REPORT

RECESS STUDY COMMITTEE

TO

102nd MAINE LEGISLATURE

IMMUNITY FROM TORT LIABILITY
ACCORDED TO
NONPROFIT AND GOVERNMENTAL AGENCIES

1965

INTRODUCTION

This Committee was established for the purpose of "conducting a study on the subject of common law, legal immunities available as a defense in actions at law against certain nonprofit and governmental entities." Essentially the subject matter can be divided into two main categories: the immunity which is afforded to charitable organizations and the immunity, referred to as "governmental", which is available to the state and other public entities. Because of the difference in the nature and operation of these immunities, this report will deal with them separately.

The Committee, in studying this matter, has attempted to gain the views of those institutions which could be affected by a change in the status of the common law immunities. In furtherance of this objective a public hearing was held in Augusta on June 24, 1964. All groups and individuals known to be interested were contacted personally, and notice of the public hearing was placed in five Maine newspapers on two separate dates. The following is a list of the organizations and individuals who made an appearance at the hearing:

Appearances in favor of continuing charitable immunity:

United Community Services of Portland (eighty-one separate organizations), represented by Sumner T. Bernstein, Esq.

State Young Men's Christian Association, represented by Frank S. Carpenter and Gordon W. Drew.

Pine Tree Council, Boy Scouts of America, represented by Mr. Ben Pike.

American Legion, represented by Robert McFarland.

Maine Council of Churches, represented by Louis J. Marsteller.

Waterville Community Chest, represented by Bradford Wahl.

Waterville Boy's Club, represented by Robert C. Rowell.

Maine Hospital Association, Maine Osteopathic Hospitals, and Salvation Army, all represented by Loyall F. Sewall, Esq.

Mercy Hospital of Portland, represented by William B.Mahoney,Esq.

Colby College, Thayer Hospital, Thomas College, and Good Will Home, represented by Arthur W. Seepe.

Bowdoin College, represented by Glenn R. McIntire.

Castine Community Hospital, represented by Harrison E. Small.

Women's Legislative Council of Maine (thirty-one separate organizations). Mrs. Norman E. Ross.

Central Maine General Hospital of Lewiston, represented by Dana S. Thompson.

Kennebec Valley Community Chest, represented by Harry C. Simons,Jr.

Bates College, represented by Norman E. Ross.

Appearances in favor of abolishing charitable immunity:

Legislative Committee, Maine Trial Lawyers Association, represented by Herbert H. Bennett, Esq. and Peter N. Kyros, Esq.

Orville Ranger, Esq., of Brunswick.

Appearance in favor of continuing governmental immunity with modification:

Maine Municipal Association, represented by Hon. Frank G. Chapman.

Appearance in favor of abolishing governmental immunity:

Legislative Committee, Maine Trial Lawyers Association, represented by Herbert H. Bennett, Esq.

In addition to the public hearing, the subject of immunities has been discussed recently in various other forums. The Maine Trial Lawyers' Association dealt with the subject at a conference held in Portland,Maine, in May, 1964. The Maine State Bar Association at its annual meeting in August, 1964, was addressed on the topic of charitable immunity by Mr. Jacob Fuchsberg, President of the National Association of Claimants' Council of America. A student article dealing with the immunity of the state appeared in the 1964 issue of the Maine Law Review. Such activities have been helpful in supplementing the study performed by this Committee.

I. CHARITABLE IMMUNITY

History

The judicial doctrine of charitable immunity provides that a charity cannot be held liable in money damages for the torts or civil wrongs of its agents. For example, if a person is wrongfully injured by an employee of a charitable hospital, there can be no recovery against the hospital. However, the individual causing the injury may be liable in his personal capacity, since the immunity affects only the vicarious liability of the organization concerned.

The doctrine is a creature of the courts and finds its roots in rather questionable decisions rendered by the English courts during the nineteenth century. The argument is often advanced that those early cases did not deal directly with the problem of charitable liability, and furthermore, that they were repudiated prior to the time when the doctrine was first adopted in the United States in the case of McDonald v. Massachusetts General Hospital, 21 Am. Rep. 529 (Mass. 1876). This is undoubtedly correct, and such an uncertain history provides the opponents of charitable immunity ample material with which to attack its validity. Conceptually, the lack of an authoritative foundation in the common law does create problems, but an argument based solely on this factor is somewhat sophistical and ignores the rationale advanced by the American courts upon the adoption of the doctrine. If charitable immunity has merit, the circumstances of its birth are of little importance.

At the present time, the trend in the United States is undoubtedly toward full liability for charities. The jurisdictions which have dealt with the doctrine can be generally classified into three groups; (1) complete liability, (2) complete immunity, and (3) qualified immunity. Those

jurisdictions which deny immunity and hold charities answerable for the torts of their agents are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, Utah, Vermont, and Washington. For the most part those jurisdictions adhered to immunity at one time, but later court decisions abrogated the doctrine. In very few cases did abrogation result from legislative action.

Jurisdictions which afford charities complete immunity are Arkansas, Maine, Maryland, Massachusetts, Missouri, Oregon, Pennsylvania, and South Carolina. Several other jurisdictions have qualified the immunity so that liability may turn upon (1) the status of the injured party (i.e.,stranger or beneficiary), or (2) negligence of the charity in selecting the employee who caused the injury, or (3) the availability of non-trust assets with which to satisfy a judgment. The qualified immunity jurisdictions are Connecticut, Georgia, Illinois, Indiana, Louisiana, Nebraska, Nevada, North Carolina, Tennessee, Texas, Virginia, West Virginia, Wyoming, and Wisconsin.

Five major theories have been advanced in support of the immunity. The first theory is usually referred to as the "trust fund theory".

> /The/ funds of a charity are held in trust, the diversion of which the courts will not permit because (1) it might result in destroying, or substantially impairing the usefulness of, charitable institutions, (2) the donor's intent would be thus thwarted, (3) it is beyond the power of the trustees to divert trust funds directly, and therefore they cannot do so indirectly, or (4) the funds, being set apart for a particular purpose, cannot be taken upon execution. (Annot., 25 A.L.R.2d 29, 60 (1952).)

Other courts have adopted the view that since charities do not derive any profit from the service of their employees the doctrine of respondeat superior is not applicable. Another rationale is that the functions of a

charity are intimately connected with the functions of government, and therefore, the immunity afforded is but an extension of governmental immunity. When the claimant is a beneficiary of the charity the argument has been advanced that the beneficiary, by accepting the gratuitous offering of the charity, waives any right to maintain suit against that charity. The final theory is, in essence, a part of all the others since it rests immunity on the grounds that "public policy" demands that charities be immune. All theories are explained and documented in detail in an annotation appearing in 25 A.L.R.2d 29 (1952).

The task before this Committee is to determine whether the doctrine of charitable immunity, as it exists in Maine, is in accord with public policy and the best interests of the state, or whether it is anachronistic and in need of change.

The Scope and Application of Charitable Immunity in Maine.

The first Maine case dealing with charitable immunity is Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408 (1910). The plaintiff charged that the hospital's servants were negligent in allowing plaintiff's decedent to evade the attendants and fall through a window. In denying recovery, the court states at page 410:

> No principle of law seems to be better established both upon reason and authority than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness.

The court emphasizes the fact that contributions, upon which charities depend, would be affected adversely by allowing the institution to be held liable with the result that the effectiveness of such institutions would be impaired. Implicit within this argument is the "trust fund theory" and

also the notion that the public is best served by permitting charities to perform their special function unfettered by tort claims.

Beyond the rationale of the doctrine, it is also important to determine the scope of the immunity. What types of institutions are afforded the exemption? Is the Maine court likely to expand the class of institutions which are encompassed within the doctrine?

In Jensen the court defined "charitable institution" by relying on an earlier Maine case, Webber Hospital Association v. McKenzie, 104 Me. 320 (1908), where, at page 329, the following definition is set forth:

> It comes within the letter and the spirit of a charitable corporation whose distinctive feature is that it has no capital stock and no provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of the institution. (Emphasis Added)

In 1963 the Maine court was presented with an opportunity to review the concept of charitable immunity in the light of present conditions. In Mendall v. Pleasant Mountain Ski Development, Inc., 159 Me. 285 (1963), suit had been brought seeking damages for injury allegedly caused by agents of the State Principals' Association. The association contended that it was not liable because it was a charitable institution. The agreed statement of facts established that the greater portion of the association's revenue was gained by conducting basketball tournaments at which an admission price was charged. The association was organized for the purpose of developing and furthering education in the public secondary schools of Maine and the expenditure of its funds was devoted to this objective. Despite the non-profit nature of the association the court held that it was not a charitable institution entitled to immunity from suit. In accordance with the qualifications which had been established in Jensen, the decision turned upon the source of the association's revenue.

> Several theories have been advanced in support of the doctrine of charitable immunity. Our court saw fit in

> Jensen to rest its grant of immunity upon two grounds, (1) that funds donated for charitable purposes are held in trust to be used exclusively for those purposes, and (2) that to permit the invasion of these funds to satisfy tort claims would destroy the sources of charitable support upon which the enterprise depends. Neither theory would have application where the institution claiming immunity derives none of its support from charitable gifts or donations. . . .
>
> We see no reason, however, for broadening the class which may be entitled to the immunity. We hold that an organization which receives and administers virtually no charitable gifts or donations is not entitled to immunity from liability for its torts. (Mendall v. Pleasant Mountain Ski Development, Inc., 159 Me. 285, 290-91 (1963).)

From the Mendall decision it can be seen that the Maine court has confined the immunity to institutions which derive a portion of their revenue from public or private gifts. The doctrine is not all-encompassing and the Maine court is not likely to make it so. If a corporation or association does not depend upon public or private gifts it is not immune from suit, notwithstanding its benevolent purpose and objectives. The Maine court recognized the fact that charitable institutions perform an invaluable service to many people and held that immunity from suit was necessary in order to protect the funds of the charity and also to insure adequate contributions from public and private sources. The court has attempted to confine the scope of the doctrine so as to be in accord with the reason for its existence.

Arguments For and Against Immunity

Charitable immunity has long been the subject of much criticism, both in the courts and in legal periodicals. The arguments which have been asserted against the doctrine are meritorious and deserve careful consideration. The most complete and able enunciation of the argument against charitable immunity can be found in an opinion written by Judge Rutledge in President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942). The rationale of the "trust fund theory"

and charitable immunity in general were attacked upon the following grounds:

(1) Under the general principles of tort law, liability is the rule and immunity is an exception. Such exceptions must be founded on sound public policy.

(2) The arguments in favor of immunity are conflicting and completely outmoded.

(3) There is no evidence that liability has crippled charities in those states where full liability is the rule, nor is there any evidence that donations have decreased in those states.

(4) The availability of liability insurance permits charities to protect their funds from dissipation due to tort claims.

(5) Much of modern charity is big business and has a capacity for absorbing loss which did not exist when the doctrine of charitable immunity was first established.

(6) Modern public policy demands that every person injured must be fully compensated by those best able to pay.

The thrust of all the arguments opposing charitable immunity is that through the medium of liability insurance the injured party can receive full compensation with little, if any, financial damage to the charity. This argument assumes that sufficient coverage will be available at a reasonable cost within the means of each organization. Certain charities can insure and in fact a majority of those present at the hearing before this Committee indicated that they carry some form of liability insurance despite the fact that they are immune from suit. It is certain, however, that if the immunity were abolished, the premium rate for insurance would increase markedly. It is difficult to gain exact figures but premiums would of necessity reflect the new liability and the attendant increase in

litigation costs. Chief Justice Bell of the Supreme Court of Pennsylvania estimated that the cost of insuring a hospital would be from $10,000 to $20,000 a year, depending upon size and several other factors. Proceedings: Conference of Chief Justices 21 (1962). The abolition of immunity could also increase insurance costs by creating a litigious attitude in respect to charities. Chief Justice Bell alluded to this possibility:

> Furthermore, I am convinced that the extirpation of Charitable Immunity will greatly increase trespass litigation which is already swamping and clogging our courts, and that claims against charities and hospitals in particular will be limited only by the imagination and ingenuity of astute lawyers specializing in the field of tort. (Proceedings: Conference of Chief Justices. 22 (1962).)

In regard to the smaller charities in Maine, of which there are many, this increased operating expense could be prohibitive.

If immunity were abolished, it is also quite possible that the trustees, deacons or officers of unincorporated charities could be subjected to personal liability for the acts of the agents of charity. In a non-charitable organization a trustee can be held personally liable for injuries inflicted upon third persons by an employee or agent. 3 Scott on Trusts section 264, page 2053 (1956). If charitable immunity were abolished the same rule might be applied in determining the personal liability of trustees of unincorporated charities. It is suggested in Volume 4 of Scott on Trusts, at page 2915, that the reason for not holding trustees of charities personally liable is to prevent the diversion of trust funds to other than charitable purposes, since normally the trustee would be entitled to indemnify himself from the trust funds. In the absence of charitable immunity this rationale would have no application with the result that liability might extend to the trustee. Such a situation would certainly dissuade persons from accepting positions of responsibility in the charitable organization and would seriously hinder the efforts of the charity.

If charities are to be liable for the acts of their agents it is certain that no charity will be able to function and maintain a staff of volunteer officers and trustees unless it is fully insured. The necessity of maintaining adequate insurance could, in many instances, seriously impair the charity's ability to execute its program. Chief Justice Bell emphasized the fact that at the present time the protection of charitable immunity is still required.

> While it is possible, although I believe very improbable, that the abolition of charitable immunity may not seriously injure many of our large corporate charities, the doctrine of charitable immunity is still necessary in many small communities in order to help and protect the many small charities and small hospitals which render so much beneficial service to their particular community. Abolition of charitable immunity would cripple or destroy many of these small worthy and "pro bono publico" necessary charities. (Proceedings: Conference of Chief Justices, page 19 (1962).)

The arguments against charitable immunity are forceful and as a pure exercise in logic certain points are difficult to refute. However, it is also true that there still remains a practical necessity for protecting charities. The question is whether the public welfare will be best served by insuring that every tort claimant may assert his claim not only against the individual responsible but also against the charity for which that individual was acting; or whether it is more important that the charity be permitted to expend its funds in the service of mankind unmolested by tort claims.

Recommendation Regarding Charitable Immunity

In view of the foregoing material, a majority of this Committee is of the opinion that the immunity which is accorded to charitable institutions should not be abolished by legislative enactment at the present time. There is no evidence before this Committee which indicates that there is a substantial public demand for change, and of most importance is the fact

that there has been no actual proof of substantial inequities resulting to those allegedly suffering from neglect on the part of charitable institutions. The Committee feels that the abolition of charitable immunity could injuriously affect charities, particularly smaller community projects. The problem presented is precisely the same as the issue which faced the Supreme Judicial Court of Maine. Recognizing the valuable service which these institutions render, it is felt that such a consequence should not be risked in the absence of a clear and convincing demonstration of substantial hardship resulting from the operation of charitable immunity.

II. GOVERNMENTAL IMMUNITY

A. Immunity of the State

Governmental or sovereign immunity, although sometimes discussed in connection with charitable immunity, is quite dissimilar both in origin and operation. In general, the doctrine provides that a state cannot be held liable for the acts of its agents unless it consents to such liability. In Austin W. Jones Co. v. State, 122 Me. 214, 222 (1923), the Maine court offers the following explanation:

> /In/ the absence of express legislation conferring a right or remedy, suit cannot be maintained against a sovereign state to recover damages for the malfeasance, misfeasance, laches or unauthorized exercise of power by its officers and agents. . . in the absence of such legislation the doctrine of respondeat superior . . . does not prevail against the State in the necessary employment of public agents.

Although sovereign immunity is capable of being applied so as to shield a state from liability based upon contract, the practicalities of conducting business render such an application uncommon. Because of the consensual nature of a contract, such application is not so productive of controversy.

This report will therefore confine itself to the tort liability of the state and its subordinate entities.

The history and theory of sovereign immunity is exhaustively reviewed in a series of articles by Professor Edwin M. Borchard entitled "Governmental Responsibility in Tort" in 36 Yale Law Journal at pages 1, 757, 1039 (1926). In the United States sovereign immunity has been justified upon two principal theories. It is thought that the doctrine had its beginnings in the maxim, "The King can do no wrong", and out of the sixteenth-century metaphysical concept of the nature of the state, the King's personal prerogatives became the sovereign immunity of the state. That theory has been attacked on a historical basis and also on the ground that the conditions giving rise to it are not found in a democratic state. The second theory was enuciated by Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907):

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Both of those theories are fraught with philosophical difficulties. The notion that the state is superior to the law which it creates is not universally accepted, and Professor Borchard, in the articles referred to, pointed out the inconsistencies which this rationale presents. The philosophical arguments are not easily resolved, and for the purposes of this report, a reference to Professor Borchard's articles will suffice.

The personal immunity of the sovereign was first expanded to protect a subdivision of the English government in 1788. In Russell v. Men of Devon, 2 Durnf. & E. 667 (1788), an unincorporated county was sued in tort

for failing to keep a bridge in repair. Two reasons were advanced for not allowing the action: (1) there was no fund out of which a judgment could be paid, and (2) it is better that an individual should sustain an injury than that the public should suffer an inconvenience. This case is the foundation of the doctrine of sovereign immunity as it pertains to governmental entities.

Sovereign Immunity, like charitable immunity, exists primarily as a court-made doctrine. In a few states a constitutional provision prohibits the maintenance of a suit against the state, but in Maine, as in most states, the doctrine rests completely upon decisional law. It is difficult to find a case in any jurisdiction where the court expresses the reason for the adoption of the doctrine. It seems to have crept into American law, since even in the early decisions the courts assume that it is an established principle and refer to it as such. However, through the years courts and authors have offered some rationale other than the historical attributes of sovereignty. Arguments for the doctrine are summarized in Volume 2, Harper & James, Law of Torts at page 1611:

> (1) funds devoted to public purposes should not be diverted to compensate for private injuries; (2) the public service would be hindered, and the public safety endangered if the if the superior authority could be subjected to suit at the instance of every citizen, and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government; (3) that liability would involve the government in all its operations, in endless embarassments, and difficulties, and losses, which would be subversive of the public interests; and (4) that unlike private enterprise, the government derives no profit from its activities.

Some of these arguments appear to be without merit. However, no one has gone so far as to suggest that all activities of government should be subjected to liability. For example, the deliberations and enactments of the legislative branch of government should not be subject to review in accordance with tort law for several reasons. Constitutional limitations

afford adequate protection for the public welfare. Liability for an imprudent legislative act could open up the possibility of using tort litigation as a means of directing the course of legislation. The constitution delegates certain decision-making power to the legislature, and it would be extremely unwise to permit a judge or jury to second-guess that body on the question of the appropriateness of its actions. The necessity for a degree of immunity is well stated in California Law Revision Commission, Recommendation Relating to Sovereign Immunity 810 (1963):

> Government cannot merely be made liable as private persons are, for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.

At the other extreme is the situation where a state employee negligently runs down a pedestrian. If the employee has no personal funds sufficient to compensate the victim it does seem harsh that the injured person has no cause of action against the state as employer of the tortfeasor.

In these polar situations the answer to the question whether the state should be liable is obvious. With respect to those functions enumerated by the California Law Revision Commission, the public would be best served by permitting the state to act with immunity; in the situation involving the state-owned automobile it would seem that the risk of loss should fall upon the state rather than the individual. Between these extremes are a myriad of situations where it is exceedingly difficult to determine whether immunity or liability would best serve the public welfare.

In Maine the doctrine of sovereign immunity is difficult to trace since early cases contain little discussion. By 1911, however, the court was speaking of it as a well-settled principle. See Brooks Hardware Co. v. Greer, 111 Me. 78, 82 (1911). The court has not attempted to create any exceptions to the state's immunity, and at the present time it is quite accurate to say that the state and its various agencies are completely immune from tort suit. In 1961 the court was faced with the problem of determining whether a separate corporation organized by the state to perform a governmental function was likewise included within the protection of the immunity. In Nelson v. Maine Turnpike Authority, 157 Me. 174 (1961), the court held that the Turnpike Authority, as a separate corporate entity, was immune from suit since the state was the real party in interest in its activities. This decision, although in accord with a majority of jurisdictions, extends the immunity beyond what would normally be considered "state agencies."

There is a possibility that the Supreme Judicial Court of Maine might overrule its earlier decisions and abrogate the doctrine of sovereign immunity, for in at least six states the courts have followed this course. In the following cases the courts discarded the doctrine and subjected the public entity to full liability: Muskopf v. Corning Hospital District, 359 P.2d 457 (Cal. 1961); Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Molitor v. Kaneland Community Unit Dist., 163 N.E.2d 89 (Ill. 1959); Williams v. City of Detroit, 111 N.W.2d 1 (Mich. 1961); Bernardine v. City of New York, 62 N.E.2d 604 (N.Y. 1945); and Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962). Those courts proceeded generally on the theory that the historical rationale has no application in this country, the concept of a state being quite dissimilar, and that the doctrine must be discarded as mistaken and unjust. In Nelson v. Maine Turnpike Authority,

157 Me. 174, 186 (1961), the Maine court indicated its unwillingness to follow those decisions.

> The policy of immunity from liability for tort under the circumstances before us has been so long established and so long acted upon that only the clearest and most convincing reasons should compel a reversal by our court. It cannot be questioned that Legislatures and the people of the State from 1820 have acted or refrained from acting in reliance upon sovereign immunity. . . . The issue is not complex. Should sovereign immunity in tort, time tested in our State, be discarded or destroyed? This is a policy question which, in our opinion, is more properly directed to the Legislature than to the court.

From this language there does not appear to be any immediate threat of judicial abrogation, although the court has not entirely foreclosed this possibility.

The doctrine of sovereign immunity is entrenched within the law of Maine. It precludes liability on the part of the state and its agencies and extends also to separate state corporate entities carrying on a governmental function. The immunity is of great scope and the court has not shown any inclination to place limitations upon it.

Means of Obtaining Relief from the State

Perhaps it would be unjust if every person injured by an agent of the state was left uncompensated. In most cases the injured party would have a claim against the negligent agent since the immunity protects only the state and does not extend to the agent's personal liability. However, it has been suggested that this is an illusory remedy since the agent does not usually have sufficient funds to satisfy a judgment and in fact such agents are seldom sued. Therefore it would appear that the injured party would bear all the loss and the state would rest behind the shield of immunity. Despite the fact that the state is completely immune from suit it is probably true that most deserving claimants receive compensation for their injuries. The State of Maine does make reparation for damages wrongfully

caused by its agents, and the existence of the doctrine of sovereign immunity does not necessarily imply that all claimants are denied recovery. Through the means of legislative relief and the use of liability insurance, the alleged injustice caused by governmental immunity is mitigated.

Legislative relief is available in Maine through the passage of a Resolve or Bill. The relief available is of two types: the measure may award compensation in a specified amount or it may permit the claimant to bring suit against the state in a court proceeding. Proposed resolves authorizing compensation are referred to and passed upon by the Committee on Claims. During the 1963 legislative session there were sixteen resolves sounding in tort presented to that committee. The total amount of damages sought was approximately $25,000. Ten of the sixteen resolves were eventually passed by the Legislature and the total compensation awarded was $4,147. Resolves seeking the state's consent to suit are customarily referred to the Judiciary Committee for study and investigation. The resolve may provide for the claim to be presented in a regular court proceeding or be heard and decided by a special three-judge court sitting without a jury. Such resolves provide for appeal to the Supreme Judicial Court and specify in most cases a maximum limit of recovery. During the 1963 session five claims sounding in tort were presented to the Judiciary Committee of which three, granting the necessary consent to suit, were favorably considered. The maximum total recovery for the three suits was fixed at $32,500.

Using special bills as a means of granting relief to claimants is not a unique procedure. At least 14 other states have the practice of using either one or both of the methods outlined above to compensate claimants. See LeFlar & Kantorowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363 (1954). The federal government relied upon a similar special bill procedure until the passage of the Federal Tort Claims Act, and since then

has used special bills to compensate claims not within the terms of that act.

Many claims which might otherwise be presented to the Legislature are compensated through the use of liability insurance. In reviewing the resolves passed by the Legislature one is struck by the fact that few claims involve damage occasioned by state-owned vehicles. This fact is attributable to the existence of state liability insurance. Although the state is completely immune from suit, liability insurance has been procured in the interest of protecting those who are injured by the state. The Insurance Department of the State of Maine reports that all state motor vehicles are insured. The limits of coverage for bodily injury are $50,000 per person and $100,000 per accident. Coverage for property damage is $10,000 per accident. Certain agencies have more coverage; for example, the University of Maine carries automobile liability insurance in the amounts of $500,000, $1,000,000 and $50,000 for the above-mentioned categories of damage. Public liability insurance for risks other than those arising from the operation of motor vehicles is also procured by the state. Those agencies performing activities which might involve damage to private persons carry insurance to cover the particular risks involved.

The fact that the state carries insurance does not answer the question whether the individual claimant is receiving compensation from that source. The mere fact of insurance does not imply that the state is being held liable, for it would still be possible to defend any suit on the basis of sovereign immunity. However, there are two factors which preclude this possibility. The information supplied by the Insurance Department indicates that the coverage afforded by the insurance extends to the personal liability of the agent involved as well as the vicarious liability of the State of Maine. This guarantees the availability of funds, within the

limits of the policy, with which to satisfy a judgment gained against the individual agent. Second, under the terms of the policy the insurance carrier does not have the right to assert the defense of sovereign immunity in any action which it is required to defend. In a suit against the state for injury caused by an agent while driving a motor vehicle, the insurance carrier may not raise the defense of sovereign immunity. Since such a defense is affirmative in nature the court may proceed to try this case on the merits if it is not raised at the pleadings stage of the litigation. Thus through the use of liability insurance the state has recognized its responsibility and is providing compensation, as is evidenced by the fact that in recent years no automobile liability claim has been denied on the basis of sovereign immunity.

The state has indirectly waived immunity through the use of liability insurance as a substitute for governmental liability. In those areas not covered by insurance the state is providing compensation through resolves passed as a matter of legislative grace, the resolves being available to fill the interstices between the areas of insurance coverage. Due to these factors, the question posed is not whether the state should be held liable, for it has already assumed liability; but rather, the question is whether the scheme currently used is adequate and relatively efficient.

There can be no objection to the use of liability insurance other than the fact that some might desire coverage beyond that which is presently provided. In the areas covered, the state's immunity has completely disappeared, even though the result has been accomplished through indirect means. This system has the advantage of permitting the state to assume liability for those activities which have a great potential for causing damage, without opening the Pandora's box of ingenious theories of tort recovery, many of which might deleteriously affect the state.

Legislative relief presents more serious problems and has been subjected to wide criticism. The argument is frequently advanced that such a system is defective in that the infrequency of legislative sessions may compel a claimant to wait as long as two years to obtain relief. Furthermore, it is contended that the weighing of claims is a judicial function and one which the legislature is not equipped to handle. To these objections, the following answer has been offered:

> /The/ judicial process is sometimes even slower than the legislative . . . determing justice is not always a matter of legal training or technical judicial procedure . . . Certainly it is not clear that a legislative committee is less competent or more biased than a jury would be, especially a jury composed of friends and neighbors of the claimant. (Shumate, Tort Claims Against State Governments, 9 Law & Contemporary Problems 242, 251 (1942).)

Perhaps the most serious objection that has been levied against the special bill procedure is that it is time-consuming and financially inefficient. These considerations, among others, led the federal government to abandon the procedure and enact the Federal Tort Claims Act. Because of the volume of claims the federal experience proved that legislative relief was wasteful of Congressional time and the cost of administration nearly equalled the awards granted. See Gellhorn & Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U.L. Rev. 1325, 1329 (1954). The number of claims presented to the Maine Legislature is small, and their consideration does not seem to have become burdensome. The greater number of claims are handled through the insurance carrier, and legislative relief is only supplementary, being used in cases involving uninsured risks. As stated previously, only 16 claims were presented during the 1963 session of the Maine Legislature. At present one cannot conclude that the procedure is wasteful of legislative time.

Recommendation Regarding the Immunity of the State

Governmental immunity, if strictly applied, could preclude any possibility of recovery from the state. In the abstract, the state is not liable for tortious activity even if liability would have no substantial effect upon the functioning of the government. If this were the actual effect of the doctrine, there would be a necessity for limiting the extent to which the state could act with immunity. However, such is not the case. The state has assumed liability, and victims of state negligence are receiving compensation for their injuries. Much of the theoretical claim of injustice is not supported in fact.

The doctrine still retains a degree of validity and a majority of the members of the Committee are in agreement that there is no necessity for a statutory waiver or limitation of the tort immunity of the state. The doctrine does have a propensity for causing hardship but this is adequately alleviated through the procurement of liability insurance and through the passage of resolves granting compensation and consent to suit. These procedures permit the legislature to supervise the liability of the state more closely than would be possible under a statute of general application. For these reasons the Committee recommends that no change be made in regard to the immunity which is afforded to the state.

B. Municipal Immunity

While the state government is immune from suit regardless of the nature of the activity causing the injury, a municipality is immune only with respect to certain activities. The delineation between areas of municipal liability and immunity has given rise to one of the most confusing areas of the common law of Maine. The Supreme Judicial Court of Maine has rendered over forty decisions on the issue of a municipality's liability for

the torts of its agents. Even a cursory reading of these cases will reveal inconsistencies and contradictions. They are not the fault of the court, but, rather are caused by the extreme difficulty of classifying those activities which should give rise to municipal liability.

There are three separate and distinct concepts involved in the process of delineating the areas of municipal immunity and liability. First, a distinction is drawn between the governmental nature of a municipality and its proprietary nature. Second, where the activity is governmental, the question arises whether the specific acts are "judicial" in nature, or merely "ministerial". Third, where the activity is proprietary, the question may be considered whether the specific acts are within the municipality's corporate powers or ultra vires? There are many variations and nuances which will be discussed later, but these are the basic considerations which determine municipal liability.

Limited immunity stems from the peculiar status which the law has ascribed to a municipal corporation. In one sense it is but an arm of the government exercising the powers which have been delegated by the state, but in certain instances it performs activities similar to those of a private corporation. In 1877 the Maine court referred to the dual nature of municipal corporations in the case of Woodcock v. City of Calais, 66 Me. 234, 235:

> The two phases of character presented by municipal corporations, and the peculiar liabilities which attach to each, are fully recognized and established in this state as in several others. . . ./These cases/ maintain the general doctrine that municipal corporations, so far as their public character is concerned, being agencies of the government, are not liable to a private action for the unauthorized or wrongful acts of their officers, even while acting in the line of their official duties, unless made so by statute . . . that their powers and duties are prescribed and imposed by general statute alike on all such officers, and not by the cities and towns which choose them; that their official tenure, and the manner of performing their official

> duties do not depend upon the will of their immediate constituencies; and that in a word they are strictly public officers, and when in the discharge of their public duties, they in no legal sense sustain to their corporation the relation of servant or agent.

In Tuell v. Inhabitants of Marion, 110 Me. 460, 461 (1913) the general rule of municipal liability is set forth:

> /M/unicipal corporations are not liable to a private action for their neglect to perform, or their negligent performance of corporate duties imposed by statute; but if the acts complained of are not authorized by statute and are done by authority of the municipal corporation, or are afterwards ratified by the corporation, they are liable, as an individual would be, for the same wrongful acts.

Thus no liability exists for injury resulting from an activity which is imposed by virtue of the general statutes. When officials are engaged in such activities they are public officials or agents of the state rather than agents of the city, and as such they receive the benefit of the state's immunity. This, in very general terms, is the distinction between governmental and proprietary functions.

Non-liability for governmental functions is not absolute, for a further doctrine provides that the public official may become the agent of the city with resulting liability if the city chooses to direct the activities of the official. In Woodcock v. City of Calais, 66 Me. 234, 236 (1877), after recognizing that the official had performed his statutory duty, the court premised liability upon the fact that the city had "directed" his activity:

> For while he was a public officer, and had lawful authority to act in the premises without any directions from the city, still the city . . . chose by positive, formal vote to direct the commissioner. Whether he was obliged to follow the direction or not, is immaterial. He did act; and in his action he became quoad hoc the city's agent; and we are of the opinion that the superior must respond.

The municipality may therefore be liable for the performance of a governmental function if it directs the official to perform his statutory duty.

The doctrine of municipal liability for directed torts was recently reaffirmed in Michaud v. City of Bangor, 159 Me. 491 (1963), wherein the city was held liable for the wrongful destruction of plaintiff's property.

A further exception to municipal immunity for governmental functions has been created in those instances where the activity included an element of profit. In Anderson v. City of Portland, 130 Me. 214, 217 (1931), it was held that "when public use descends to private profit, even incidentally, liability attaches". This case involved a city hospital used primarily for wards of the city. Liability seems to have been based on the fact that plaintiff was admitted as a paying patient. See also Wilde v. Town of Madison, 145 Me. 83, 91 (1950).

Although the law is not entirely clear, certain decisions indicate that even though the general activity may be governmental, if the specific activity causing the damage is ministerial rather than judicial, the municipality may be liable. The clearest statement of this principle can be found in Darling v. City of Bangor, 68 Me. 108, 109 (1878):

> Municipal corporations are endowed with certain judicial or quasi judicial powers, to be exercised, not for their own private convenience or profit, but as a part of their public duty, for the furtherance of those things necessary or convenient to the community at large. The performance of these duties, involving as they do the exercise of judgment as to the time and manner of accomplishment, as a general rule impose no liability to an action for private injury resulting from acts within their jurisdiction. When these acts cease to be judicial and become ministerial only, then for negligence or omission, an action may be maintained by a person suffering injury thereby.

In that case it was held that the determination pertaining to the location of a street drain was a judicial decision and therefore no liability attached. "Judicial" as used in this context, refers to acts involving discretion and judgment as distinguished from acts of a menial nature. It is apparent that this distinction does not readily lend itself to definition. See also Stone v. City of Augusta, 46 Me. 127 (1858).

In some cases the court has refused to hold a city liable because the acts complained of were ultra vires, or beyond the bounds of corporate authority. In Seele v. Inhabitants of Deering, 79 Me. 343, 347 (1887), the court states:

> If the particular act relied on as the cause of action be wholly outside of the general powers conferred on towns, they can in no event be liable therefore whether the performance of the act was expressly directed by a majority vote or was subsequently ratified.

The court then held that digging a ditch across private land was ultra vires and the town could not be held liable. Similarly in Cumberland & Oxford Canal Co. v. City of Portland, 62 Me. 504 (1871), it was held that the city's act in filling plaintiff's canal with earth was beyond the authority of the city and, even if performed pursuant to a vote of the city government, could not give rise to liability.

With such a variety of factors involved, it is not surprising to find that results do not seem to be in accord with any one basic postulate. The immunity which is afforded does not have any established and definitive purpose but rather results from the clash of several doctrines. An example of the inconsistencies may be found in the recent case of Michaud v. City of Bangor, 159 Me. 491 (1963). The city council issued an order condemning plaintiff's building and requiring that it be demolished. The order was executed by the city building inspector and fire department. On the ground that plaintiff did not receive adequate notice of the proceedings, it was held that the condemnation was wrongful. The court held the city liable for the agents' action in burning the building on the theory that the agents were acting on behalf of the city rather than in their public capacity, since the city government had specifically authorized their acts. Thus the application of the "director tort theory", rendered the city liable even though the activity was governmental rather than

proprietary in nature. It has been suggested that under the existing law, although the city was liable for the wrongful destruction of the building, "if the fire chief had negligently driven his automobile into another automobile while on his way to burn the plaintiff's building, the city would not have been liable to the motorist in tort". (Abbott, Berman & Webber, The Supreme Judicial Court of Maine, 1963 Term, 16 Maine L. Rev. 45, 74 (1964).) If this is an accurate prediction of results, it is an anomalous situation.

The Michaud opinion undoubtedly is correct in the result it reaches, but it does not clarify the law relating to municipal immunity. The difficulty with the Maine decisions does not arise from any error in applying principles, but the principles are so unmanageable in the abstract that it is impossible to predict which activities will lead to liability. To take any one of the various activities of a municipal corporation and determine whether it is governmental or proprietary, ministerial or judicial, directed, or ultra vires, is an impossible task. In the absence of a prior decision, the limits of municipal immunity or liability in a given case, remain a matter of conjecture. The ambiguity which surrounds municipal liability creates a serious problem in municipal finance. Municipalities find it difficult to budget in advance for claims which may be brought against them, and the uncertainty which exists necessarily influences the availability and cost of municipal liability insurance. The representative of the Maine Municipal Association stated that the present law is not satisfactory in that it places the municipal government in the perilous position of not knowing to what extent it may be held liable. These considerations indicate that there is a need for codifying the law of municipal liability. To require the Maine courts to continue this hairsplitting process is both unwise and unnecessary.

Recommendation Relating to the Liability of Municipal Corporations.

A majority of the Committee is of the opinion that municipal liability for the tortious acts of agents and servants should be defined by statute instead of continuing the reliance upon court decisions. It is not proposed that immunity be completely abolished, but rather it is felt that the distinction between areas of immunity and liability can best be accomplished through the use of a statutory scheme. A more precise delineation should be of benefit not only to municipal corporations but also to those who are injured by municipal agents.

It was suggested to this Committee that the immunity which is afforded to a municipal corporation should be abolished and the municipality be held liable to the same extent as if it were a private person or corporation. The necessity for a degree of immunity has previously been dealt with in reference to the state, and many of the considerations mentioned are applicable as well to a municipality. In certain aspects a municipal government must be immune from suit. That which would substantially interfere with the effective functioning of government is not in the public interest. Certain decision-making functions such as the planning of streets and other public conveniences, should not be laid bare to the scrutiny of a judge or jury. For these reasons complete abolition would be unwise.

The statutory enactment to be considered presents two problems. First, it must be determined to what extent the municipalities shall be subjected to liability, and second, what type of statute will best define the desired area of liability. The first question involves a careful review of municipal activity and finance. The issue is,- To what extent may a municipality be held liable in tort without hindering it in the performance of necessary functions pro bono publico? Such a study is beyond the

means of this Committee and no attempt will be made to proceed by hypothesis. It is suggested, however, that the substantive content of the proposed statute be arrived at through an assessment of the present liability of municipal corporations under decisional law, the existing statutory liability (Maine Revised Statutes 1964, Title 23, Sections 365, et seq.), and the liability which may be safely assumed without interfering with the lawful deliberations of a municipality's executive and regulatory bodies.

The second problem is a matter of determining what type of statute will be most effective in defining and limiting the area of liability to which municipalities are to be subjected. Here the experience of other states and the federal government is helpful. Although there are many variations among the statutes pertaining to a limitation of immunity there appear to be two general drafting schemes in general use. One may be denominated as the "exception-to-liability" approach and the other "exception-to-immunity" approach. In general the first approach provides that the governmental entity shall be liable except in those instances where liability is expressly precluded by statute. The second provides that the governmental entity shall be liable only in those instances where specific enactments create liability. The "exception-to-liability" approach is typified by the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1958).

> /The 7 district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omissions of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

This general waiver of immunity is followed by several exceptions set forth in 28 U.S.C. § 2680 (1958), the most important being the exception for discretionary functions. The waiver does not apply to any claim "based

upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." It is interesting to note that the courts are still struggling with definitions even under this statute. In determining whether an act is discretionary the Superme Court of the United States has distinguished between negligence on a planning level and negligence on an operational level. See Dalehite v. United States, 346 U.S. 15 (1953).

The "exception-to-immunity" approach, sometimes referred to as closed-end liability, was recently adopted by the State of California. The California Law Revision Commission in recommending this approach to the legislature reviewed the disadvantages of the first approach and the corresponding advantage which closed-end liability offers.

> 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 give rise to costly litigation and a possible damage judgment. Such a statute would invite actions brought in hopes of imposing liability on theories not yet tested in the courts and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of insurance under such a statute would no doubt be greater than under a statute which provided for immunity except to the extent provided by enactment, since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under a statute imposing liability with specified exceptions.
>
> Accordingly, the legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by enactment. This will provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability. (California Law Revision Commission, Recommendation Relating to Sovereign Immunity 811 (1963).)

It would seem that closed-end liability is preferable if certainty is the desired objective. Such a statute does require care in drafting

since it is necessary to enumerate specifically those areas where the municipality is to be liable. However, the alternative approach would permit the exact scope of municipal liability to remain undefined, much as it is under the current decisional law. The California approach should add a greater degree of certainty and facilitate fiscal planning by municipalities with respect to tort claims. It is also advantageous in that provisions increasing municipal liability may readily be added and particular provisions may be repealed if necessary.

The mechanics of closed-end liability is demonstrated in California Government Code sections 814 et seq. The key provision is section 815 which reads:

> Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

This provision forecloses all possibility of suit on grounds other than a statute providing for liability. The exceptions to the general rule of immunity are then enumerated. Many of the provisions in the California Code have been drafted with reference to decisional law peculiar to that jurisdiction, and the exact scope of liability is not apparent from the Code alone. However, section 17001 of the Vehicle Code is illustrative of the exceptions which are created.

> Any public agency owning any motor vehicle is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of the motor vehicle by an officer, agent, or employee when acting within the scope of his office, agency, or employment. The injured person may sue the public agency in any court of competent jurisdiction in this state in the manner directed by law.

Other representative examples can be found in sections 835 and 855 of the Government Code dealing with dangerous conditions of public property and public health services.

It is proposed by this Committee that a statute following the closed-end-liability approach, typified by the California legislation, be enacted to define and establish those acts for which a municipality may be held liable.

One further governmental entity which should be included within the proposed statute is the county. No case in Maine decides whether a county has complete immunity similar to that of the state, or limited immunity such as that afforded to municipal corporations. Since a county has virtually no authority beyond that conferred by statute one might hazard a guess that such an entity is completely immune. A majority of courts deciding this point have so held, making no distinction between governmental and proprietary acts. See Heigel v. Wichita County, 19 S.W. 562 (Texas 1892). To the extent that a county in Maine does exercise non-statutory or proprietary authority, the imposition of liability should be considered, and, if approved, included within the proposed statute regarding municipal liability. Because of the limited function of a county government it is doubtful that such a statute would involve any threat to county finance. However, it would establish a provision for relief in the event of injury to an individual.

CONCLUSION

This report does not represent the unanimous opinion of the members of the Committee. Certain members concluded that both charitable and governmental immunity should be abolished, while others felt that no change should be made in either case. The recommendations herein made, namely, (1) that no change be made in regard to the immunity which is afforded to charitable institutions, (2) that no change be made in regard to the immunity which is afforded to the state, and (3) that municipal immunity be

modified by statute, do represent the view of a majority of the members of the Committee signing below.

Credit is due Daniel E. Wathen of the Senior Class, University of Maine Law School, who rendered superior service as Secretary to the Committee.

Joseph B. Campbell, Chairman

Alan C. Pease

Leon V. Walker, Jr.
for the Attorney General

Charlotte H. White

December 15, 1964