JUDICIAL ABROGATION OF SOVEREIGN IMMUNITY IN NEW JERSEY: A PRELUDE TO LEGISLATIVE REFORM?

The New Jersey Supreme Court in the two landmark decisions *P,T&L Construction Co. v. Commissioner, Department of Transportation*[1] and *Willis v. Department of Conservation and Economic Development*[2] took the initiative away from the state legislature and abolished, at least in part, the doctrine of sovereign immunity in New Jersey. Utilizing the trend of immunity law in this state and the effect of similar holdings in other states, this comment will both delineate the present status of New Jersey law in this area and offer predictions as to its future course.

THE HOLDINGS OF *P,T&L* AND *Willis*

P,T&L involved a suit against the state on a written contract for public construction, the claim being for $110,360.64 withheld by the state as damages for alleged delay in job completion. After the trial court sustained the state's defense of immunity,[3] the New Jersey Supreme Court certified plaintiff's appeal before the appellate division heard argument.[4] In a brief decision, the court held that "the judiciary should entertain actions against the State on contracts it makes,"[5] thus judicially abrogating immunity of the state in contract cases. *Strobel Steel Construction Co. v. State Highway Commission*,[6] upholding sovereign immunity in a similar factual situation, was expressly overruled.[7]

Pointing out that only the legislature can appropriate funds for settling monetary judgments, the court decided that the critical question was

> whether the judiciary should declare the dollar obligation of the State even though payment will depend upon whether the Legislature will abide by the court's judgment and pay it.[8]

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1 55 N.J. 341, 262 A.2d 195 (1970).

2 55 N.J. 534, 264 A.2d 34 (1970).

3 55 N.J. at 342, 262 A.2d at 196.

4 *Id.*

5 Willis v. Dept. of Cons. and Ec. Dev., 55 N.J. 534, 536, 264 A.2d 34, 35 (Chief Justice Weintraub alluding to the opinion he authored in *P,T&L*).

6 120 N.J.L. 298, 198 A. 774 (Ct. Err. & App. 1938).

7 55 N.J. at 343, 262 A.2d at 196.

8 55 N.J. at 344, 262 A.2d at 197.

Citing several decisions[9] reflecting a past willingness of the court to entertain actions against the state, Chief Justice Weintraub concluded that the courts should "decide what was just as between the State and a civil litigant."[10]

Since none of the cited cases declared that state funds were owed to the plaintiff purely upon common law grounds,[11] the court's resolution of the critical question was a more radical departure from existing New Jersey law than a cursory reading of the opinion would reveal. The court's election to declare an obligation that, absent a legislative appropriation, would be unenforceable was justified on three grounds: 1) "The immunity concept is judge-made," thus implying that it can be "judge-unmade"; 2) legislative inaction should not prompt the judiciary to "withhold its hand on a mere assumption that its coordinate branches would want it that way"; and 3) other jurisdictions have arrived at the same conclusion.[12]

Less than two months after the *P,T&L* decision, the court, again through Chief Justice Weintraub, made its second major immunity pronouncement in *Willis v. Department of Conservation and Economic Development*.[13] The action was brought to recover damages for injuries to Tomi Willis, an infant who suffered a traumatic amputation of her arm while feeding a caged bear at High Point Park, a recreational facility of the state. On motion the trial court entered judgment for the defendant based upon the plea of sovereign immunity,[14] but the appellate division reversed, one judge dissenting.[15] The reversal was based on a statute[16] which gave the High Point Park

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9 O'Neill v. State Hwy. Dept., 50 N.J. 307, 235 A.2d 1 (1967); East Orange v. Palmer, 47 N.J. 307, 220 A.2d 679 (1966); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966); Haycock v. Jannarone, 99 N.J.L. 183, 122 A. 805 (Ct. Err. & App. 1923); Amantia v. Cantwell, 89 N.J. Super. 7, 213 A.2d 251 (App. Div. 1965).

10 55 N.J. at 345, 262 A.2d at 198.

11 One of the cases involved a constitutional right to payment based upon the state's power to take land under eminent domain providing just compensation is paid therefor. Haycock v. Jannarone, 99 N.J.L. 183, 122 A. 805 (Ct. Err. & App. 1923). Another dealt with a statutory provision that required payment to a party in plaintiff's situation. Amantia v. Cantwell, 89 N.J. Super. 7, 213 A.2d 251 (App. Div. 1965). Two others were based upon a claim for a declaration of rights rather than a monetary judgment. O'Neill v. State Hwy. Dept., 50 N.J. 307, 235 A.2d 1 (1967); East Orange v. Palmer, 47 N.J. 307, 220 A.2d 679 (1966). The fifth resulted in the upholding of immunity, although it was clearly indicated that, had the facts been different, an evaluation of the entire concept might have been undertaken. Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966).

12 55 N.J. at 346, 262 A.2d at 198.

13 55 N.J. 534, 264 A.2d 34 (1970).

14 *Id.* at 535, 264 A.2d at 35.

15 *Id.* at 536, 264 A.2d at 35.

16 N.J. REV. STAT. § 13:5-2. The statute was repealed by L. 1945, ch. 22, § 44 (Feb. 21, 1945).

Commission power to sue and be sued. The majority decided "that when in 1945 the Commission went out of existence and its functions were transferred to a department of the State . . . the transfer carried with it the same consent to suit."[17]

After dismissing that holding as erroneous, the supreme court proceeded to decide the larger question, namely, "whether the judiciary should continue to refuse to pass upon the State's tort liability in the absence of a statute consenting to that course."[18] Answering the question in the negative, the court pointed out that other states had reached the same result,[19] that tort liability immunity of New Jersey municipalities had already been severely limited,[20] and that immunity from liability in contract cases had been abrogated at the state level.[21] Furthermore, the reaction of the state legislature was viewed as one of approval.[22]

The abrogation of immunity was not complete, for limitations were carefully delineated. First,

> the State will not be held liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial cast, nor generally with respect to decisions calling for the exercise of official judgment or discretion.[23]

Chief Justice Weintraub noted that the court had invoked the same limitation with respect to municipal corporation liability.[24] Second,

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17 55 N.J. at 536, 264 A.2d at 35.

18 *Id.*

19 55 N.J. at 538, 264 A.2d at 36 (citing Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) and Stone v. Arizona Hwy. Comm., 93 Ariz. 384, 381 P.2d 107 (1963).

20 *Id.* at 539, 264 A.2d at 36.

21 *Id.* at 536, 264 A.2d at 35 (referring to the *P,T&L* decision).

22 *Id.* at 538-39, 264 A.2d at 36.

> On the legislative side, suits have been authorized against corporate agencies of the State, and the Legislature has not disapproved our holding in *Taylor v. New Jersey Highway Authority* . . . that the consent to suit included consent to liability upon judge-made principles of tort law. In addition, tort claims are regularly considered by a subcommittee of the Joint Legislative Appropriations Committee, although the modest sums appropriated do suggest, on their face at least, a restrained approach with respect to damages. . . .
> . . . Again, it should be noted that the Legislature has not disapproved the doctrine that municipal corporations are suable in tort matters, nor, with one exception, the rules of substantive law applied to them.

23 *Id.* at 540, 264 A.2d at 37.

24 *Id.* at 540-41, 264 A.2d at 37.

> This limitation seems to be uniformly accepted, as we pointed out in *Hoy v. Capelli*, [48 N.J. 81, 222 A.2d 649 (1966)], and *Visidor Corp. v. Borough of Cliffside Park*, [48 N.J. 214, 225 A.2d 105 (1966)]. In those cases, we invoked the same limitation with respect to the liability of municipal corporations. See also *Amelchenko v. Borough of Freehold*, [42 N.J. 541, 201 A.2d 726 (1964)]; *Fahey v. City of Jersey City*, [52 N.J. 103, 244 A.2d 97 (1968)]; *Bergen v. Koppenal*, [52 N.J. 478, 246 A.2d 442 (1968)]; *Miehl v. Darpino*, [53 N.J. 49, 247 A.2d 878 (1968)].

the decision to hear tort claims against the state is not to be applied retroactively except as to the plaintiffs in the instant case.[25] It was here that the court forced the legislature to make its position clear. January 1, 1971 was set as the effective date of the decision, by which time the court apparently hoped for some sort of legislative action. In the event that the message was not clear enough, some suggestions were presented.[26]

NEW JERSEY CASE LAW BEFORE *P,T&L* AND *Willis*

State

In the absence of a statutory enactment conferring upon a litigant the power to bring suit against the state for damages, no such action was maintainable without the state's aquiescence in spite of the court's attempt in *P,T&L* to find a precedent.[27] The immunity was applied whenever a suit would have controlled state action or would have subjected the state to liability,[28] even indirectly as in a suit against a state agency.[29] The judiciary, in order to impose liability, had been forced to resort to statutory construction[30] to find a waiver of immunity.

Sovereign immunity was not absolute when money was not in issue. For example, that doctrine was held not to bar suits to mandamus

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25 *Id.* at 541, 264 A.2d at 37-38.

26 [T]he Legislature may wish to require timely notice of claims to permit an opportunity to investigate. Or the Legislature may choose to fix a monetary limit on recoveries, or to exclude some category of damages, or to adopt a concept of liability different from that of the common law, or to entrust the whole matter to an administrative agency.

Id. at 541, 264 A.2d at 38.

27 Cases cited note 11 and accompanying text *supra.*

28 *E.g.*, Gallena v. Scott, 11 N.J. 231, 94 A.2d 312 (1953).

Where the substantial rights of the State would be directly and adversely affected if there were judgment according to the demand made, the State is a necessary party defendant, and if it cannot be made a party, for want of consent to be sued, then the suit is not maintainable. . . . The question is whether the suit is in reality against the State itself, as a means of controlling its action or imposing a liability.

Id. at 237, 94 A.2d at 315.

29 Duke Power Co. v. Patten, 20 N.J. 42, 118 A.2d 529 (1955). *See also* the later cases of O'Neill v. State Hwy. Dept., 50 N.J. 307, 235 A.2d 1 (1967) (suit against Commissioner of State Highway Department); Hall v. Alampi, 47 N.J. 60, 219 A.2d 330 (1966) (action against Secretary of Agriculture and Director of Plant Industry).

30 *See, e.g.*, Taylor v. New Jersey Hwy. Auth., 22 N.J. 454, 126 A.2d 313 (1956) where the court allowed a suit against the New Jersey Highway Authority based upon the express statutory provision establishing the Authority that it shall have the power to sue and be sued in its own name.

an official to perform a ministerial duty.[31] Also, in *O'Neill v. State Highway Department*,[32] the court held that

> [a] suit to settle title to property does not collide with considerations upon which the State's immunity from suit now rests. The private claimant does not ask the judiciary to compel the Legislature or the Chief Executive to do anything.[33]

The state was also found to be without immunity where the plaintiff sought to restrain the enforcement of an unconstitutional statute.[34]

Although the holdings of earlier state cases gave little indication of the judicial discontent with the traditional sovereign immunity concepts, there was dictum evidencing the court's disapproval of that doctrine and its willingness, given the proper case, to reconsider the entire concept:

> We think the case before us is not the one in which to explore the power of the Court to enter that area [governmental immunity] or the wisdom of doing so. *The reason is that the thesis of the claim of liability is itself too doubtful.*[35]

In fact, one authority, after reviewing the decision in *McCabe v. New Jersey Turnpike Authority*,[36] which held that the defendant was liable when snow and ice fell from a bridge on plaintiff's car, stated that the decision sounded "like a preliminary to a full-fledged overruling of sovereign immunity."[37] Although the prognostication was premature,

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31 Jersey City v. Zink, 133 N.J.L. 437, 44 A.2d 825 (Ct. Err. & App. 1945).

32 50 N.J. 307, 235 A.2d 1 (1967).

33 *Id.* at 316, 235 A.2d at 6.

34 Abelson's Inc. v. New Jersey State Bd. of Optometrists, 5 N.J. 412, 75 A.2d 867 (1950).

> A suit to restrain a state agency of the particular class from executing an unconstitutional statute . . . is not one designed to control the action of the State or to subject it to liability within the principle of sovereign immunity from suit.

Id. at 417, 75 A.2d at 869.

35 Fitzgerald v. Palmer, 47 N.J. 106, 109, 219 A.2d 512, 514 (1966) (emphasis added). In this case plaintiff's decedent was killed when a piece of concrete was thrown from an overhead crossing constructed by the State Highway Department. Plaintiff contended that the state was negligent in constructing the overpass when it failed to erect wire fences to prevent such criminal activity. The court denied recovery and refused to reconsider the immunity concept since the decision not to put up a fence was a discretionary one. Under *P,T&L and Willis* the same conclusion would undoubtedly be reached.

36 35 N.J. 26, 170 A.2d 810 (1961).

37 3 K. Davis, *Administrative Law Treatise*, § 25.01 (1965 supp.) at 98. The conclusion reached by Professor Davis is a bit surprising since the court's reason for predicating liability was based on a weighing of a number of factors which, in combination, indicated a waiver of immunity by the state. N.J. STAT. ANN. § 27:23-5 empowers the Turnpike Authority to sue and be sued. Furthermore, the Authority had passed a bond resolution

the rulings in *P,T&L* and *Willis* did abrogate immunity as fully as any other jurisdiction. Whether the legislature will allow the decisions to stand is another matter.

Municipal

Municipal immunity from suit in New Jersey was first announced in the landmark decision of *Freeholders of Sussex v. Strader*[38] in 1840. This immunity, unlike that of the state, has gradually been eroded. Municipalities were regarded to be agents of the state in the performance of some functions and thus could partake of the state's sovereignty.[39] In other respects they acted as private individuals and could be held liable in the same way.[40] Because of this conceptual distinction, the governmental vs. proprietary function dichotomy was born. The result was confusion:

> In few, if any, branches of the law have the courts labored more abjectly under the supposed inexorable domination of formulas, phrases and terminology, with the result that facts have often been tortured into the framework of a formula, lacking in many cases any sound basis of reason or policy. This is notably the case in the effort to apply the supposedly settled rule that the municipal

requiring it to carry liability insurance to handle claims arising from Turnpike operations. The holding of the court, therefore, was not novel, even for New Jersey.

38 18 N.J.L. 108 (Sup. Ct. 1840). For a comprehensive summary of New Jersey case law on the immunity of municipalities as of 1934, *see* Weintraub and Conford, *Tort Liability of Municipalities in New Jersey*, 3 MERCER BEASLEY L. REV. 142 (1934). For a survey of the law in this area as of 1969, *see* Note, *Municipal Tort Liability: An Emerging Standard in New Jersey*, 1 RUTGERS CAMDEN L.J. 69 (1969).

39 *See* Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

> None of the civil divisions of the State—its counties, cities, towns and villages—has any independent sovereignty. . . . The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed.

Id. at 365, 62 N.E.2d at 605. To the same effect, Chief Justice Weintraub stated in Cloyes v. Delaware Tp., 23 N.J. 324, 129 A.2d 1 (1957):

> The doctrine of municipal immunity originated in judicial decisions since the separation of the Colonies from England. . . . The immunity is confined to those activities which the municipality undertakes as the agent of the State as distinguished from those which it pursues in its corporate or proprietary capacity.

Id. at 327, 129 A.2d at 2. *See also* Borchard, *Government Liability in Tort*, 34 YALE L.J. 129 (1924).

> Yet, while autonomous in many respects, the city is still for some purposes an agent of the state. How sound in theory this segregation of function as an agency of state government now is may be questioned, although its historical basis is not subject to doubt.

Id. at 131.

40 Weintraub and Conford, *supra* note 38, at 144:

> It is now definitely settled that where a municipality embarks upon a venture from which it derives some special benefit or advantage in its corporate capacity, it is liable as fully and completely as any private individual similarly engaged.

> corporation is not liable for torts committed by its agents in the performance of governmental, political or public functions, whereas it is liable when the tort is committed in the performance of corporate, private or ministerial functions.[41]

Even if the municipality was involved in a governmental function, it could still be held liable for active wrongdoing as opposed to passive negligence. This proposition was first announced in *Hart v. Freeholders of Union*[42] in 1894:

> There is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their wrongful acts, as distinguished from mere negligence. The grounds on which the exemption has been rested in the one class of cases are inapplicable to the other class.[43]

The governmental vs. proprietary function and active wrongdoing vs. passive negligence tests have both recently fallen into disrepute with our courts.[44] They have been replaced by a new rule which allows the municipality to claim immunity only when it was engaged in the exercise of official discretionary duties.[45] Since there was no

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41 Borchard, *supra* note 39, at 129.

42 57 N.J.L. 90, 29 A. 490 (Sup. Ct. 1894).

43 *Id.* at 93, 29 A. at 491. *See also* the more recent cases of Caporossi v. Atlantic City, 220 F. Supp. 508 (D.N.J.), *aff'd*, 328 F.2d 620 (3d Cir. 1963), *cert. denied*, 379 U.S. 825 (1964); Leemon v. South Jersey Port Comm., 145 F. Supp. 828 (D.N.J. 1956); Hoy v. Capelli, 48 N.J. 81, 222 A.2d 649 (1966); Hayden v. Curley, 34 N.J. 420, 169 A.2d 809 (1961); Hartman v. City of Brigantine, 23 N.J. 530, 129 A.2d 876 (1957); Casale v. Housing Auth., 42 N.J. Super. 52, 125 A.2d 895 (App. Div. 1956).

44 *See, e.g.*, B.W. King, Inc. v. West New York, 49 N.J. 318, 230 A.2d 133 (1967) where the court stated:

> In fixing municipal liability for torts there has been a more or less blind adherence to the municipal proprietary-governmental distinction, without a real consideration of the reasons which gave birth to that doctrine and of whether, in the light of the general expansion of municipal activity, the doctrine has not outlived its usefulness. . . .
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> . . . Rather than to base liability upon a finding that the municipality's function . . . was either proprietary or governmental and to compound the confusion, we prefer . . . [not to] add to the perpetuation of the controversial dichotomy.

Id. at 324-26, 230 A.2d 136-37. *See also* Jackson v. Hankinson, 51 N.J. 230, 238 A.2d 685 (1968) regarding the active wrongdoing vs. passive negligence test.

> [A]lthough there has thus far been no express and complete disavowal of active wrongdoing terminology, there has been a shift towards frank recognition that municipal entities, along with all others, should justly be held accountable for injuries resulting from their tortious acts and omissions under ordinary principles of negligence . . . .

Id. at 235, 238 A.2d at 688.

45 Jackson v. Hankinson, 51 N.J. 230, 238 A.2d 685 (1968). The landmark decision announcing complete municipal immunity for discretionary acts was *Amelchenko v. Borough of Freehold*, 42 N.J. 541, 201 A.2d 726 (1964). For a survey of other cases elab-

problem of separation of powers, it is not surprising that the judiciary was more willing to render judgments against municipalities. Because legislative action was not necessary to effect the satisfaction of a money judgment, the court had no reason to fear that its pronouncements would be merely "idle declarations". Under *Willis* the discretionary rule now applies as to torts committed by the state, arrived at without the confusing intermediary doctrines that permeated the field of municipal immunity for so many years.

SOVEREIGN IMMUNITY IN OTHER JURISDICTIONS

New Jersey law has been drastically changed by the decisions under discussion. However, the question arises whether this change is more or less permanent or merely a step in the development of New Jersey immunity concepts. The reaction of other jurisdictions following similar holdings may provide an answer.

Professor Davis, in his treatise on Administrative Law, states:

> Sovereign immunity in state courts is on the run. State courts are taking the offensive against it. The development during the period 1957-1965 is deep and dramatic. The movement seems to be gaining momentum.[46]

It is not only the judiciary which is responsible for the development. In the words of Professor Van Alstyne, consultant to the California Law Revision Commission:

> [T]he impetus for a statutory restructuring of governmental tort responsibility in many states has been derived from an appellate decision abrogating, either wholly or partially, existing tort immunities of governmental bodies. Elsewhere, however, the legislature has itself assumed the initiative and has enacted substantial statutory departures from preexisting immunity, without the stimulus of a judicial prod.[47]

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orating on the discretionary rule in New Jersey *see* Note, *Municipal Tort Liability: An Emerging Standard in New Jersey*, 1 RUTGERS CAMDEN L.J. 69, 84-85 (1969).

46 Davis, *supra* note 37, at 95. *See also* Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) which contains precedent from numerous jurisdictions in support of the Wisconsin Supreme Court decision to judicially abolish sovereign immunity in that state. The *Holytz* case parallels the New Jersey cases under discussion not only by making liability the rule and immunity the exception, but also by extending an invitation to the legislature to act in the form of a prospective application of the rule. Exceptions for discretionary functions were also delineated as in New Jersey.

47 Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919, 920-21. *See also* Lawyer, *Birth and Death of Governmental Immunity*, 15 CLEVE.-MAR. L. REV. 529 (1966).

While legislative action, as a solution to this problem, would give more uni-

In his article, Professor Van Alstyne surveys fourteen jurisdictions where sovereign immunity has been swept away in whole or in part.[48] In only two has the impetus come from the legislature,[49] though in six it responded to judicial decisions with a pronouncement of its own.[50] Of the six, California's statute is deemed to be the most comprehensive and could serve as a guideline for other jurisdictions:[51]

> Although these documents [the Law Revision Commission's pamphlets] are focused on California, the thinking will be of great usefulness to all states confronted with the problem of sovereign responsibility. The quality of the California studies is very high, and they push forward the frontier of understanding.[52]

Noting that judicial abrogation of immunity has, at least in half of the jurisdictions, been followed by legislative action makes clear what the court in *Willis* was hoping for when it postponed the effect of the decision to 1971. The legislature was invited to make its position clear, hopefully in line with the court's.

Curiously, in *P,T&L* the court did not declare that its ruling would only be prospective, apparently with the intent to allow suit on any contract not barred by the statute of limitations. The legislature, fearful that a flood of litigation would inundate the courts, responded with a statute which delays the effect of the *P,T&L* and *Willis* rulings to July 1, 1971.[53] That action may be indicative of the legislature's willingness to respond with a comprehensive enactment.[54]

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formity to subsequent case decisions, it appears that most state legislatures are reluctant to take this responsibility until prodded into action by the courts. The courts, therefore, must take the initiative as an impetus to obtaining appropriate legislation.

Id. at 549.

48 Alaska, Arizona, California, Connecticut, Florida, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Nevada, Utah, Washington, and Wisconsin.

49 Connecticut and Utah.

50 California, Illinois, Michigan, Minnesota, Nevada, and Wisconsin.

51 Van Alstyne, *supra* note 47, at 973-74:

> The California Tort Claims Act . . . is the most comprehensive, detailed, and sophisticated enactment dealing with governmental tort liability in any jurisdiction. . . .
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> The principal feature of the California statute . . . is its basic determination to make all phases of governmental tort liability and immunity a matter of statutory regulation, thereby precluding judicial development of the new common law approaches to new or emerging problems.

52 Davis, *supra* note 37, § 25.17 at 118.

53 N.J. STAT. ANN. § 52:4A-1 (1970).

54 For example, California's judicial abrogation of immunity was followed by a statute which delayed the effect of the rulings for two years. By the time the decisions were to go into effect, the legislature had effectuated its comprehensive statute.

Retention of immunity for discretionary functions also falls in line with the mainstream of legal development.

> It is obvious that governmental tort immunity is far from dead, although to a considerable degree it is now being re-translated as a "discretionary function" immunity. . . .
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> . . . .
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> What is occurring is, quite obviously, not the total demise of the long-criticized irresponsibility of public bodies for their torts, but a restructuring of the rules which determine when a tort committed by governmental action is compensable.[55]

THE FUTURE OF SOVEREIGN IMMUNITY IN NEW JERSEY

As a result of the new pronouncements, sovereign liability is the rule in New Jersey and immunity the exception. Absent a legislative declaration, it will be up to the courts to more precisely define and shape the immunity concept on a case by case basis. The prospect of such an undertaking has caused the authors of one article to lament:

> Continued abdication of legislative responsibility in this area will ultimately, it is felt, compel judicial abrogation of government immunity with all its attendant problems, and it is in an effort to avoid the crisis which would necessarily result from such an unfortunate exercise of judicial power that the following presentation is made.[56]

The principal objection to judicial handling of the problem is that the courts, deciding cases on an ad hoc basis on the strength of issues selected and argued by the adversaries, may be inherently unsuited for the task of establishing a comprehensive, well reasoned, and effective ultimate doctrine.[57] Moreover, ad hoc decisions unavoidably

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55 Van Alstyne, *supra* note 47, at 975, 979.

56 S. Napolitano & G. Kenny, *The Status of Sovereign Immunity in New Jersey: A Proposed Legislative Reform*, 91 N.J.L.J. 429, 438 (1968).

57 *See* Davis, *supra* note 37, § 25.18:

> [O]n some aspects of the problem the courts need legislative assistance, as the elaborate study by the California Law Revision Commission shows. . . . Even in New York, where the law of sovereign responsibility is mostly judge-made, some inadequacies result from lack of legislative assistance.

Id. at 126. Not all authorities view the legislature as the proper source for setting down guidelines for governmental responsibility. For example, in *Kelso v. City of Tacoma*, 63 Wash. 2d 913, 390 P.2d 2 (1964), the Supreme Court of Washington stated:

> [R]econsideration of common-law doctrine on an *ad hoc* basis — which of course is *stare decisis* in the best and most enlightened sense and, historically, is the *modus operandi* of the common law — could be less jarring in effect and, per-

entail undesirable uncertainty for parties who become involved in a factual situation not previously before the court. However, there is another side to the coin. A codified solution frequently includes an unwanted lack of flexibility. Even the most thoroughly considered enactment cannot anticipate every situation.

Whether in response to the prompting of our highest court[58] or not, the legislature has seen fit to begin a study in this area. Chief Justice Weintraub in the *Willis* case stated:

> [A]fter we expressly held open in *Fitzgerald v. Palmer* . . . the question whether the judiciary should entertain such suits, the Legislature adopted *L.* 1967, *c.* 20. There, after reciting that "Recent decisions of the courts of this State interpreting the statutory and case law concerning governmental immunity in negligence actions have indicated the need for a thorough review of the law in this field," the Legislature authorized the Attorney General to study "the present general provisions of the statutes and case law relating to governmental immunity of the State, of counties and municipalities to respond in damages for the negligence of their agents or servants; and to report to the Legislature the results of such study, together with recommendations for amendments and additions to existing statutes intended to modernize procedures relating thereto." The statute reflects the feeling we share, that something positive should be done.[59]

Other activity was also undertaken:

> The Legislature has also created a legislative commission to study the necessity for and the feasibility of establishing a court of claims in the judicial branch of State government to replace and supersede the functions of the Subcommittee on Claims of the Joint Legislative Appropriations Committee with the passage of Senate Concurrent Resolution No. 30 of this year. The members of this commission have been appointed, but the commission has yet to organize and begin operation. . . . It is expected that this commission will begin operation shortly, and that it will call upon the Attorney General's Office for a report on the study authorized by P.L. 1967, c. 20, and for further assistance in its work. Because of

haps, could be accomplished with more consistency and finesse than if undertaken by less deliberate and more embracing or inclusive legislative action.

Id. at 920, 390 P.2d at 7 (concurring opinion). One factor to keep in mind is that judicial judgments alone cannot force appropriations and payments to the successful litigant. Legislative acquiescence is necessary and if done only on an individual statute basis, it would, in effect, amount to a second retrial of the case, this time by the legislative body. Possible arbitrariness is apparent. A statute authorizing the setting aside of funds for *any* judgments against the state would be far more equitable.

58 47 N.J. at 109, 219 A.2d at 513-14.

59 55 N.J. at 538-39, 264 A.2d at 36.

the status of both studies, there are no results or recommendations to date.[60]

Although the judiciary's preferred rule was clearly indicated in *P,T&L* and *Willis,* the invitation to the legislature was obvious. The establishment of the investigatory commission suggests that action will be forthcoming.[61] Whether the legislature will respond with a blanket waiver of immunity where liability is complete subject to judicial exceptions as in New York,[62] or a waiver of immunity subject to legislatively imposed exceptions as in most states,[63] or an act with specifically defined liabilities and immunities as in California,[64] is within the legislature's discretion. A short but fairly comprehensive act proposed for New Jersey and intended to head off judicial action precisely in the nature of the *P,T&L* and *Willis* cases was published in 1968.[65] The proposal is broken down into two areas, contract and tort. Complete liability for contracts is recommended, as long as the "requirements concerning bidding procedures and other prerequisites to a valid contract"[66] are met. In the area of tort, a complete reaffirmation of immunity is sought, subject to legislative exceptions. This part of the proposed statute, therefore, is at variance with the majority of jurisdictions.

A traditional complaint, that weakening of immunity results in dissipation of public funds, appears to be less than a formidable obstacle.

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60 Letter from Thomas P. Bryan, Research Associate of the Law Revision and Legislative Services, Division of Legislative Information and Research, which is headed by Mr. Samuel A. Alito, Sept. 16, 1970.

61 *See* Van Alstyne, *supra* note 47, discussing the effect of *Spanel v. Mounds View School District,* 264 Minn. 279, 118 N.W.2d 795 (1962).

> The change in state law announced by the decision was declared to be strictly prospective, applying only to injuries accruing after the adjournment of the next regular session of the Minnesota Legislature. The 1963 session *seized the invitation, and produced a comprehensive statutory revision of governmental tort law.* (emphasis added)

Id. at 950. (That case only effected immunity of municipalities, but the comparison is still valid.)

62 N.Y. Ct. Cl. Act § 1 et seq. (McKinney 1963).

63 Van Alstyne, *supra* note 47.

> The basic premise of the governmental tort legislation of most of the states . . . is acceptance of tort liability as the general rule, subject to legislatively defined exceptions.

Id. at 972.

64 Cal. Gov't Code §§ 810-996.6 (1966) (enacted 1963).

65 S. Napolitano & G. Kenny, *The Status of Sovereign Immunity in New Jersey: A Proposed Legislative Reform,* 91 N.J.L.J. at 486 (1968).

66 *Id.* at 471.

> The fear that large unanticipated impositions upon public funds will be required to satisfy tort damage claims is exaggerated; the ready availability of liability insurance provides adequate protection at moderate cost which may be budgeted in advance. . . . Modern notions of sound public policy reject the view that the burden of loss should fall upon the person injured by the tortious acts or omissions of public servants; on the contrary, it is deemed better, as a rule, to distribute the private losses caused by the governmental enterprise over the public at large which is the beneficiary of that enterprise.[67]

Moreover, should insurance costs be an anticipated burden, the legislature may impose dollar limits on damages,[68] either as part of a comprehensive plan or by a statute specifically designed for that purpose.

Should the *Willis* ruling remain intact, a problem of determining exactly which functions will be deemed discretionary and which will be construed as ministerial may arise. The solution seems simple enough until one is reminded of the governmental vs. proprietary function confusion which tortured the courts and attorneys until recently. One guideline for the practicing lawyer is the trend of decisions in other states utilizing the discretionary-ministerial dichotomy. The availability of such a guideline provides an advantage for jurisdictions that move more slowly.[69] The line of New Jersey cases treating the

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[67] Van Alstyne, *supra* note 47, at 921.

[68] *See* Van Alstyne, *supra* note 47.

> Historically, one of the principal deterrents to reform of governmental immunity has been the fear that tort liability would impose intolerable burdens upon public finances, diverting tax revenues from their designated purposes to the detriment of the general welfare. . . .
>
> The fiscal approach [with damage limitations embodied in immunity statutes] assumes the validity of [such] fears . . . . By providing a specific, albeit essentially arbitrary, basis for fiscal planning and acquisition of insurance coverage, dollar limits avoid the risk of calamitously high judgments.

Id. at 970-71.

[69] *See, e.g.*, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

> Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.

Id. at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99. *See also* Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

> [W]e have long and consistently held that the courts would not go behind the ordinary performance of planning functions by the officials to whom those functions were entrusted.

Id. at 584, 167 N.E.2d at 65, 200 N.Y.S.2d at 411.

same distinction in the municipal area is also instructive.[70] One factor to keep in mind is the possible propensity of the judiciary to find liability even for what may be high level decisions.

> The discretionary immunity is not always extended to its fullest scope. For example, liability is often imposed for injuries resulting from a dangerous condition of public property, even though the condition may have gone unrepaired due to a discretionary decision by responsible officials to delay the work or divert the available resources to other projects believed to deserve a higher priority.[71]

CONCLUSION

It is felt here that *P,T&L* and *Willis* provide a foundation for concepts of immunity based upon sounder principles than blind adherence to stare decisis. Hopefully, the apparently pending legislative enactment will be one which "reflects (the) considerations of governmental integrity while affording substantial protection to those injured by . . . a public entity."[72] Since the King is alive and well in other jurisdictions which abolished immunity, the prognosis is that he will survive in New Jersey also.

Donald J. Maizys

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[70] An example is the case of Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964). There the court gave an indication of what it would recognize as a discretionary activity:

> Moreover, establishment of a general method of handling snowstorms is a matter of planning. The decision adopting a procedure regulating when, where and in what order of priority the equipment and personnel are to be used in dealing with them is legislative or governmental in nature. Such decisions cannot be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions. The extent and quality of governmental service to be furnished is a basic governmental policy decision. Public officials must be free to determine these questions without fear of liability either for themselves or for the public entity they represent. *It cannot be a tort for government to govern.* (emphasis added)

Id. at 550, 201 A.2d at 730-31. *See also* Note, *Municipal Tort Liability: An Emerging Standard in New Jersey*, 1 Rutgers Camden L.J. 69, 84-85 (1969).

[71] Van Alstyne, *supra* note 47, at 972 n.370.

[72] Material cited, *supra* note 65, at 471.