA. CONST. art. XII, §§9, 13 that make it questionable whether the school board could be liable without amending the constitution. These sections require that school funds be disbursed solely for the support and maintenance of public free schools, and no laws may authorize the diversion of school funds to any other than school purposes.

36. 82 So. 2d 353 (Fla. 1955).

37. Davis v. Love, 99 Fla. 333, 352, 126 So. 374, 381 (1930).

persons or things of a class is special and comes within the constitutional prohibition."[38] Consequently, under section 22 of article III, when the legislature authorized suits against the state road department and limited such suits to contract claims for work done, it was considered an enactment of a general law.[39]

Despite the constitutional provisions authorizing the legislature to permit suits against the state by general law, the Florida Legislature has enacted only a few limited waivers for tort actions in the areas of public vehicles and other selected activities. And, in these situations it has provided that such liability extends only to the maximum limit of liability insurance purchased by the state agency.[40]

As a result, the state of Florida can neither be sued[41] nor can it be made a party defendant[42] without its consent given by general law.[43] Furthermore, suits against state officers, in which the state is the real party against which relief is sought, are considered suits against the state.[44]

The Claims Bill System

Although judicial relief against the tortious state agency is barred in most situations by the sovereign immunity of the state, some relief is nevertheless available. The immunity doctrine in Florida has coexisted with our present system of legislative relief known as the "claims bill system."

The Florida Constitution provides for this system of recovery through the passage of either a special or general bill to satisfy claims for damages caused by the state or its political subdivisions.[45]

The rules for the 1965 regular session of the Florida Senate provided that all bills for payment of claims in excess of 1,000 dollars from the general revenue fund of the state should be referred to the Appropriations Committee and the Claims Committee. It was then the committees' duty to assess the validity and extent of the claimant's injuries and to make recommendations.

The Florida Constitution requires that all claim bills must be passed by two-thirds of the members elected to each house of the

38. *Ex parte* Wells, 21 Fla. 280, 310 (1885).

39. Davis v. Love, 99 Fla. 333, 351, 126 So. 374, 380 (1930).

40. See note 18 *supra*.

41. Cone v. Wakulla County, 143 Fla. 880, 197 So. 536 (1940); Southern Drainage Dist. v. State, 93 Fla. 672, 112 So. 561 (1927).

42. Tax Securities Corp. v. Securities Inv. Corp., 115 Fla. 536, 155 So. 752 (1934).

43. Southern Drainage Dist. v. State, 93 Fla. 672, 112 So. 561 (1927).

44. Hampton v. State Bd. of Educ., 90 Fla. 88, 105 So. 323 (1925).

45. The authoritative basis for claims bills is found in FLA. CONST. art. XVI, §11.

legislature before any money shall be appropriated or paid on a claim. The special or local bills are payable out of county funds; general bills are payable out of state funds.

Although the various committees honestly endeavor to secure a fair and reasonable retribution for the injured claimant, they must necessarily fall short of providing a plenary judicial determination. Many of the disadvantages of such a system are the result of legislative assumption of a purely judicial function.

A similar system existed at the federal level before the FTCA. In fact, claims bills remain at the federal level for those actions and claims that have not been delegated to the jurisdiction of any court.[46] The time-consuming and diversionary nature of the system was a major reason for the passage of the FTCA.[47] This same problem now burdens the Florida Legislature.

There are even more serious burdens upon the claimants. The mechanics of the system places a premium on political influence and favoritism. A justifiable claim for relief should be free from politics, but occasionally the success of a claim may depend more upon the status of the claimant than upon the merit of his claim. The system often imposes a costly burden of delay until the legislature assembles and is able to consider the claims presented. Most significant, however, is the violation of the traditional concept of a judicial remedy for every wrong. A claimant is denied the right to a public review by his peers and must submit to the untrammeled discretion of the state to restrict its own liability. The system is in the nature of a civil bill of attainder and has been sharply criticized by eminent writers.[48]

THE NEED FOR LEGISLATION IN FLORIDA

The basic need for legislation in the area of governmental immunity in Florida is predicated upon an inadequate claims bill system and the absence of sufficient general statutory provisions waiving the immunity of the state and providing uniform and full relief. The courts of Florida have been unwilling to provide the solution for the state and its political subdivisions, and this is as it should be. Even so, the Florida Supreme Court has set the tone for the legislature with

46. For example, 28 U.S.C. §2680 lists specific exceptions to actions that may be brought under the FTCA. Thus, to seek recovery for injuries resulting from an intentional tort the claimant must seek a special claims bill from the Congress. All contract claims will be brought in the court of claims and all tort claims, except those specifically excepted, will be brought in the federal district courts.

47. See note 11 *supra*.

48. See Pound, *The Tort Claims Act: Reason or History*, 30 NACCA L.J. 404, 409 (1964).

its recent decisions in the area of municipal liability. As a result of these recent decisions and the consistent refusal of the courts to abrogate the immunity above the municipal level, there exists a dichotomy between complete judicial relief at the local level and purely legislative relief at the county and state levels. It is conceivable, from the experiences of other states, that this immunity above the municipal level will not withstand all future attacks. It is suggested that an intensive effort be undertaken to secure a just system of public liability that is tailored to the needs of the rural as well as the urban centers, the special districts as well as the counties, and the officers as well as the employees of the state.

LEGISLATIVE SOLUTION

Comprehensive legislation solutions have taken a variety of forms ranging from the blanket waiver of all immunity to the comprehensive enumeration of selected waivers. The degrees of specificity most clearly delineate the three basic approaches.

The broadest waiver is that adopted by New York, which provides:[49]

> The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations, provided the claimant complies with the limitations of this article . . . .

It has been argued that the blanket waiver is tantamount to no legislative action at all for it essentially continues to leave the entire policymaking to the courts.[50] Numerous problems are created when the courts are compelled to treat all public entities as if they were individuals and delicate and complex questions will surely arise concerning prior statutory waivers that remain on the books unless

49. N.Y. CT. CL. ACT §8.

50. Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 467-70 (1963). In construing this section, the New York courts agreed that the legislature had the right to authorize the courts to hear claims against the state. See Rieseberg v. State, 40 Misc. 2d 676, 243 N.Y.S.2d 887 (1963). They have also held that since civil divisions of the state have no independent sovereignty, when the state waived its immunity, the immunity of municipal components disappeared to precisely the same extent. Speigler v. School Dist. of City of New Rochelle, 39 Misc. 2d 720, 241 N.Y.S.2d 967, *aff'd*, 19 App. Div. 2d 751, 243 N.Y.S.2d 74 (2d Dep't 1963). See also Town of Amherst v. Niagara Frontier Port Authority, 38 Misc. 2d 906, 238 N.Y.S.2d 710 (1963), *rev'd on other grounds*, 19 App. Div. 2d 107, 241 N.Y.S.2d 247 (4th Dep't 1963) (the state and its agencies are not subject to suits in equity in the absence of statutory authority).

they are found to have been impliedly superseded. Otherwise it will be the duty of the courts to reinterpret such statutes in light of the new legislative intent.

A second basic approach is that of the FTCA. In 1946, Congress accepted the broad waiver approach introduced by New York when it provided that the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances. . . ."[51] But the FTCA went further than the New York act by enumerating specific exceptions[52] to the general waiver. This same approach has been followed by the states of Alaska[53] and Hawaii.[54]

The third method of statutory waiver involves a detailed and comprehensively tailored program of public liability. The statutes narrowly define the policy considerations, scope, and extent of liability as well as provide for the administration of claims. This method represents an effort to satisfy the needs of order and predictability at all levels of public activity by conforming such liability to the unique considerations of each activity. This type of act does not initially waive the existing immunity as did New York and the FTCA, but rather the existing immunity is retained except where it is specifically waived by statute.

In accepting this latter approach, the California Law Revision Commission rejected the New York and FTCA methods, stating:[55]

> A statute imposing liability with specified exceptions would provide the governing bodies of public entities with little basis upon which to budget for the payment of claims and judgments for damages, for public entities would be faced with a vast area of unforeseen situations, any one of which could

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51. 28 U.S.C. §2674 (1964). It is important to note that the FTCA does not contain any substantive tort law, but rather provides that in all cases he substantive rights of the claimants are to be determined in accordance with the law of the state in which the tort occurred. United States v. Muniz, 374 U.S. 150 (1963); Hess v. United States, 361 U.S. 314 (1960).

52. 28 U.S.C. §2680 (1964).

53. ALASKA COMP. LAWS ANN. §§56-7-1 to -10 (Supp. 1957).

54. HAWAII REV. LAWS §§245 A-1 to -17 (Supp. 1963).

55. 4 REPORTS, RECOMMENDATIONS & STUDIES 811. Although the criticisms leveled by the California Commission are perhaps reasonable inferences from the sweeping language of the New York Act, the New York courts have tempered the scope of the broad waiver by construing exceptions. See also Weiss v. Fote, 7 N.Y.2d 579, 585, 167 N.E.2d 63, 65, 200 N.Y.S.2d 409, 412 (1960), 26 ALBANY L. REV. 75 (1961) in which the court refused to hold the city of Buffalo liable for its negligence in designing the clearance interval for traffic lights. See also N.Y. JOINT LEGISLATIVE COMMITTEE ON MUNICIPAL TORT LIABILITY, FIFTH REPORT (Legis. Doc. No. 36, 1959).

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

TORT LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES

Employee Immunity

Historically, in this country, governmental officers and employees have been liable for their actions unless authorized within the scope of their employment. Judges and high executive officers,[56] however, have been considered immune from suit because of a fear that to make them liable for their actions would impair their ability to carry out their duties efficiently.[57] Indeed, judges were immune even for malicious acts.[58] Lower executive officers were not liable for their discretionary functions, but could be liable for purely ministerial duties.[59] It was felt that activities requiring a certain amount of personal discretion warranted, within limits, some latitude of immunity to encourage efficient operations.[60] But when the action of an employee is simply that of executing a function and all of the discretion has been exercised at a higher level, he is required to carry out the order within reasonable limits and is liable for any tort he might commit.[61]

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56. California is the only state that has a substantial body of case law adopting the federal courts' approach of extended immunity to administrative officers. See Dray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 346 (1959).

57. See generally Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827 (1957).

58. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872).

59. *Cf.* Spalding v. Vilas, 161 U.S. 483 (1896). See also CAL. GOV'T CODE §820.4.

60. Federal Bureau of Investigation agent has discretion in arresting, but his immunity extends no further than the existence of probable cause. On the other hand, a federal prosecuting attorney has unlimited immunity in initiating actions. See Kozlowski v. Ferrara, 117 F. Supp. 650, 652 (S.D.N.Y. 1954).

61. Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); American School of Magnetic Healing v. McAnnutly, 187 U.S. 94 (1902).

It has been suggested that the immunity enjoyed by the officers and employees of the governing sovereign is but an extension of the immunity of that sovereign and that when the immunity of the sovereign is waived, the immunity of the employee is nonexistent because he is essentially acting for the sovereign. But such is not the case. The immunity of officers and employees for their discretionary acts rests on grounds entirely independent of those justifying the state's immunity from liability for torts that its agents have committed.

The immunity afforded the employee is designed to shield him from undue harassment from spiteful, vengeful, or litigation-prone individuals.[62] Judge Learned Hand provided excellent insight into the rationale of this unique doctrine when he rejected the argument that such immunity was designed to protect the guilty public employee:[63]

> The justification for . . . [employee immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . . In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Once it is understood that the immunity granted an employee of the sovereign is unrelated to that enjoyed by the sovereign itself, then in most situations it would be illogical to deny all relief simply because the employee caused the injuries while performing a discretionary function. Because we shield an employee from harassment and retardation in the performance of his duties must we likewise deny the injured claimant relief from the employer-sovereign? The answer would seem to be "yes" in California.[64] The California Legislature declared that a public entity is liable for a negligent or wrongful act or omission by its employee within the scope of his employ-

62. Van Alystyne, *supra* note 50, at 486.

63. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

64. Besides the fear that personal liability might inhibit the public employee from carrying out his duties with diligence, comparable immunity was justified in California on the ground that rising expenses and a limited tax base may make a public employee as apprehensive of the effect of governmental liability upon the budget he must administer as would personal liability. See 4 REPORT, RECOMMENDATIONS & STUDIES 810.

ment to the extent that the employee is personally liable for such act or omission.[65] This conformity of the liability of the public entity and its employees has been expanded to grant immunity to the employee when the public entity is immune, and likewise, to grant immunity to the public entity when the employee would not be liable for his own tortious acts or omissions.[66] Thus because the California courts have held that a public employee is immune from liability for his discretionary acts within the scope of his employment, even if there be abuse,[67] the employer would remain immune.

This reasoning has been criticized inasmuch as the act is designed to secure relief for tortiously injured parties. Simply because the rule maintains the immunity of the employee while performing a discretionary function, it is difficult to understand why the state should not now compensate for these injuries.[68]

Discretionary and Ministerial Functions

The distinction between discretionary and purely ministerial functions has been written into the FTCA. The United States is not liable for claims based upon an act or omission of a government employee when the function or duty required of the federal agency or employee is discretionary. It does not matter that the discretion involved was abused.[69] Whether the conduct of a government employee is a discretionary function is a matter to be decided under the act rather than under state rules relative to political, judicial, quasi-judicial, and ministerial functions.[70] Generally, the distinction is between those acts done at a planning level and those at the operational level. But the United States Supreme Court has held that this immunity remains for a discretionary plan developed under a direct delegation of plan-making authority from the top.[71] The

65. CAL. GOV'T CODE §815.2 (a). This is the rule that had been applicable to all public entities in the state insofar as their proprietary functions are concerned.

66. CAL. GOV'T CODE §815.2 (b).

67. This rule has been codified in CAL. GOV'T CODE §820.2.

68. 4 REPORTS, RECOMMENDATIONS & STUDIES 815-16. The act already contains certain exceptions discussed *infra*. The California Commission recognized that the rule would be especially harsh when the injuries are the result of deliberate and malicious abuses of governmental authority and is continuing its study to determine if modifications should be made.

69. 28 U.S.C. §2680 (a) (1964).

70. United States v. Muniz, 374 U.S. 150 (1963).

71. Early cases construing the "discretionary function" provisions by the United States Supreme Court attempting to set a firm interpretation were unsatisfactory and caused unreasonable hardship. In Dalehite v. United States, 346 U.S. 15 (1953), the Court was faced with the Texas City disaster in which a tanker explosion caused extensive damage and injury, but recovery was not allowed be-

weakness of such reasoning is that it enables the courts to apply immunity at even the lowest levels of governmental activity and, consequently, to defeat the original intention of the act to make the government liable.[72] The provision was obviously not intended to deny recovery at all levels of activity, but was thought necessary to give courts the flexibility to insure the efficient exercise of discretionary duties by government employees without the pressure of a threat of suit.[73]

Countless suggestions have been made to aid the courts in establishing a settled rule,[74] yet there remains no definite limit to what is discretionary under the FTCA. Perhaps there is no answer short of a major statutory revision, as one writer has suggested, except to rely upon the sound wisdom of the court within broad policy limits determined on a case-by-case basis. But it is clear that modifications to this broad policy rule will provide a better system of just compensation and a sounder public policy.

The fault does not lie with the application of this viscous rule of descretionary activities, but lies with the assumption upon which it is predicated. The assumption is that immunity or liability should be resolved upon whether the government officer or employee was required to use discretion in carrying out his duties or whether he was merely following stated orders of discretion exercised at a higher level. It would be a more reliable and an easier rule to apply if the immunity preserved depended solely upon whether the employee was acting in accordance with a statute or regulation, regardless of its validity, and to enumerate specific liability situations rather than pass on each situation as it arises.

The California Commission, in an effort to clarify the dilemma of

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cause the Court concluded that discretionary functions under the FTCA includes more than the initiation of programs and activities. It also "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.* at 35-36 (1953).

72. Indian River Towing Co. v. United States, 350 U.S. 61 (1955). "The broad and just purposes which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities . . . ." Once the Government had exercised its discretion, it was obligated to use due care. *Id.* at 68-9.

73. See generally Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 78 (1960); Note, *Torts: National and International Sovereign Immunity*, 16 OKLA. L. REV. 457, 461 (1963).

74. Several of these suggestions are collected in Note, *Torts: National and International Sovereign Immunity*, 16 OKLA. L. REV. 457, 463 (1963).

discretionary immunity, recommended specific statutory provisions that would indicate whether or not liability exists in particular situations. The resulting statutes were concentrated in those areas in which tort claims most often arise.[75] But in the absence of a specific statutory waiver, any immunity must depend upon the ministerial-discretionary dichotomy.

The commission concluded that under certain circumstances a public entity should be liable even though no public employee would be liable. Thus in some cases in which public property is in a dangerous condition or a public entity fails to exercise reasonable diligence to comply with applicable statutory minimum safety standards for public equipment or public improvements, only the public entity will be liable. Also the public entities are responsible for the tortious acts and omissions of independent contractors to the same extent as private persons.[76] It was felt that they should not be able to escape their responsibilities by contracting away their hazardous duties.

Perhaps the most extensive specific statutory liability of the public entities of California is the liability of the public for the breach of its obligations as an occupier of land.[77] The code has discarded the traditional concept of invitee, licensee, or trespasser and has based all liability upon the failure of the public occupier or owner to take all reasonable precautions once it knows or has reason to know that the condition creates a substantial risk of harm to persons who will foreseeably use the property with due care.[78]

The California code, however, also recognizes specific immunities that continue to exist. Whereas the New York Act often left its immunities to be determined by the courts,[79] the California statutes codified many of the exceptions that had evolved under the New York Act and the FTCA.

The California Commission felt the essential governmental character of certain activities made them inappropriate for judicial review. In many instances the review of public officials' decision-making is reserved to the electorate who have the ultimate respon-

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75. These major areas include: (1) the dangerous condition of property owned or occupied by a public entity, (2) police and correctional activities, (3) fire protection, and (4) medical and hospital and public health activities.

76. CAL. GOV'T CODE §815.4.

77. CAL. GOV'T CODE §§830-835.4.

78. CAL. GOV'T CODE §830.2. Under this statute the courts are required to determine that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk is involved before they may permit the jury to find that a condition is dangerous.

79. See note 55 *supra*.

sibility.[80] Consequently, public entities and their employees are not liable for:

(1) any injuries resulting from the adoption or failure to adopt any statute, ordinance, or regulation,[81]

(2) the execution of any law with due care though later it may be held unconstitutional,[82]

(3) the failure to enforce the law,[83]

(4) the granting, refusing, revoking, or suspending any license or similar authorization,[84] or

(5) the failure of preventing another from negligently or wrongfully injuring another.[85]

It is also recognized that public employers are not liable for malicious prosecution, nor are they liable for the acts of their subordinates unless they themselves were guilty of some misconduct.[87]

Intentional Torts

The commission did not accept the FTCA's exclusion of liability for intentional torts.[88] Congress thought that intentional torts would be too difficult to defend and that they might open the doors to exaggerated and unreasonable recoveries.[89] Neither of these fears appears

80. The basis of this conclusion seems to be in the desired maintenance of a separation of powers. See 4 REPORTS, RECOMMENDATIONS & STUDIES 817.

81. CAL. GOV'T CODE §§818.2 (public entity), 821 (public employees).

82. CAL. GOV'T CODE §§820.4 (public entities), 820.6 (public employees).

83. CAL. GOV'T CODE §821.

84. CAL. GOV'T CODE §§818.4 (public entities), 821.2 (public employees).

85. Thus if a public building inspector negligently inspects or fails to inspect any property, other than public property, there will be no liability. So, too, is immunity extended to allow adequate inspection for health and safety requirements on private property without fear of liability. See CAL. GOV'T CODE §§816.6 (public entities), 821.4 (public employees); see also CAL. GOV'T CODE §§855.4, .6. It was also felt that the public should not be liable for programs benefiting the public that may fall short of perfection. Thus the public is not liable for failure to provide adequate police (CAL. GOV'T CODE §§845, .2) or fire protection (CAL. GOV'T CODE §§850, .2, .4.

86. CAL. GOV'T CODE §821.6 continues the immunity of the public employee for malicious prosecution and §816 makes the public entity liable, but under §825.6 the public entity may recover any amounts paid on the judgment from the employer whose maliciousness caused the injury.

87. *But see* Foyster v. Tutuska, 44 Misc. 2d 303, 253 N.Y.S.2d 634 (1964) in which a sheriff was held responsible for the negligence of his deputies in the performance of their duties in criminal matters.

88. 28 U.S.C. §2680(h) (1964). On June 17, 1965, Senator Yarborough introduced a bill to provide for compensation to persons injured by certain criminal acts. S. 2155, 89th Cong., 1st Sess. (1965).

89. See *Hearings on S. 269 Before the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 39 (1940). See also Comment, 56 YALE L.J. 534, 547 (1947).

well founded enough to deny all recovery. The difficulty of defending any suit should not be cause to preserve immunity when an individual has been intentionally harmed by the employees or agencies of the Government any more than for negligent injuries. The private corporation must assume the consequences of intentional wrongdoing by its employees acting within the scope of their employment. The preservation of this distinction for the protection of the federal government seems unjustified and contrary to the purpose and policy of the act of providing a remedy for injured persons. The fear of excessive claims is tempered by providing that all cases shall be heard without a jury and that no punitive damages may be awarded.[90] This arbitrary exclusion of redress for intentional torts has led some courts to withhold federal liability by applying the technical substantive definitions of state tort law.[91] One writer has suggested a limitation of these intentional tort exceptions to only those torts committed with an evil attitude.[92] Perhaps there is some merit in this approach, but realistically the malice and corruption present in any tort, as well as the seriousness of the tort, is essentially a consideration involved in determining whether it occurred within the scope of employment. As such, any express exception might be directed at specific torts rather than at the subjective state of mind of the tortfeasor.[93]

Punitive Damages

Under the FTCA[94] and California Act[95] no recovery is allowed for punitive damages. In New York, however, punitive damages may be awarded when the wrongdoer has acted maliciously, wantonly, or with recklessness that betokens improper motive or vindictiveness.[96] The exclusion of punitive damages is usually founded upon the basic policy purposes of the acts and is not meant to deny deserved relief to the claimant. Because punitive damages are in the nature of a

90. 28 U.S.C. §2402 (1964).

91. See Moos v. United States, 225 F.2d 705 (8th Cir. 1955). Recovery was denied on ground that surgical operation on wrong leg was a battery under state law.

92. See Note, *Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 892 (1957).

93. *Ibid.* See CAL. GOV'T CODE §§816, 821.6 (malicious prosecution).

94. 28 U.S.C. §2674 (1964).

95. CAL. GOV'T CODE §§818, 825. No damages may be recovered for an injury to a state prisoner or mental patient either. See CAL. GOV'T CODE §§844.6, 854.8. *But see* CAL. GOV'T CODE §§845.4, .6, 855, .2.

96. See Darlow v. State, 207 Misc. 124, 137 N.Y.S.2d 69 (1955).

punishment to the tortfeasor, it seems unnecessary for the government to punish itself beyond complete restitution for the injuries suffered. The ultimate burden of recovery falls upon the taxpayers. For this reason it would be desirable to exclude punitive payments under a state act.

Indemnification

The public entities in California are, in most cases, ultimately liable for the acts or omissions of employees occurring within the scope of their employment since the employee is often able to recover any claims he himself was forced to pay. The act is not unique in indemnifying its employees except to the extent it requires the present or former employee to give notice to the public entity and allow it to defend.[97] If, however, the public entity did not conduct the defense, such employee may nevertheless recover from the public entity if he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment.[98] On the other hand, nothing in the act establishes the liability of a public entity when the employee has been guilty of actual fraud, corruption, or actual malice. Before the employee may recover from the public entity, he must also overcome this guilt. Furthermore, whenever the employee has acted with fraud, actual malice, or corruption the public entity has the right to recover from the guilty employee any amount paid.[99] The commission recognized that when any fraud, corruption, or malice exists, the interests of the public entity and the employee will conflict since the public entity will not be ultimately liable.[100] For this reason, when the public entity assumes the defense of the employee in such cases, it must reserve the right of indemnity from the employee by agreement with the employee or waive its right.[101]

The merit of this scheme is in its attempt to establish a just balance between complete liability on one hand and an immunity designed to temper the burden placed upon the public for certain actions of its employees. These specifically enumerated liabilities and immunities are founded upon California's own prior experiences and upon the experiences of others in an effort to avoid as much uncertainty as possible and to provide a stable basis for financial responsibility at all

97. CAL. GOV'T CODE §825.

98. CAL. GOV'T CODE §§825.2 (a), (b).

99. The public entity may recover from the employee even when the employee would have been personally immune from liability had he been sued directly. See CAL. GOV'T CODE §§816, 821.6 (malicious prosecution).

100. CAL. GOV'T CODE §825.6 (a).

101. CAL. GOV'T CODE §825.2.

levels of government. It is a reasonable approach and one that merits the consideration of future state acts.

CLAIMS, ACTIONS AND JUDGMENTS

The 1963 California Code went to great lengths so that all claims might be handled through one means or another. Public entities may establish claims boards[102] or appoint claims officers who may settle all claims or delegate that authority.[103] The ability to settle claims and avoid litigation is often beneficial to both parties. Similarly, the FTCA provides that the head of each federal agency,[104] or his designee, acting on behalf of the United States may settle any claim for money flowing from a negligent or wrongful act or omission of any government employee acting within the scope of his employment. But the damages must not exceed 2,500 dollars.[105] It is often difficult to explain why an action for damages in excess of 2,500 dollars in which the precise amount is readily determinable and is satisfactory to both parties cannot be settled without resorting to a plenary trial. The inability to settle these claims poses added financial burdens upon the administration of the system and causes unnecessary delay in the final disposition of cases. Nevertheless, the restriction must be explained from a consideration of the purpose of of the act. Although the FTCA is essentially a scheme for assuring relief for claimants, it must also be viewed as an attempted organizational improvement providing a more efficient use of Congressional time.[106] Because the FTCA represented a substantial surrender of control over the settlement of claims against the Government, it is practical to conclude that Congress saw no reason to remove the discretion of settlement from itself only to place it with another administrative body without a limitation upon such control. But the soundness of this explanation is questionable. Under the FTCA the process of settlement is being surrendered to the heads of the federal agencies who have both ability and an interest in reducing the unnecessary cost of litigation when possible. If Congress fears excessive

102. CAL. GOV'T CODE §935.2.

103. CAL. GOV'T CODE §§935.4, .6, 948, 949.

104. 28 U.S.C. §2677 (1964).

105. 28 U.S.C. §2672 (1964) (also, the heads of each federal agency must report annually to Congress all claims paid under this section); 28 U.S.C. §2673 (1964). Originally the FTCA placed a 1,000 dollar maximum upon claims that could be settled but a 1959 amendment raised this amount to 2,500 dollars. This is not intended to be a restriction upon the amounts recoverable, but is intended to provide a basis for settling a larger number of claims coming under the maximum limit. Even the amended maximum is subject to criticism.

106. See note 11 *supra*.

or frivolous settlements, it could simply require the courts to approve all settlements in excess of a stated maximum. To deny settlement altogether beyond a nominal maximum would, likewise, unreasonably retard the efficient administration of a state tort claims act.

Like the FTCA, no action may be maintained in California until it has been presented to the public agency[107] and has been acted upon or rejected by the board.[108] The public entity may require the claimant to secure the cost of the action.[109]

In an attempt to provide uniformity, the California Legislature enacted a single claims procedure for both state and local claims. Generally, the statutes require that all claims be presented within 100 days of the cause of action.[110] But if the claimant was disabled or his failure to comply with the 100 days was due to mistake, surprise, inadvertence, or excusable neglect, and the public entity has not been prejudiced, he may bring the action within one year.[111] This liberal allowance in bringing claims seems in line with the policy of the act.

FINANCING THE LIABILITY OF PUBLIC ENTITIES

The California Act attempts to insure that the waiver of immunity is not defeated by the inability of the public entities to meet the judgments against it.[112] Local entities are required to levy taxes or otherwise secure sufficient revenue to pay all outstanding claims.[113] The commission recognized the inequality of financial position among various public entities and has provided that payment of claims that would cause undue hardship may be paid over an extended period up to ten years.[114] Further provisions are made for bond financing to meet tort judgments that may be extended over forty years.[115] It is also allowable for several public entities to buy group insurance to spread the cost of small entities over a larger group.[116] The wisdom of such provisions will lie with experience. It is impossible to foresee all contingencies that will give rise to increased liability. Even

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107. See CAL. GOV'T CODE §§905-.6 (not all claims are required to be presented).

108. CAL. GOV'T CODE §945.4.

109. CAL. GOV'T CODE §947. See also CAL. GOV'T CODE §951, which requires a minimum of $100 and requires that in no event where a judgment is rendered for the public employee shall the cost be less than $50 per plaintiff.

110. CAL. GOV'T CODE §911.2.

111. CAL. GOV'T CODE §§911.4-912.2.

112. CAL. GOV'T CODE §970.2 (a writ of mandate may be secured to compel a local public entity to require payment of a tort judgment).

113. CAL. GOV'T CODE §§970-.4.

114. CAL. GOV'T CODE §970.6 (b).

115. CAL. GOV'T CODE §§975-978.8.

116. CAL. GOV'T CODE §§989-991.2, 11007.4.

though the risk assumed by a public entity is often unrelated to its size or financial ability, a tort claims act should not restrict the allowance of full recovery.[117] Such restrictions merely ignore the goal of responsible public liability when adequate insurance, financing, and state assistance are possible.

CONCLUSIONS

Florida has an excellent opportunity to construct and adopt a tort claims act that will, to a great extent, have been pretested by its application in other states and proved in its ability to meet all the financial and administrative responsibilities.

The problems of drawing standards of governmental liability and immunity are immensely difficult. The comprehensive scheme plan as adopted in California possesses the advantage of being flexible enough to tailor legislation to the unique conditions within our own state and to provide a more predictable basis for liability insurance.

OSMOND C. HOWE, JR.

117. The California Commission recognized that a few types of public entities are financially dependent upon some other public entity from whom they derive all or part of their funds. In these situations the supporting entity should be required to appropriate funds to cover its prorata share of the tort judgments.