THE ROLE OF THE COURTS IN ABOLISHING GOVERNMENTAL IMMUNITY

THE abolition of the governmental immunity doctrine has been urged since before the turn of the century.[1] Until recently, however, courts have refused to give tort relief in the absence of legislation or facts on which the immunity doctrine could be circumvented. Since governmental enterprises continue to expand in scope at an ever increasing rate, their contact with and influence on the individual becomes more significant. Therefore, the unpredictable and often inequitable consequences resulting from the "governmental-proprietary" dichotomy,[2] "discretionary-ministerial" distinction[3] and

[1] "[I]f they [municipal corporations] by their neglect of duty inflict injury on any one they should be held liable for it. To establish this rule is the only way to enforce diligence." Young, *Liability of Municipal Corporations for Negligence*, 18 AM. L. REV. 1008, 1018 (1884). In the late nineteenth century, another noted authority criticized tort immunity of public entities as being unjustified on public policy grounds. GOODNOW, MUNICIPAL HOME RULE 106, 180-82 (1916). However, widespread comment was not generated until the publication of a series of eight articles by Professor Edwin M. Borchard in the 1920's. See, *e.g.*, Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925); Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1039 (1927); Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928). For a discussion of the writings of Goodnow and Borchard, as well as those of other early advocates of governmental responsibility, see Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214-18 (1942). In recent years, academic commentary has been overwhelmingly directed against governmental immunity on grounds of history, comparative law and policy. See 2 HARPER & JAMES, TORTS § 29.4, at 1617 (1956) [hereinafter cited as HARPER & JAMES]. For an excellent, though somewhat out of date, symposium, see *Governmental Tort Liability*, 9 LAW & CONTEMP. PROB. 179 (1942). See generally *Governmental Tort Symposium*, 29 N.Y.U.L. REV. 1321 (1954); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Comment, 26 GA. B.J. 435 (1964).

[2] The rationale behind the "governmental-proprietary" dichotomy is that when a public entity is involved in a governmental function, it is acting as the arm of the state and is, therefore, immune from tort liability; but, when involved in a proprietary function it is devoid of the cloak of immunity. 2 HARPER & JAMES § 29.5, at 1620. Because of the confusion this dichotomy has caused among and within jurisdictions, it has been attacked as being one of the most unsatisfactory distinctions known to the law. 3 DAVIS, ADMINISTRATIVE LAW § 25.07, at 460 (1958) [hereinafter cited as DAVIS].

It has generally been assumed that all state activities, as distinguished from activities of political subdivisions, are immune. 81 C.J.S. *States* § 130 (1953); 52 AM. JUR. *Torts* § 100 (1944). However, California and Texas are at least two states in which the "governmental-proprietary" distinction has been extended to state functions. See Pianka v. State, 46 Cal. 2d 208, 292 P.2d 458 (1956); State v. Elliott, 212 S.W. 695 (Tex. Civ. App. 1919); CAL. LAW REVISION COMM'N, A STUDY RELATING TO SOVEREIGN

other judicial attempts[4] to designate areas of governmental tort liability and immunity have been increasingly lamented from the

IMMUNITY 13 n.2 (1963) [hereinafter cited as SOVEREIGN IMMUNITY STUDY]; 81 C.J.S. *States* § 130 nn.76 & 77 (1953). Political subdivisions of the state, such as counties and townships, have generally been considered immune as an arm of the state, but in some cases have been held to exercise proprietary functions. See 2 HARPER & JAMES § 29.5; 14 AM. JUR. *Counties* § 48 (1938); 20 C.J.S. *Counties* § 215 (1940); Note, *The Decline of Sovereign Immunity in Indiana*, 36 IND. L.J. 223, 230 (1961).

No satisfactory test having been devised to distinguish governmental from proprietary functions, the distinction should be discarded as unjust and unpredictable. See 2 HARPER & JAMES § 29.6, at 1621; SOVEREIGN IMMUNITY STUDY 224; 26-27 NACCA L.J. 31, 37-38 (1960-61). But the patchwork of decisions may suggest underlying policy considerations which could be helpful in determing areas of governmental liability. See SOVEREIGN IMMUNITY STUDY 224-25.

[3] The "discretionary-ministerial" distinction is based on the premise that if the wrong was committed in the course of an activity involving discretion of a judicial or legislative nature, no liability will be imposed; but if the activity is merely a ministerial function, not involving personal judgment, liability may be imposed. Repko, *supra* note 1, at 222. The reason that governmental entities and their employees are given immunity from tort liability in carrying out discretionary functions is that public interests are better served by allowing decisions to be made without the fear of possible tort liability. See notes 38 & 39 *infra*. In practice the distinction has operated to limit the area of liability permitted by the "governmental-proprietary" dichotomy. Repko, *supra* note 1, at 223. It is generally agreed that immunity is needed for some discretionary functions. See notes 37 & 38 *infra*. For a discussion on the related exception to the Federal Tort Claims Act and the confusion it has caused, see 3 DAVIS §§ 25.08-.10.

[4] New Jersey's unique "active wrongdoing" test is another example of a confusing attempt to circumvent governmental immunity. See Repko, *supra* note 1, at 223-24; Rosenberg, *The Decline of Municipal Tort Immunity*, 5 CURRENT MUNICIPAL PROBLEMS 47, 49-59 (1963). The part of this rule which limited the liability of a municipality for negligent acts of commission to instances where the wrongdoer occupied such a position of authority as to hold the municipality itself responsible as a participant has been recognized as an anomaly and discarded by the New Jersey Supreme Court. McAndrew v. Mularchuk, 33 N.J. 172, 192, 162 A.2d 820, 831 (1960). Therefore, the general principles of vicarious liability apply, but only where negligent acts of commission form the basis of the claim. *Id.* at 193, 162 A.2d at 832.

A minority of courts have held that the purchase of insurance constitutes a waiver of immunity to the extent of the insurance coverage. By 1960, however, twenty-one states had held that a public entity did not alter its tort immunity by purchasing insurance and only three states had reached the contrary view. Annot., 68 A.L.R.2d 1437 (1962). Since 1960, at least four states have joined the ranks of the minority, showing an increasing approval of the view that the presence of insurance warrants avoidance of the governmental immunity doctrine. Christie v. Board of Regents, 364 Mich. 202, 111 N.W.2d 30 (1961); Schoening v. United States Aviation Underwriters, Inc., 120 N.W.2d 859 (Minn. 1963); Vendrell v. School Dist. No. 26C, 226 Ore. 263, 360 P.2d 282 (1961); Marshall v. City of Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963). See generally David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A.L. REV. 1, 47-53 (1959); Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588. For a discussion of liability insurance and indemnification of officers and employees as indirect methods of creating governmental liability, see DAVIS § 25.04 (1958, Supp. 1963).

bench as well as the bar.[5] Reinforced by growing acceptance of a "spread-the-loss" philosophy,[6] commentators have argued that public entities[7] should be held responsible for torts committed by their employees within the scope of their employment.[8]

Despite appeals for reform from the courts[9] and commentators,[10] most state legislatures have failed to provide a satisfactory solution.[11] Within the last seven years, however, several courts have abolished the governmental immunity doctrine by judicial fiat,[12] and it seems

[5] See, *e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 441-45 (1941); Kennedy & Lynch, *Some Problems of a Sovereign without Immunity*, 36 So. CAL. L. REV. 161, 166-67 (1963); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

[6] The "risk" theory of tort liability, exemplified by the workmen's compensation acts, imposes liability without regard to fault, on the theory that persons injured should be compensated for their loss by distributing the costs over the beneficiaries of the enterprise that created the risk. See SOVEREIGN IMMUNITY STUDY 271-72; 2 HARPER & JAMES §§ 13.1-.8. The classical reason for condemning governmental immunity has been that it places the burden of damage resulting from the wrongful acts of government on the injured rather than on the community. See Annot., 75 A.L.R. 1196 (1931). It has been argued that an "important social objective would be attained by 'spreading the cost' of damages caused by governmental activities among all taxpayers who would ultimately bear the burden of municipal tort liability." Note, 42 NEB. L. REV. 710, 715-16 (1963). Thus government has been pointed to as being the ideal loss spreader. See SOVEREIGN IMMUNITY STUDY 272; 3 DAVIS § 25.17, at 503; Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956). *But see* Kennedy & Lynch, *supra* note 5, at 176.

[7] The terms public entities, government agencies, and political subdivisions are used interchangeably in this comment in referring to all entities, such as states, counties, municipal corporations, townships, and school districts, which are considered to be governmental in nature.

[8] See, *e.g.*, Cal. Gov't Code § 815.2(a) (Supp. 1963); CAL. LAW REVISION COMM'N, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY—NUMBER 1—TORT LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES 814-15 (1963); 3 DAVIS § 25.17, at 93 (Supp. 1963).

[9] See, *e.g.*, Lee v. Dunklee, 84 Ariz. 260, 263-64, 326 P.2d 1117, 1119 (1958); Fette v. City of St. Louis, 366 S.W.2d 446, 448 (Mo. 1963).

[10] See authorities cited note 1 *supra*.

[11] Before the recent trend toward judicial abolition of governmental immunity, Congress and the New York legislature were the only two governing bodies to have enacted legislation making governmental entities liable to approximately the same extent as a person or private corporation. See Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.); N.Y. CT. CL. ACT § 8. As a reaction to the judicial abrogation of governmental immunity, the legislatures of Illinois, California, and Minnesota have passed legislation affecting governmental liability. See note 15 *infra*. Also, there have been indications that other legislatures are considering action in this vital area. See, *e.g.*, Comment, 16 MAINE L. REV. 209 (1964).

[12] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Hargrove

likely that other courts will soon follow the same path. Although the trend toward holding government responsible for its torts is commendable and justified, a strong caveat should be directed to courts which have not yet undertaken judicial abrogation of the governmental immunity doctrine. An attempt is made in this comment to isolate and clarify certain factors which a court should consider and to suggest possible guidelines which a court should follow in formulating its decision when the abolition of governmental immunity is urged upon it.

JUDICIAL ABROGATION

It is unfortunate that legislatures have not acted to provide an adequate statutory replacement for the outdated doctrine of governmental immunity. The legislature, with its public forum and investigative machinery, is better equipped than the courts to outline the desired scope of governmental liability.[13] A judicial decision necessarily lacks the political comprehensiveness of a legislative enactment, for the court must primarily address itself to a limited fact situation. Furthermore, a court decree is usually retrospective and affects rights established before the decision date. Thus, far-reaching and uncertain consequences may result when judicial rather than legislative abrogation is used.[14] But since legislatures have not

v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (dictum); Spanel v. Mounds View School Dist. No. 621, 118 N.W.2d 795 (Minn. 1962) (dictum); Rice v. Clark Co., 382 P.2d 605 (Nev. 1963); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

The rationale which the courts have employed in asserting their power to abolish the immunity doctrine is that, since the courts first created the rule, they can abolish it without legislative action. See, *e.g.*, Stone v. Arizona Highway Comm'n, *supra* at 393, 381 P.2d at 113; Muskopf v. Corning Hosp. Dist., *supra* at 218, 359 P.2d at 461, 11 Cal. Rptr. at 93.

[13] See Rice v. Clark Co., *supra* note 12, at 613 (dissenting opinion); SOVEREIGN IMMUNITY STUDY 267-330; Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963); Comment, 6 ARIZ. L. REV. 102, 108 (1964).

[14] When the abrogating decision is considered in the light of the pre-existing law, uncertainty as to desirable action can develop within the legislature and public entities because of the difficulty in predicting the new areas of liability. See SOVEREIGN IMMUNITY STUDY 268 & n.3; Cobey, *The New California Governmental Tort Liability Statutes*, 1 HARV. J. LEGIS. 16, 17-18 (1964); Hertler, *Judicial Legislation and the Doctrine of Governmental Immunity*, 39 U. DET. L.J. 570, 581 (1962); Van Alstyne, *supra* note 13, at 466-67; Note, *The Tort Liability of Florida Municipal Corporations*, 16 U. FLA. L. REV. 90, 101-03 (1963). In an attempt to inject certainty into the confusion following the abrogating decisions, a number of state legislatures have enacted illuminating legislation. See note 15 *infra*.

acted, and since it seems unlikely that they will act, the burden has shifted to the courts to reach a proper result on a case-by-case basis.

The responsibility, therefore, falls upon the courts to consider not only the cases before them, but to consider also the consequences of their decisions on future litigants and the public as a whole. The court can best fulfill its role by enunciating a decision which will serve as a catalyst to legislative action[15] and as an interim solution to the many problems which will undoubtedly arise due to a change in a long established policy of governmental immunity. Therefore, in formulating an abrogating opinion, the court should be aware of the pitfalls and uncertainty encountered in most of the jurisdictions which have already judicially abolished governmental immunity. Furthermore, the court should include in the abrogating opinion an indication as to how far it intends to extend governmental liability. Thus the bench must determine where the limits of governmental responsibility should be drawn.

[15] Past experience indicates that judicial abrogation has been the most effective way of prompting legislative action in this area. Three state legislatures have reacted to judicial abrogation in their states by passing legislation in direct response to the courts' decisions. In California, a moratorium period was created to give the legislature time to study the problems caused by the court's decision. See CAL. CIVIL CODE § 22.3 (Supp. 1963). The 1963 session of the California legislature virtually rewrote the California law respecting governmental liability in tort on the recommendation of the California Law Revision Commission. See, *e.g.*, CAL. GOV'T CODE §§ 815, 815.2, 830-31, 835, 844-46, 850, 854-56, 860, 911.2, 911.4, 915, 945, 945.2, 970-71, 975 (Supp. 1963); Cobey, *supra* note 14. The Illinois legislature reacted to judicial abrogation by restoring immunity to a number of activities and by providing a short statute of limitations and monetary limit on recovery in actions against school districts. See ILL. REV. STAT. ch. 34, § 301.1 (1961) (immunity restored to counties); ILL. REV. STAT. ch. 57½, § 3a (1961) (immunity restored to forest preserve districts); ILL. REV. STAT. ch. 105, §§ 12.1-1, 491 (1961) (immunity restored to park districts); ILL. REV. STAT. ch. 105, § 333.2a (1961) (immunity restored to the Chicago Park District); ILL. REV. STAT. ch. 122, §§ 821-31 (1961) (short statute of limitations and $10,000 recovery limit in actions against school districts); Comment, 9 DE PAUL L. REV. 39 (1959). In Minnesota, the legislature responded to the court's abolition by passing legislation which stated that political subdivisions, but not the state, would be liable in tort with certain specified exceptions. The statute also provided for a monetary limit on recovery against political subdivisions, a claim procedure and the purchasing of insurance by governmental agencies. See MINN. STAT. ANN. §§ 466.01-.17 (1963); *The Minnesota Supreme Court 1962-1963*, 48 MINN. L. REV. 119, 198-203 (1963).

Anticipated legislative reaction is justifiably one of the motives behind decisions to judicially abolish governmental immunity. See Van Alstyne, *supra* note 13, at 464; Note, 31 CINN. L. REV. 307, 327 (1962). With the momentum of the trend to judicially abolish governmental immunity behind them, courts will find it easier to overrule their past precedents of governmental immunity and thereby shift the burden to the legislature to provide a comprehensive guide to governmental responsibility.

DELIMITING THE SCOPE OF GOVERNMENTAL LIABILITY

Even the staunchest advocates of governmental responsibility agree that tort immunity is needed in certain areas of governmental activity.[16] Close scrutiny, moreover, will show that the legal principles of tort liability as related to private persons cannot readily be transposed into the sphere of governmental activity.[17] Public and private entities are so significantly different that it would be unwise to treat them exactly alike for tort purposes.

Distinctive Characteristics of Governmental Liability

Government has an impact on the individual unlike that of any other individual or business. Both in scope and variety, public activities range far beyond those of private enterprise. State and municipal highways, law making and enforcement, licensing and permit issuing, and land use regulation are governmental responsibilities which would be difficult, if not impossible, to carry out without harm resulting to someone. Yet, because of their broad scope and benefit to the community, it would be inadvisable in many situations to burden public entities with absolute[18] or vicarious[19] liability for all damages incurred. Fire protection and prevention, law enforcement, water and air pollution control, flood

[16] See, *e.g.*, 3 DAVIS § 25.11; Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924). "Obviously the Administration cannot be held to the obligation of guaranteeing the citizen against all errors or defects, for life in an organized community requires a certain number of sacrifices and even risks." *Ibid.*

[17] SOVEREIGN IMMUNITY STUDY 269-71; Van Alstyne, *supra* note 13, at 468-70; see Comment, 16 MAINE L. REV. 209, 216 (1964).

[18] It has been suggested that governmental units may be the ideal loss spreader "especially . . . if its taxes are geared to ability to pay" and the public entity is "large enough." See 3 DAVIS § 25.17, at 503. This suggestion of "equitable loss spreading" has been criticized by some commentators as not taking into consideration the practical problems of government. See Kennedy & Lynch, *supra* note 5, at 176. Professor Davis did recognize, however, that government should not be held liable for all the private losses they cause. 3 DAVIS § 25.17, at 504. If public entities were to be held liable for all the harm resulting from their activities without regard to fault, it is doubtful that they would be able to accomplish the ends for which they exist. See SOVEREIGN IMMUNITY STUDY 269; 3 DAVIS § 25.17, at 501; Kennedy & Lynch, *supra* note 5, at 177; Van Alstyne, *supra* note 13, at 468. Other commentators have felt that the suggestion of "equitable loss spreading" merely serves to "underscore the fact that resolution of the problem cannot intelligently be predicted upon theoretical concepts of the role of tort law." Van Alstyne, *supra* note 13, at 471; see SOVEREIGN IMMUNITY STUDY 272.

[19] See SOVEREIGN IMMUNITY STUDY 273; Van Alstyne, *supra* note 13, at 472-91. The individual governmental employee involved should be, and usually is, answerable to the person wronged in most situations where the governmental unit should not be held liable. See SOVEREIGN IMMUNITY STUDY 273.

control, water and soil conservation, and public health functions are a few examples of activities essential to the public welfare the performance of which would become extremely onerous if government were held liable for all resulting harm.[20] Therefore, it is in relation to policy factors not necessarily present in cases between private litigants that liability should be imposed on governmental entities.[21]

Moreover, a number of essential functions performed by governmental entities are so profitless or precarious that private enterprise might not undertake them.[22] Furthermore, governmental entities are required by law to render most of these services to the public regardless of the risks involved; whereas, in most instances a private entity may discontinue any activity when it becomes expedient to do so.[23] Consequently, the public entity is exposed to greater risks with less freedom of action by which to protect itself than is the private entrepreneur.[24] Thus, while complete governmental immunity is generally regarded as being unjust, unlimited governmental liability may not be the best alternative, especially when created by a retrospective judicial decree. Rather, a mean is needed between the extremes. Where this mean lies, however, is a subject of controversy among legal scholars, courts, and legislatures.

Locating the Mean

An attempt to solve the controversy over the limits of governmental liability should be aimed at identifying possible legal criteria which would permit the loss spreading function of tort law to apply to government without unduly frustrating the beneficial activities concerned.[25] In order to delineate the boundaries of public responsibility, therefore, it is necessary not only to apply established concepts of tort law, but also to balance the public policy factors in-

[20] See SOVEREIGN IMMUNITY STUDY 269; Kennedy & Lynch, *supra* note 5, at 177; Van Alstyne, *supra* note 13, at 468.

[21] For a discussion of the policy factors to be considered, see notes 29-34 *supra* and accompanying text.

[22] See Kennedy & Lynch, *supra* note 5, at 177.

[23] See SOVEREIGN IMMUNITY STUDY 269; Kennedy & Lynch, *supra* note 5, at 177; Van Alstyne, *supra* note 13, at 468.

[24] SOVEREIGN IMMUNITY STUDY 270; Van Alstyne, *supra* note 13, at 469.

[25] 3 DAVIS § 29.17 (Supp. 1963, at 91); SOVEREIGN IMMUNITY STUDY 270, 293; Van Alstyne, *supra* note 13, at 469, 472.

volved.[26] Of course, the "fault"[27] and "risk"[28] concepts of tort liability should be considered, but of paramount importance are the policy factors peculiarly related to public entities which must be evaluated and balanced.[29] Examples of the public policy factors to be weighed are: whether public funds should be diverted to compensate for private injury;[30] whether there is a possibility of reduced efficiency due to the fear of possible law suits;[31] whether the chance of liability will encourage better safety precautions;[32] whether the injured, the governmental employee or the taxpayer should bear the risk of loss;[33] and whether the beneficial ends of the particular public activity involved will be unduly burdened.[34]

Although it is possible for the court to do this balancing on a case-by-case basis, it is manifestly a legislative function to provide a comprehensive solution after sufficient study.[35] However, the court may avoid a chaotic aftermath to its decision abrogating governmental immunity by stating in its opinion that it does not purport to

[26] See SOVEREIGN IMMUNITY STUDY 272-73; Van Alstyne, *supra* note 13, at 472.

[27] The "fault" theory of tort liability is the traditional concept that imposes liability on the basis of "fault." See 2 HARPER & JAMES §§ 12.1-.4; SOVEREIGN IMMUNITY STUDY 271.

[28] For a discussion of the "risk" theory of tort liability, see note 6 *supra*. The conflict between the "fault" and "risk" concepts in the area of public tort liability is analyzed in David, *Public Tort Liability Administration: Basic Conflicts and Problems*, 9 LAW & CONTEMP. PROB. 335, 337 (1942). "Although fault is still the dominant rationale, various exceptions have developed and the tremendous growth of liability insurance as a risk-distributing mechanism has tended to influence the practical administration of tort liability . . . along lines characteristic not of the fault concept but of the risk concept. In effect, modern tort law appears to consist of an amalgam of both fault and risk theories, with steadily developing pressures in favor of extending the latter approach." SOVEREIGN IMMUNITY STUDY 272.

[29] For a comprehensive balancing of these policy factors in various selected fact situations, see SOVEREIGN IMMUNITY STUDY 271-83; Van Alstyne, *supra* note 13, at 470-532.

[30] The need to protect public funds is the classical justification for governmental immunity. See Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 575, 109 N.E.2d 636, 640 (1952).

[31] This factor is most significant where discretionary decisions of governmental officials are involved. See SOVEREIGN IMMUNITY STUDY 246-60.

[32] See Fuller & Casner, *supra* note 5, at 459-60.

[33] Van Alstyne, *supra* note 13, at 490.

[34] For a more comprehensive evaluation of public policy factors involved in determining governmental immunity and liability, see 2 HARPER & JAMES § 29.3, at 1611-12 and authorities cited note 29 *supra*.

[35] As Professor Van Alstyne observes, "a comprehensive statutory solution is badly needed to give direction and bring some degree of consistency and uniformity to the applicable statutory and common law principles." Van Alstyne, *supra* note 13, at 465. This is a task that no court of last resort could successfully carry out. See Rice v. Clark Co., 382 P.2d 605, 612-13 (Nev. 1963) (dissenting opinion); Stanton, *Sovereign Immunity*, 38 CAL. S.B.J. 177 (1963).

abrogate governmental immunity completely, and by asking the legislature to provide a comprehensive definition of the limits to governmental liability after a thorough study of the situation. Furthermore, the court can facilitate an easier transition by providing an interim solution that will establish predictable areas of liability.

An Interim Solution

The court's interim solution should outline the extent to which the court intends to hold public entities responsible in tort in the absence of legislative pronouncements. It is suggested that the court express an intent generally to hold all governmental bodies liable in tort and then specify certain exceptions. Included in these exceptions should be harms generally considered non-tortious and outside judicial inquiry, such as those caused by judicial, legislative, quasi-judicial, and quasi-legislative acts.[36] For damage resulting from some discretionary acts and decisions neither governmental employees nor the public entities should be liable.[37] A general rule of discretionary immunity seems necessary to insure that official decision making will not be impeded by the fear of direct or indirect reprisals.[38] Moreover, where governmental employees are given immunity, as a general rule, the governmental employer should also be immune from liability.[39] A recent California decision[40] suggested

[36] See Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 220, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962); 3 DAVIS § 25.01 (Supp. 1963, at 79, 83).

[37] See 3 DAVIS § 25.13, at 489-91. This exception, however, should not be as broad as under the "discretionary-ministerial" distinction discussed in note 3 *supra*. For suggested limitations on this exception, see SOVEREIGN IMMUNITY STUDY 273; Van Alstyne, *supra* note 13, at 472-91.

[38] Even though in some cases the operation of the rule may result in harshness, it is better, as Justice Learned Hand has contended, "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." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 221, 359 P.2d 457, 462-63, 11 Cal. Rptr. 89, 94-95 (1961); SOVEREIGN IMMUNITY STUDY 251; Kennedy & Lynch, *supra* note 5, at 180-81; Van Alstyne, *supra* note 13, at 478.

[39] California has codified such a provision in recent legislation. CAL. GOV'T CODE § 815.2 (b) (Supp. 1963); see CAL. LAW REVISION COMM'N, *supra* note 8, at 815. *But see* 3 DAVIS § 25.17 (Supp. 1963, at 92-95). When the governmental employee is immune, a strong factor in favor of extending immunity to his governmental employer is that if the governmental agency were held liable the employee may fear indirect reprisals from his employer. This fear of indirect reprisal would defeat the purposes for which governmental employee immunity is given.

[40] Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 229-30, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961) (dictum).

the possibility that in certain instances a governmental agency might justifiably be held liable even though its employee was immune, but the legislature acted to provide that in such a situation public entities would not be liable in the absence of statutory enactment.[41] Obviously, since legislative intent supercedes judicial fiat in this area, courts should enforce governmental immunity where pre-existing statutory limitations on governmental liability have been established.[42] Finally, the court should reassure public entities that each case is to be viewed in relation to the public policy factors involved in each individual situation.

Of course, this judicial expression will be dictum and not binding on the court. Thus a change in personnel or shift in a justice's thinking may lead to a deviation from the standards specified. Even so, the interim solution should help to remove a dark cloud of unpredictability and provide public entities the guidelines with which to plan fiscal policies until the state legislature has had a chance to render a comprehensive statutory plan. Moreover, the legislature will not be forced to make a hasty decision but will be able to give the problem the sufficient study that it requires.

Fiscal Considerations

The preceding discussion has dealt with the courts' role in determining areas of substantive governmental liability. Before any final conclusions can be drawn, however, the fiscal results which might flow from the abrogation of tort immunity should be considered, along with any possible legal devices which the court might use to soften the effect of its decision.

Uniqueness of Public Funds

Public funds allocated to a governmental agency are based on anticipated expenditures and are limited to the revenue which the

[41] Cal. Gov't Code § 815.2(b) (Supp. 1963); see Cal. Law Revision Comm'n, *supra* note 8, at 815-16, 838. The California legislature has been advised to provide that a public entity may be held liable for malicious prosecution or the discretionary act of an employee in selecting or failing to discipline a subordinate even though the responsible employee is immune. See Cal. Law Revision Comm'n, *supra* note 8, at 838, 841. Thus the California legislature, under the guidance of the Law Revision Commission, will determine where further liability of public entities will extend when the responsible employee is immune. Such a situation lends certainty where the *Lipman* decision left uncertainty. However, Professor Davis has criticized this approach; he feels a "closed end" type statute freezes the law in areas where courts can make a worthwhile contribution. 3 Davis § 25.17 (Supp. 1963, at 95-97).

[42] See Comment, *Sovereign Immunity in Colorado, and the Feasibility of Judicial Abrogation*, 35 U. Colo. L. Rev. 529, 552 (1963).

public entity raises from taxes and assessments or receives under appropriations from a larger public entity. The proponents of continued governmental immunity point to the disastrous effects which liability might have on these limited funds.[43] However, Judge David, among others, has shown that this fear is not entirely warranted and can be avoided through commercial insurance and other loss spreading techniques.[44] Even the burden on small municipalities, where the danger of a large verdict is said to invite bankruptcy, has been shown to be exaggerated.[45]

Although the fear of catastrophic liabilities has been overemphasized, the unique character of public funds should be considered by a court in drafting its decision. In preparing their fiscal policies, governmental agencies may have relied on tort immunity. Therefore, courts should allow the public entities time in which to re-evaluate their fiscal policies and prepare to meet their new responsibilities through insurance or additional revenue appropriations.

Prospective Abolition

One of the most useful devices available to delay the impact of judicial abrogation of tort immunity is prospective abolition. Prospective abolition of outmoded rules of law has been approved by a number of authorities,[46] including the Supreme Court in *Great No. Ry. v. Sunburst Oil & Ref. Co.*[47] The so-called *Sunburst* doctrine has been rejuvenated with the trend toward overruling charitable and governmental tort immunity.[48] Governmental immunity is peculiarly adaptable to the device of prospective abolition. Through this device, the outmoded law can be reformed without denying to public entities the necessary time to provide insurance or other

[43] See SOVEREIGN IMMUNITY STUDY 288; Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW & CONTEMP. PROB. 363 (1942).

[44] See David, *supra* note 4, at 8-14. *But see* Kennedy & Lynch, *supra* note 5, at 169-72. Insurance, official bonds, installment payment of judgments, bond issues, and statutory limits on tort recovery against public entities are a few of the suggested alternatives to warrant against a detrimental effect on public funds. See SOVEREIGN IMMUNITY STUDY 288-306; David, *supra* note 4, at 8-14, 45-53, 53-54; Fuller & Casner, *supra* note 5, at 450, 460. *But see* Kennedy & Lynch, *supra* note 5, at 178.

[45] Warp, *supra* note 43.

[46] See generally Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); Note, *Prospectively Overruling the Common Law*, 14 SYRACUSE L. REV. 53, 58 (1962); 16 ARK. L. REV. 289-92 (1962).

[47] 287 U.S. 358 (1932).

[48] See Note, *Prospectively Overruling the Common Law*, 14 SYRACUSE L. REV. 53, 58 (1962).

revenue protection. Moreover, public funds are protected from a possible flood of judgments based on claims not yet barred by the statute of limitations. Finally, the arguable injustice of a retrospective decree, which in effect would penalize public entities for their reliance on the court's previous statements of the law, is avoided.[49]

Delaying the effective date of the decision is another useful device, closely related to prospective abolition, which not only provides a period of adjustment for governmental agencies, but also encourages the legislature to act. If the state legislature is in or near session, the court may invite legislative reaction by delaying the effective date of the decision until after the adjournment of session, thus subjecting its holding to any action the legislature should take with regard to governmental immunity. This procedure was used in *Spanel v. Mounds View School Dist.*[50] to effectively stimulate the Minnesota legislature into redrawing the limits of governmental liability.[51] Thus, as to the limits of the court's abrogation, the Minnesota court avoided the period of chaos and uncertainty that has existed in other states between judicial abrogation and legislative reaction.[52]

By the selective use of prospective abolition it will be possible to make an orderly transition from governmental immunity to governmental liability and pave the way for constructive legislative action. However, when prospective abolition is used, an exception should be made for the plaintiff in the case at bar.[53] By holding the

[49] See Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28-29, 163 N.E.2d 89, 97-98 (1959); Comment, 6 ARIZ. L. REV. 102, 105 (1964).

[50] 264 Minn. 279, 281, 292-93, 118 N.W.2d 795, 796, 803-4 (1962).

[51] See MINN. STAT. ANN. §§ 466.01-.17 (1963); *The Minnesota Supreme Court 1962-63*, 48 MINN L. REV. 119, 198-203 (1963).

[52] Compare Holytz v. City of Milwaukee, 115 N.W.2d 618, 626 (Wis. 1962), where the decision was made effective forty days in the future. The stated purpose of the court was to give municipalities time to make financial arrangements to meet the new liability implicit in their holding. *Ibid.*; see Note, *supra* note 48, at 60.

[53] See Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 26-27, 163 N.E.2d 89, 97-98 (1959); Holytz v. City of Milwaukee, 115 N.W.2d 618, 626 (Wis. 1962). Moreover, it seems equitable that the persons injured in the same cause of action as the plaintiff should likewise not be barred from recovery. As to these persons, the proximity of their causes of action to the plaintiff's, the possibility that they were merely awaiting the outcome of the plaintiff's "test" case before pressing their claims, and the limited number of possible claimants involved outweigh the policy factors concerned in prospective abolition. See Molitor v. Kaneland Community Unit Dist. No. 302, 24 Ill. 2d 467, 182 N.E.2d 145 (1962); Note, *Prospectively Overruling the Common Law*, 14 SYRACUSE L. REV. 53, 58-59 (1962).

defendant liable, the court's abolition of governmental immunity will be binding precedent and not mere dictum. Moreover, the plaintiff will receive the benefit from his time and money spent in urging the overruling of governmental immunity. Such a policy will give future plaintiffs incentive to appeal bad precedent.[54]

CONCLUSION

Judicial abolition of the governmental immunity doctrine is warranted in order to press legislative machinery into operation. In its abrogating opinion, the court should balance the public policy factors involved on a case-by-case basis and attempt to establish an interim solution as to the limits of governmental liability. The objectives of such a solution should be to provide a workable framework which will instill confidence within public entities and the legislature, thus facilitating a climate in which an orderly, comprehensive legislative solution can grow. Furthermore, it is the court's responsibility to reduce the impact of its decision on the fiscal resources of public entities. This can best be done by a selective use of the flexible and workable device of prospective abolition.

[54] See Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28, 163 N.E.2d 89, 97 (1959).