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# LEGISLATIVE REFORMS OF GOVERNMENTAL TORT LIABILITY: OVERREACTING TO MINIMAL EVIDENCE

*Ann Judith Gellis\**

## I. INTRODUCTION

Calls for tort reform to stem the growing tide of tort suits and costs come not only from private sector defendants, but from the public sector as well. The rapid and significant increases in insurance premium rates for local governmental entities which occurred from 1983 to 1985 heightened an already strong chorus of complaints by local government officials that local governments were being deluged with lawsuits to the detriment of the public interest.<sup>1</sup> In large measure, these complaints are part of a broader feeling that society is being overtaken by "hyperlexis" and that the tort system has veered too far from its traditional course of a fault-based system of compensation and deterrence to a no-fault system with an overall emphasis on risk spreading. Local governments have lent their support to changes in tort rules, such as elimination of joint and several liability and limitations on noneconomic damages.<sup>2</sup>

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1. See, e.g., Blum, *Lawsuits Put Strain on City Budgets*, NAT'L L.J., May 16, 1988, at 1, col. 1; *Cities Drawing Legal Fire*, NAT'L L.J., Apr. 18, 1983, at 1, col. 1; *Costs and Availability of Insurance: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 143-44 (1986) (testimony of Hon. Grant Jones, National Conference of State Legislatures) [hereinafter *House Hearings*]; *The Ongoing Crisis of the Availability and Affordability of Liability Insurance and its Effects on the Housing Industry, Local Government, and Transit Systems, 1986: Hearings Before the Subcomm. on Housing, and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong., 2d Sess. 98-99 (1986) (testimony of Stephen Chapple, General Counsel United States Conference of Mayors) [hereinafter *Senate Hearings*].

2. See, e.g., resolution of National Institute of Municipal Law Officers, adopted at its 1986 Mid-Year Seminar on "The Tort Liability Crisis: Insurance Unavailability Problems, Self and Group Municipal Liability Insurance Risk Management", supporting "an in-depth exploration of tort reform measures designed to reduce municipal exposure to liability. Included in this evaluation should be recommendations for changes in joint and several liability, collateral source rules, structured settlements, damage limitations laws, statutes of limitations and attorney fee limitations; and other legislation to achieve solutions to the problems [created by the tort liability and insurance crisis]." 27 MUNICIPAL ATTORNEY No. 2, at 9 (Mar.-Apr. 1986).

The public sector has also pushed, with considerable success, to further expand the umbrella of tort immunity. This umbrella is unavailable to private sector defendants, and it distinguishes governmental tort reform from general tort reform. However one analyzes tort law and tort reform in general, there is a compelling need to determine whether this institution of local and state governments should be reinvigorated at the end of the twentieth century. The usual justification for local government tort immunity is the overriding interest of society in having public services provided, even if negligently.<sup>3</sup> Governments cannot go out of business; certain services must be provided; yet, there is a limit on how much revenue local governments can raise. Nevertheless, changes which make it more difficult or impossible for victims of governmental negligence to recover compensation, or which widen the kinds of entities entitled to tort immunity, also affect the daily lives of citizens by influencing the quality and quantity of public services provided by government, and the distribution of the costs of those public services. Costs unaccounted for in the governmental decision making process are shifted to the individual victims.

Whatever the causes of the current "tort crisis," or indeed whether such a crisis exists, we have already witnessed in tort law what Professor Priest called "the most extraordinary state law development having national impact since the states' unanimous adoption of the Uniform Commercial Code."<sup>4</sup> Much of this extraordinary change deals specifically with the tort liability of our local governments. The liability of local governments raises important issues, separate from the questions of tort liability in general. It is therefore important to understand the changes in local government liability, and how these changes affect the allocation, distribution and costs of public services. Neither the understanding of the tort crisis nor the proposed remedies are the same for local governments and private parties.

Local governments were among the hardest hit by the liability insurance crisis, and governmental tort law reforms are a response to the hue and cry that governments raised about the tort liability explosion. Until now there has been no analysis of trends in common law tort cases against state and local governments. This article examines the recent reforms in state tort immunity statutes and the evidence of trends in tort cases against local governments. Legislators have embarked on a flurry of

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3. James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 614 (1955); see also *Symposium on Civil Liability of Government Officials*, 42 LAW & CONTEMP. PROBS. 1, 104 (1978) [hereinafter *Liability Symposium*].

4. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1523-24 (1987).

activity. Have they defined the issues correctly? Are their acts based on panic or on a sound understanding of what they perceive as a crisis requiring an attack on tort doctrine?

Part II of this article examines the functions and consequences of the doctrine of governmental tort immunity. It looks at how the doctrine interacts with the allocation of resources for public goods and services and the distribution of costs of those goods and services. Part III considers both recent changes and proposals for changes in state tort immunity laws which enlarge local governmental immunity. Parts IV and V address the issue of what evidence is available to support this need for greater immunity from tort liability. Part IV discusses the insurance crisis experienced by local governments in the eighties. Part V explores empirical evidence on governmental tort liability, and then reviews the questions remaining open for future study.

There is, in fact, little evidence bearing directly on local governmental tort liability. Thus, there are many open questions. An examination of the kinds of recently adopted legislative reforms in tort immunity statutes makes it apparent that many local governments, faced with significant costs of repairing, replacing or expanding public infrastructure and facilities to meet current needs, want the option not to do so. They want to place the costs of their nonaction on the users of existing public facilities. This allocation of costs reverses decades of legislative and common law development. This article contends that neither sound reasoning nor compelling empirical evidence supports such a dramatic reversal in the treatment of public, as opposed to private, tort liability.

## II. SOVEREIGN IMMUNITY FUNCTIONS AND CONSEQUENCES

The current flurry of legislative activity expanding governmental tort immunity, discussed more specifically in Part III below, renews the debate about the functions of the doctrine of sovereign immunity and its interaction with the functions of tort law. This Part discusses the underpinnings of arguments in favor of expansion of immunity and questions whether the doctrine results in efficient and equitable governmental decision making. It concludes that, while some form of immunity may be necessary to preserve legislative policy making processes from judicial encroachment, the negative aspects of the doctrine — in particular its exacerbation of government's tendency to account for costs inaccurately and to distribute costs inequitably — require that there be no expansion either of the types of activities covered or the types of organizations entitled to protection in the absence of evidence that increased liability exists and that increased costs pose a real threat to the delivery of public services.

### A. *State of Sovereign Immunity Doctrine*

The application of the common law doctrine of sovereign immunity to local governments has always troubled the courts, with the result that the pronounced rules often confounded logic and justice. Municipal corporations in particular have never been afforded the same immunity protection as the state sovereign. In fact, quite the opposite rule prevailed until the mid-nineteenth century: Municipal corporations were treated as private corporations which could be sued for their torts.<sup>5</sup> As a theory of municipal corporation law evolved which gave municipal corporations characteristics of both a public entity, owing its creation and continued existence to the state, and a private corporation, serving its shareholders/citizens, the rules on tort liability were altered to reflect this dual nature.<sup>6</sup> The entity was immune for torts it committed in its governmental capacity, but it was not immune for activities committed in its proprietary or private capacity.

As one would expect, there were difficulties in labeling activities as distinctly governmental or proprietary, either at any one time, or over time as perceptions of government's role in society changed. Added to the inevitable inconsistencies in judicial opinions of whether an activity fell into one category or another, were the inconsistencies resulting from the different treatment given to other local governmental units, most notably the county. Counties, as agents of the state government, enjoyed broader immunity than did municipalities. Thus, it was not uncommon to have within one jurisdiction situations where activities undertaken by a city might give rise to liability, but a county undertaking the same activity would be immune.<sup>7</sup>

The 1960s and 1970s saw a judicial assault on the doctrine of sovereign immunity as being absolute, ill-grounded in legal theory, and inequitable.<sup>8</sup> The steady erosion of immunity for state and local govern-

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5. For a history of the doctrine of sovereign immunity as applied to municipal corporations, see E. Borchard, *Government Liability in Tort*, 34 YALE L.J. 129 (1924); see also Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law-Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250 (1937).

6. Barnett, *supra* note 5, at 262, 266-70. For a broader discussion of the development of the public-private distinction in connection with the status of municipal corporations, see H. HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* 220-39 (1983); Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057, 1099-109 (1980).

7. Borchard, *supra* note 5, at 42-45 & 229-30.

8. Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919, 920-22; Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1176-78 (1977). See also the general discussion of the *Abandonment of Government Immunity* in D. MANDELKER, D. NETSCH & P. SALSICH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 435-37 (2d ed. 1983).

ment torts no doubt was a response to the more expansive role of government in the lives of its citizens. As government engaged in more activities previously conducted by private individuals, more citizens suffered injury at the hands of government. At the same time, society's views of the purposes of the tort system as a whole were changing. Notions of compensation and risk spreading — of not leaving the victim without a remedy — could not co-exist with a broad exemption for governmental tortious acts in an ever growing activist state.<sup>9</sup> After all, the government with its taxing power over all members of the community is the ultimate risk spreader.

With the fall from favor of the sovereign immunity doctrine went the distinction between governmental and proprietary activities as a guiding principle for determining local governmental liability. In its place, courts and legislatures have employed a new test which examines whether the activity which gave rise to the injury was discretionary or ministerial (or, in some formulations, planning versus operational) in nature.<sup>10</sup> Discretionary activities generally are those involving some form of legislative or quasi-legislative policy decision making. Ministerial activities are those which, while they may require the government actor to exercise discretion and judgment, are essentially activities of implementation. The focus of inquiry has shifted from distinguishing types of activities to defining the essence of government decisionmaking processes in order to protect policy determinations of the legislature from judicial interference. For, while the courts led the way in seeking to eliminate absolute sovereign immunity at the state level and to bring a more principled application of the doctrine at the local government level, there has always been general acceptance that a limitation on judicial review of legislative decisions is inherent in the separation of powers between the legislative and judicial branches.

#### *B. Nature of Dissatisfaction with Current Status of Local Governmental Immunity*

Every damage recovery against a government has an effect on its treasury, and thus, imposes restraints on a government's ability to allocate

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9. See L. FRIEDMAN, *TOTAL JUSTICE* 52-76 (1985). Professor Friedman attributes the shift in emphasis of twentieth century tort law from admonishing people who were blameworthy to compensating victims to the changes in people's expectations of recovery. Larger businesses and government and the availability of liability insurance meant that fuller compensation could, and should, be obtained.

10. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218-25 (1963); D. MANDELKER, D. NETSCH & P. SALSICH, *supra* note 8, at 449-54.

resources. Even so, there are few serious calls for a return to absolute immunity. This suggests that there is some consensus that society's concept of justice requires governments to pay their "fair share" for harm arising out of the performance of ministerial (or operational) activities. Additionally, there does not seem to be significant disaffection with the discretionary/ministerial test for determining liability exposure. Rather, the thrust of the arguments is that governments are paying more than their fair share. The question of what constitutes governments fair share has two interrelated aspects.

### 1. Deep Pocket Phenomenon

The first is the belief that local governments are "deep pockets."<sup>11</sup> It is argued that juries do not comprehend the link between damages awarded against governments and the amount of taxes needed to pay those awards and still maintain public services at the current level; therefore, juries view cases involving government defendants as cost-free opportunities to engage in wealth transfers from society to the individual. In addition, the doctrines of joint and several liability and comparative negligence make it highly desirable to join a government defendant whenever possible.<sup>12</sup> Since it has the power to tax, a government, unlike an individual defendant, is not likely to be judgment proof.

Local governments claim that they have higher damage awards assessed against them than individual defendants responsible for comparable injuries, and that they are often joined in actions where their involvement is, at best, tangential. There is some evidence to support the claims of local governments that they have been victims of the deep pocket phenomenon. A study of jury verdicts in Cook County, Illinois, in the period 1959-1979, conducted by the Rand Institute for Civil Justice, found that for comparable injuries, governments (constituting 8% of defendants) had higher damage awards assessed against them than did individu-

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11. Blum, *surpa* note 1 at 32; E. I. Koch, Statement before the Governor's Advisory Commission on Liability Insurance 6, 8 (Feb. 21, 1986) (copy on file with author).

12. The doctrine of comparative negligence allows a plaintiff, even if negligent, to recover damages over and above the amount attributed to his own negligence. Under the doctrine of joint and several liability, those damages can be recovered from any negligent defendant, regardless of the degree of fault. It is argued that together the doctrines encourage plaintiffs to join a "deep pocket" defendant to ensure full recovery. U.S. Dept. of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, 64 (Feb. 1986); State of New York Advisory Commission on Liability Insurance, 1 *Insuring Our Future* 146-47 (Apr. 7, 1986) (appointed by Governor Mario M. Cuomo) [hereinafter Cuomo Commission Report].

als.<sup>13</sup> The study also showed that jury awards increased by 50% when a corporate or governmental defendant was joined with an individual defendant.<sup>14</sup> Contrary to the rhetoric, the deep pocket phenomenon did not represent a changed perception of the role of awards by juries. It was consistently found throughout the twenty year period.<sup>15</sup> Although the study's finding suggests a pattern, it appears to be based on a small number of cases against where government defendants, particularly where there are severe injuries.<sup>16</sup>

The Rand data does not, in any event, support claims that local governments are easy targets for suit. There is no evidence that juries held governments to a different standard of liability than individuals or corporations.<sup>17</sup> In fact, the little evidence there is on government liability suggests that government defendants have a higher success rate than other defendants. This is found both in the Rand study which showed that government defendants won three out of five jury trials,<sup>18</sup> and in recently completed studies of section 1983 civil rights litigation. The latter studies found significant differences between the success rate of constitutional tort plaintiffs (suits in which the defendant is a governmental entity or official) and non civil rights litigants, even controlling for presence of counsel.<sup>19</sup>

A number of other civil litigation studies show that, in general,

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13. A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 43 (1985) [hereinafter DEEP POCKET STUDY]. When plaintiffs' injuries were moderate, government defendants paid 50% more than individual defendants, while corporate defendants paid 30% more. For severe injuries, government defendants paid nearly two and one-half times more than individual defendants, while corporate defendants paid four times as much. *Id.*

14. *Id.* at 48.

15. *Id.* at 44.

16. See *infra* notes 146-48 and accompanying text.

17. DEEP POCKET STUDY, *supra* note 13, at 25-26.

18. *Id.*

19. In a series of constitutional tort litigation studies in the Central District of California, the Eastern District of Pennsylvania and the Northern District of Georgia, Professors Eisenberg and Schwab found that, even using a very broad definition of success, constitutional tort plaintiffs did significantly worse than non civil rights litigants. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 677 (1987). A case was defined as successful if "(1) the plaintiff wins after trial, (2) the parties settle their dispute, (3) the court grants a stipulated dismissal, or (4) the plaintiff dismisses the case voluntarily." *Id.* at 681. Constitutional tort plaintiffs in counseled, nonprisoner cases, in the California study were successful about 50% of the time, compared with a success rate of 80% for plaintiffs in contested noncivil rights cases. *Id.* at 682. Findings in the other federal districts were similar: "[N]onprisoner constitutional tort plaintiffs succeeded . . . in 50% of the cases filed. Control group plaintiffs succeeded in 84% of the cases they filed." Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government As Defendant*, 73 CORNELL L. REV. 719, 729 (1988).



plaintiffs have success rates in the range of 80 % to 90 % in non-civil rights cases.<sup>20</sup> Yet, data obtained from New York City shows that 55 % of tort filings against the City are disposed of without monetary settlement.<sup>21</sup> A study conducted for the International City Management Association on Public Officials Liability found that in civil lawsuits involving suits under federal civil rights legislation and suits related to condemnation and land use decisions, plaintiffs in over 50 % of the suits do not receive monetary damages.<sup>22</sup> City and state governments have also been found to be more successful in appellate cases, both as appellant and as respondent, against all kinds of litigants.<sup>23</sup>

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20. See, e.g., A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964) (a study of automobile accident cases in Michigan for 1958); Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961) (a study of personal injury litigation in New York City for 1957); H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970) (a study of automobile accident claims filed with an insurance company in March and April 1962); D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, *CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT, PART A* (1983) (an extensive nationwide study of over 1600 civil cases) [hereinafter CLRP STUDY].

The Michigan study excluded government defendants. The study of personal injury litigation in New York City clearly included government defendants since two sources of data were the City's Law Department and the New York City Transit Authority. The study did not, however, isolate statistics for government defendants. Without knowing the number of government defendants represented in the sample, no conclusion can be drawn as to whether plaintiffs were equally successful against government defendants. The authors of the study do not note any significant differences. The *CLRP Study* did include government defendants, but they made up a very small percentage, from 2 % to 7 % of defendants in state court litigation *Id.* at I-68.

21. Koch, *supra* note 11, at Exhibit 1 (data provided by the Corporation Counsel's Office of the City of New York with respect to tort filings and settlements in the period 1977-1985). See *infra* notes 156-74 and accompanying text.

22. Eighty-seven percent of reported claims involved settlements of under \$20,000. ICMA & The Wyatt Company, *Public Officials Liability Insurance: Understanding the Market* 12 (1986).

23. In an empirical study of who wins and loses in state supreme court cases, using a sample of cases over the period 1870-1970 from sixteen states, city and state governments had the highest success rate as appellant, as respondent and combined. Cities and states had a net advantage (comparing the appellant success rate with the opponents' appellant success rate) of plus 11.8 %. Moreover, governments success rates in appeals increased over time from 49 % in the late nineteenth century to 67 % in recent decades. Wheeler, Cartwright, Kagan & Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing In State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403, 419-20, 424-26, 431 (1987).

Cities and state governments' overall advantage over individuals was 8.4 %. Small town governments were not as successful: individuals had an overall advantage of 2.2 % over small towns. This was the only finding where the "have not" party had the advantage. *Id.* at 420.

There are a number of possible factors which might explain why governments as defendants are more successful. Local governments, as "repeat players," may devote relatively more resources to their cases than the plaintiffs.<sup>24</sup> At the same time, they may be less sensitive than business organizations, also repeat players, to the costs of litigation in determining whether to settle or litigate claims.<sup>25</sup> Schwab and Eisenberg make a related point in their analysis of the success of governmental defendants in constitutional tort cases. Because the incentive structure of governments is far more complex, that is, not fueled primarily by profit maximization, plaintiffs make inaccurate predictions of how governments will behave. This leads them to miscalculate litigation costs. At the same time, government defendants may be more accurate in their own predictions of behavior and costs.<sup>26</sup>

It may also be that the doctrine of sovereign immunity, even if not applied in a particular case, has created a bias in favor of government. For example, Ross' study of automobile accident claims, *Settled Out of Court*,<sup>27</sup> found that insurance companies routinely settled cases in which liability did not exist either out of sympathy for the injured party or because they feared a sympathetic jury.<sup>28</sup> It may be that, given a past tradition of broad tort immunity for governments regardless of the

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24. See generally Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter analyzes outcomes of litigation in terms of the types of parties, e.g., one-shotters versus repeat players, and in terms of the advantages enjoyed by repeat players. He notes, for example, that repeat players can "play the odds," and are more likely to play for rules in litigation either by litigating or appealing cases "they regard as most likely to produce favorable rules." See also Wheeler, *supra* note 23, at 403-04. This study of state supreme court decisions assumes governmental parties are repeat players with strong resources. *Id.* Their success rates, see *supra* note 23, support Galanter's hypothesis that "haves" are more successful in the appellate process as well. Schwab and Eisenberg also discuss the literature on how being a repeat player affects the incentives to litigate to deter other similar suits. Schwab & Eisenberg, *supra* note 19, at 751, 753-55.

25. See H. Ross, *supra* note 20, at 204-11, for a discussion of the practice of insurance adjusters, despite public statements to the contrary, to pay claims for their nuisance value even where the absence of liability is clear. Addressing the denial of such practice, Ross says: "This is common rhetoric in the companies I studied, although its apparent irrationality in the context of a profit enterprise may be a first clue to the state of reality. Businesses are rarely run primarily on matters of principle." *Id.* at 204. Governments, however, are not profit-making enterprises and officials tend to be goal or principle oriented. This may mean that the nonfinancial gains from litigating (e.g., preservation of a government's reputation for not settling cases in the absence of liability) are greater than the costs associated with litigation. See also Schwab & Eisenberg, *supra* note 19, at 750-55.

26. Schwab & Eisenberg, *supra* note 19, at 750.

27. H. Ross, *supra* note 20.

28. *Id.*

seriousness of the injury, governments and juries, alike, are less vulnerable to such sympathies.<sup>29</sup> Juries may in fact understand the connection between taxes and damage awards and, therefore, be less likely to find against governments except in the clearest cases. This last explanation, however, must be reconciled with the evidence of the jury's deep pocket bias once it finds liability.<sup>30</sup> What we know at this point is that it is tougher to obtain a finding of liability against a government defendant. But once liability is found, there may be a deep pocket bias.

## 2. Interference with Resource Allocation

The other aspect of determining government's fair share is more complex. At its root, the argument asserts that governments are paying too much relative to their other functions. In part, this argument is a recognition that the continued provision of basic public services demands that government not be sued into bankruptcy no matter how negligent its acts and no matter how fair the system otherwise is in terms of treating defendants equally.<sup>31</sup> It is also a recognition that there are both legal and political limits on taxation by local governments. As a result, there may not be revenues sufficient to finance the true cost of the public services desired, including costs associated with accident avoidance and negligent performance. Intertwined with this last point is the fundamental issue underlying sovereign immunity. Given political restraints on revenues and government's need to continue functioning, who shall decide who will bear the cost of government activities? Shall the legislature decide *ex ante* or the courts *ex post*?

The effect of tort liability on government's pocketbook is twofold. It not only diverts current funds from other public services, but also interferes with future allocations. In order to avoid further liability, the government diverts funds from other competing uses which government managers may consider higher priorities. Tort immunity maximizes a government's ability to allocate resources in furtherance of its political agenda by preventing judicial second guessing of the costs and benefits of government

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29. Cf. Wheeler, *supra* note 23, at 440 (in appellate cases involving governments, the authors point to the difference in success rate between large and small governments to postulate that the greater success of governments is tied to "greater legal sophistication and litigational capabilities" rather than any bias toward government).

30. See text accompanying *supra* notes 13-16.

31. See the general discussion of limits on sovereign liability in *Liability Symposium*, *supra* note 3, at 104.

decisions.<sup>32</sup> Damage limitations also serve as a method, although necessarily crude,<sup>33</sup> of preventing governments from paying too much in the aggregate; and thus act to limit judicial intrusion on the legislature's overall ability to allocate resources.<sup>34</sup>

Unrestrained judicial review of government decisions poses other concerns for the political well-being of the community in addition to concern for the separation of powers between the branches of government. At least one function of tort liability is to create incentives to prevent injuries by forcing the internalization of the costs of carelessness. Underlying the continued acceptance of some immunity for government acts are assumptions about government actors and organization which suggests that these incentives do not get properly translated into government decision-making processes. Fearing liability, bureaucrats who are already risk averse may become more so, and the pool of talented persons willing to forego private advantage to serve in the public sector may be reduced. The psychic income of serving the public may not be sufficient to overcome fear of lawsuits and possible liability. The result, it is argued, is over-deterrence: a government decisionmaking process which is less capable of, and less willing to, entertain imaginative ideas.<sup>35</sup>

Governments produce a wider package of goods and services than

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32. See, e.g., Baxter, *Enterprise Liability, Public and Private*, in *Liability Symposium*, *supra* note 3, at 45, 50.

33. Damage limitations or caps typically place ceilings on the total amount recoverable by any one person and the aggregate amount paid out per occurrence. These amounts are unrelated to actual damages, severity of injury or number of injured parties.

34. See *infra* notes 64-83 and accompanying text, for a review of recently enacted legislative reforms which carve out more areas of immunity. These statutes suggest that, with a few exceptions (e.g., hazardous waste and pollution liability), it is not so much dissatisfaction with the standard of care imposed that concerns reformers (e.g., juries applying no-fault standards instead of the traditional fault based standard of negligence) but rather the amount paid.

35. A distinction must be made between official liability and government-enterprise liability. The former raises a more direct and serious issue of over-deterrence. But, even with official immunity, government liability may unduly restrain the governmental decision-making process because of its negative effects on officials' behavior. See, e.g., *Lipman v. Brisbane Elementary School District*, 55 Cal. 2d 224, 229, 359, P.2d 465, 467, 11 Cal. Rptr. 97, 98 (1961) (en banc) (citing the possibility of inhibited officials and inability to attract persons to government services as reasons for denying enterprise liability as well as official liability). For analyses of the effects of official civil liability versus the effects of enterprise liability on the behavior of government actors, see P. SCHUCK, *SUING GOVERNMENT* (1983); Cass, *Damage Suits Against Public Officials*, 129 U. PA. L. REV. 1110, 1153-74 (1981); Mashaw, *Civil Liability of Government Officers, Property Rights and Official Accountability*, in *Liability Symposium*, *supra* note 3, at 26-33; Shepsle, *Official Errors and Official Liability*, in *Liability Symposium*, *supra* note 3, at 35; Baxter, *Enterprise Liability, Public and Private*, in *Liability Symposium*, *supra* note 3, at 45.

private sector suppliers, and the mix of goods and services they produce is far more fluid. From one period to the next, the mix reflects both changes in the public's desired level of funding for services previously supplied, and demand for new services in response to the absence or inadequacy of market suppliers. A government decision to provide a good which is either unavailable in, or inadequately supplied by, the private sector involves various sub-decisions relating to the provision of that good: how much to produce, who should receive the good, how to finance it, and how to structure delivery of the good. These decisions are complicated political decisions, quite apart from the political nature of the budgetary process. Moreover, the indivisibility of "public goods," (i.e., exclusion is not feasible)<sup>36</sup> makes it more difficult to measure government's productivity or effectiveness in managing resources.<sup>37</sup> Thus, the argument in favor of sovereign immunity is not only that judicial second guessing is inappropriate in our democratic society in terms of who makes decisions as to resource allocation, but that the complexity of the decision-making process as to the entire output makes it far less certain that the judiciary has the information necessary to second guess as to any one decision.<sup>38</sup>

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36. One commentator defines "public good" as follows:

(1) If the good is available to one member of a group, it is available to the others, or at least cannot economically be denied them. (2) If provided to one member of a group, the good can be provided to others at no extra cost, or at least at an extra cost that is below the average cost of all the units provided.

Olson, *Official Liability and Its Less Legalistic Alternatives*, in *Liability Symposium*, *supra* note 3, at 67, 72.

37. "The very indivisibility that makes a public good go to everyone in a group in essence makes it unquantifiable. Thus, we usually don't know how much output an agency has produced, or if we knew, whether that level of output would reflect efficient management of the resources." *Id.* at 75.

38. *Id.* at 78. Olson points out that official immunity is based on assumptions about the ability of government managers to monitor the performance of their subordinates, and states that those assumptions are invalid because of significant informational difficulties. This argues for eliminating or restricting official immunity in order to improve government's performance. But, argues Olson, these very same informational difficulties that plague government managers also apply to the courts. Thus, removal of official immunity will not necessarily translate into more efficient government agencies. Olson's argument applies with equal force to a rule imposing enterprise liability. We will not necessarily get more efficient decision-making by imposing liability. It may be, however, that the separate issue of fairness, in terms of compensation for the victim, might dictate allowing recovery against the enterprise as a whole, whether or not the court can effectively determine *ex post* the efficiency of government decisionmaking processes.

See also Kramer & Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 283-86. Kramer and Sykes note that, while both strict and negligent vicarious liability result in better resource allocation in the private sector because each forces cost internalization, the result of cost internalization by the public sector was not clear. Reduction in government services may or may not be efficient. *Cf.*

There is some force to the arguments against judicial intervention in decisions; it makes sense to have decisions in accord with the public's interest as defined by the electorate. But, limiting recovery by either immunizing the act or capping damages places upon a randomly selected segment of society, those who are victims of government negligence, the cost of government's pursuit of one goal over another. Our system of tort law does not, of course, provide every victim of an accident with monetary compensation. Accidents caused by government acts can be viewed as a group of events for which society has decided compensation should not be paid.<sup>39</sup>

But there exists a question of basic fairness. Unlike accidents where the law determines no one is at fault, injuries suffered at the hands of government but for which no compensation is paid because of immunity are acts which if performed by one's neighbor or the XYZ Corporation would yield recovery. It is true that a victim's practical chance of recovery against a private defendant depends upon the financial position of the tortfeasor, but the government is different from a judgment proof defendant. In the case of government negligence, the law denies recovery. To the victim, this is morally different from a law under which he can obtain a determination of a wrong committed, but may be unable to recover damages because the defendant has no assets. There is the possibility the plaintiff might eventually recover against the defendant if assets become available. Moreover, in the government negligence case, there is an ongoing relationship between the parties that is likely to exacerbate feelings of injustice on the part of the victim. The typical tort suit against a government defendant is one in which, on one side, we have a plaintiff who has been paying taxes to the tortfeasor and on the other side a defendant who, as in the past, can compel the payment of taxes from all citizens, including the victim, to meet its various obligations. Thus, to use Professor

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Cass, *supra* note 35, at 1179 (arguing that enterprise liability provides both better incentives for government officials and compensation for the victim).

39. The movement of the tort system away from a fault based system to one designed primarily to compensate victims has been the subject of great legal debate about why it came about, its moral underpinnings, its effect on tort litigation and liability insurance and the adequacy of a judicial system to administer a no-fault system of victim compensation. However clear the direction of tort law may be, we have not yet endorsed a no-fault system for parties injured by pure accidents. For general analyses and commentary on the direction of modern tort law in general and the legal scholarship in the area. See L. FRIEDMAN, *TOTAL JUSTICE* 52-76 (1985); G. E. WHITE, *TORT LAW IN AMERICA* (1985); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

Michelman's terminology from a related analysis of the just compensation issue, tort immunity carries with it "demoralization costs."<sup>40</sup>

The inequity of noncompensation is in some instances compounded because the victims may not, in fact, be random. For example, a number of states single out maintenance of parks and recreational facilities for immunity from tort liability on the ground that only government will provide such services to the public free or at substantial subsidization. The additional burden of liability would cause some governments to withdraw such services to the detriment of the community. Sovereign immunity allows governments to choose to maintain their parks negligently. If a government chooses negligent maintenance, some citizens will stop using the parks. Those who can afford to buy park services from other suppliers (e.g. membership in a country club) will not use the public parks, but those who cannot afford to purchase park-like services elsewhere are left behind.

One rejoinder to the argument that lower income persons bear the brunt of a practice of negligent park maintenance is that such persons are also the prime beneficiaries. Even negligently maintained parks are better than no parks, and tort liability for negligent maintenance of parks would result in communities ceasing to provide them at least through general revenues (as opposed to user fees).<sup>41</sup> Assuming this is the case, there are still other social costs which flow from tort immunity to be considered in terms of the quality of the governmental decision-making processes. The issue is not simply whether or not dangerous parks are better than no parks at all. Of the two groups, those who can purchase park-like services and those who cannot, those who can afford to exit are the more likely, had they no exit option, to voice complaint.<sup>42</sup> They have more resources and more political clout. With court remedies eliminated, the costs of the decision as to the level of maintenance are not only borne randomly by the victims, but the victims are more likely to be from a group with less financial ability to bear those costs and less political ability to object or call into question allocation decisions through other political processes.<sup>43</sup> Immunity for

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40. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967). Michelman notes that the issues addressed in his article are closely akin to the issues of compensation from the treasury for accident victims generally. *Id.* at 1214 n.5. Where the losses are attributable to direct government decisions, as they are in the "regulatory takings" discussed by Michelman, the issue is, "shall the losses be left with the individuals on whom they happen first to fall, or shall they be socialized?" *Id.* at 1169.

41. See the discussion in the text accompanying *infra* notes 52 & 53 for why this assumption may not be correct.

42. A. HIRSCHMAN, *EXIT VOICE AND LOYALTY* 45-53 (1970).

43. See Kramer & Sykes, *supra* note 38, at 279 (uncompensated injuries from section

operation of hospitals and correctional facilities is subject to the same objection. The victims come from groups with limited political access and limited options, or no option at all, except to use the public services.

However imperfect the translation of deterrence incentives from court decisions might be, the absence of liability reduces significantly the chances that government decisionmakers will account for these costs in making their choices *ex ante*. The result is a less efficient decisionmaking process and one which is less responsive to consumer preferences.<sup>44</sup> If the only "voice" has been silenced, government will not pay sufficient attention to preferences for safety in recreational facilities. If dissatisfaction is muted or ineffectively presented, unsafe parks may not be the product of a reasoned consideration of whether such parks are better than no parks, but rather the product of political expediencies.

There are other factors which suggest government officials will not consider the true costs of negligent delivery of public services. Politicians are under constant pressure to provide increased public goods and services. In part, they are responding to the demands of voters, and in part they are motivated by their own desire to be reelected. Visible, tangible delivery of public services enhances their stature for the next election. Similarly, most theories of bureaucratic behavior posit that government agencies operate to expand their budgets.<sup>45</sup> Yet, at the same time, government actions are restrained by demands, sometimes reaching fever pitch, for lower taxes.

There is significant empirical data that citizen pressures for both increased services and lower taxes exist side by side. Surveys of California and Massachusetts voters after enactments of constitutional property tax limitations in those states found that in voting for severe restrictions on property taxes, voters neither wanted, nor saw the necessity for, any cut in public services.<sup>46</sup> Noting that these two sets of demands often coexist,

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1983 violations may "fall" disproportionately on segments of the population with limited political power; as a result, a majority of the electorate, even if informed as to the behavior of municipal officials, "may prefer liability externalization"). *See also* Michelman, *supra* note 40, at 1255 (to the extent uncompensated losses fall on the poor, the poor are less likely to feel that in the course of their participation in society, they have achieved reciprocity in compensatory concessions. Non-compensation will be experienced as more unfair and unjust).

44. A. Hirschman, *supra* note 42 at 59-61.

45. For literature on the motivations and behavior of politicians and bureaucrats, *see generally* A. DOWNS, *INSIDE BUREAUCRACY* (1967); D. KATZ & R. KAHN, *THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS* (2d ed. 1978); W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

46. D. SEARS & J. CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA*, 44-50 (1985); Ladd & Wilson, *Why Voters Support Tax Limitations: Evidence from Massachusetts' Proposition 2-½*, 35 NAT'L TAX J. 121, 124 (1982).



Professors Kramer and Sykes, addressing municipal liability under section 1983, suggest that municipalities will view "externalization of liability" as an opportunity for cost reduction.<sup>47</sup>

Maintenance is a low visibility service, and empirical evidence supports the theory that when a bureau is forced to reduce costs, maintenance will be at the top of its list.<sup>48</sup> Maintenance is an operating expense funded out of the current budget for which the short term political rewards are likely to be viewed as less compelling compared with those associated with adding new facilities or new programs.<sup>49</sup> Unless the cost of nonmaintenance has an impact on the availability of funds for visible programs or activities more highly valued by politically active interest groups, lowering maintenance standards is the least painful way to reduce costs. The less painful political decision may translate into undue hardship for the ordinary users of public facilities.

It is of course true that in practical terms there is a limit on how high taxes can be raised at any given time. Governments must choose what services to provide and at what level. It may well be that, after decades of neglect, costs of upgrading and maintaining public infrastructure at a level sufficient to avoid liability, when combined with the costs of providing other services at the same level as before, are beyond the taxing capacity of many governments.<sup>50</sup> This political fact may explain the large number of

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47. Kramer & Sykes, *supra* note 38, at 279. See also A. MELTSNER, THE POLITICS OF CITY REVENUE 196 n.5 (for references to literature concerning the lack of nexus between preferences for expenditures and desire to pay taxes), 203 (1971).

48. See, e.g., F. LEVY, A. MELTSNER & A. WILDAVSKY, URBAN OUTCOMES 48, 59, 137 & 185 (1974) (the authors found that in the three public services they studied in the City of Oakland — schools, streets and libraries — maintenance expenditures were the most expendable); see also H. LEONARD, CHECKS UNBALANCED: THE QUIET SIDE OF PUBLIC SPENDING 169-75 (1986) (an analysis of the current problems with the nation's infrastructure which lays much of the blame for our decaying infrastructure on the forces which make maintenance politically unrewarding).

The connection between maintenance and liability costs can be seen in a study of lawsuits against municipalities and schools arising out of injuries in parks and recreational facilities. This study found that most accidents are the result of lack of supervision and poor maintenance. In particular, cases against municipalities involved more instances of poor maintenance. Supervision, like maintenance, is an operating expense. B. VAN DER SMISSEN, THE LEGAL LIABILITY OF CITIES AND SCHOOLS FOR INJURIES IN RECREATION AND PARKS § 4.2 at 192 (1968).

49. See H. LEONARD, *supra* note 48, at 173, where the author discusses the disincentives created by treating maintenance as an operating expense, and therefore, not "bondable."

50. Public works spending at all levels of government dropped from 20% of public expenditures in 1950 to 7% in 1984. Estimates of replacement or rehabilitation costs for the nation's bridges alone is put at \$51.4 billion. Clinton, *America is Buckling and Leaking*, N.Y. Times, June 24, 1988, at A31. A recent study commissioned by the Municipal Bond

states which have extended tort immunity to the upkeep of public infrastructure.<sup>51</sup> One can argue, then, that crude measures such as immunity are politically necessary, even if they are not justified by sound policy.

Even accepting the power of the argument purely for expediency, it is still not clear that governments should use immunity to respond to the problem of insufficient funds. The immunity remains even when the political necessity for the immunity has ceased; as state law, it is applied to all local governments regardless of individual financial capacity. Most important, providing for tort immunity presupposes that certain choices are inevitable — suppositions which may or may not be accurate.

Return to the example of tort immunity for park maintenance and the argument that even though lower income persons bear the brunt of a practice of negligent maintenance of parks they are the prime beneficiaries. There is an underlying assumption that, under a rule of liability, no community would choose to allocate sufficient funds for adequate park maintenance given the other public services which must be funded. This seems an unlikely assumption, for it means that public parks have no value to those persons with higher incomes who can afford to purchase park-like services. On the contrary, empirical evidence suggests that the distribution of park services is biased in favor of the well-to-do, *i.e.*, they get better and more services than the poor.<sup>52</sup> While this bias presents other problems for the equitable distribution of public services, it nevertheless suggests that parks are valuable to all members of the community<sup>53</sup> and that the distribution of park and recreational services is probably unrelated to the immunity/liability rules. Thus, one has to question decisions that create incentives to maintain recreational facilities poorly, driving away the well-to-do and putting significant risks on those who cannot elect to purchase alternatives.

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Insurance Association estimates that, by 1995, state and local governments will spend about \$150 billion annually on capital improvements and infrastructure. Twenty percent of these expenditures will be supported by public borrowing. *Bond Buyer*, N.Y. Times, June 5, 1989, at A16.

51. See *infra* notes 70-73 and accompanying text.

52. Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1675 (1979); F. LEVY, A. MELTSNER & A. WILDAVSKY, *supra* note 48, at 232-37.

53. A. MELTSNER, *supra* note 47, at 204 (reporting that culture, recreation and public safety were the public services most often mentioned by citizen leaders as the services they used).

### III. REFORM OF STATE IMMUNITY STATUTES

The persuasiveness of the policy arguments is best assessed after examining the situation. First, it is clear that change is taking place in areas that the foregoing discussion suggests raises serious problems. Whether one wants to support such changes will depend to a great extent then on the matters discussed in the subsequent two parts of this article: the insurance crisis and the actual experience of municipalities in court.

#### A. Tort Claims Acts in General

In many states, the abrogation of sovereign immunity for governmental negligence came from the judiciary. Whether judicially or legislatively initiated, most states today have tort claims statutes which remove local government immunity from suit for certain types of negligence.<sup>54</sup> The typical tort claims act takes one of two forms: the state either waives immunity for its political subdivisions and carves out the exceptions where immunity continues; or *vice versa*, *i.e.* there is no general waiver of immunity, but liability attaches for specific acts.<sup>55</sup> In either case the contours of state tort claims acts are quite similar. Local governments are liable for negligent ministerial acts and not liable for those acts classified as discretionary. Only a few states still use the governmental/proprietary distinction to divine when liability attaches.<sup>56</sup>

In addition to discretionary acts, legislative action or nonaction, judicial acts, granting of permits or licenses, arrests and imprisonments are uniformly clothed with immunity. Most states have specifically limited

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54. Over two-thirds of states have tort claims statutes. See Appendix A.

55. See MINN. STAT. ANN. §§ 466.02 & 466.03 (West 1977) as an example of the waiver of liability or open-ended model, and CAL. GOV'T CODE §§ 815-818.8 (West 1980) as an example of the exception or closed-ended model.

56. Ohio recently enacted a tort claims act which incorporates the prior common law governmental-proprietary distinction. Its statute contains detailed definitions of what constitutes governmental and proprietary functions, as well as broad catchall clauses for each. For example, a governmental function includes any function that is for the common good of all citizens of the state or that "promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function." OHIO REV. CODE ANN. §§ 2744.01(C)(1)(b) & (c) (Anderson 1987 Supp.).

Michigan, Texas and Rhode Island also incorporate the governmental/proprietary distinction. MICH. COMP. LAWS ANN. § 691.1413 (West 1987); TEX. CIV. PRAC. & REM. § 101.022(b) (Vernon 1986); R.I. GEN. LAWS § 9-31-2 (1985). Michigan defines a proprietary function as "an activity primarily conducted for the purpose of producing a pecuniary profit." MICH. COMP. LAWS ANN. § 691.1413 (West 1987). Damage limitations are not applicable to proprietary activities in Texas and Rhode Island.

government liability for unimproved property, the conditions of streets and highways caused by weather conditions<sup>57</sup> and government inspections. Another fairly common provision in state tort claims acts is the designation of the initial decisions as to the placement of traffic signs and other traffic controls as discretionary, and therefore immune.<sup>58</sup>

As to public buildings and other public property, *e.g.* streets, highways, and bridges, the state statutes vary as to when local governments can be held liable for negligent operation and maintenance. In many states the plaintiff must prove the government had actual or constructive notice of a "dangerous condition" and reasonable time to repair.<sup>59</sup> Moreover, constructive notice and reasonableness tend to be narrowly defined. The Illinois statute, for example, specifies that there is no constructive notice if the inspection system used by the government was reasonably adequate. Determination of the adequacy of the inspection system is based on a cost-benefit analysis which takes into account the cost of the inspection system and the likelihood of injury.<sup>60</sup> Similarly, the California statute specifies that reasonableness is determined by taking into consideration the time and opportunity the public entity had to take action and by "weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost . . . of protecting against the risk of injury."<sup>61</sup>

The typical tort claims act, moreover, contains additional protections for the public fisc not available to private defendants. The most important are: (i) procedural requirements making it more difficult to sue the government than a private individual corporation, such as notice require-

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57. The "snow and ice" exception can be found in nearly every state, even those without tort claims acts. *See generally* 2 C.J. ANTIEU, MUNICIPAL CORPORATION LAW §§ 13.05-13.11 (1989).

58. *See, e.g.*, ILL. ANN. STAT. ch. 85, para. 3-104 (Smith-Hurd 1987); N.J. STAT. ANN. § 59:4-5 (West 1982); TEX. CIV. PRAC. & REM. § 101.060(a)(1) (Vernon 1986).

59. *See*, CAL. GOV'T CODE §§ 830-835 (West 1980); N.J. STAT. ANN. § 59:4-2 (West 1982). Both California and New Jersey require that injuries be proximately caused by a dangerous condition on public property. The condition must have been negligently caused by an employee, or the government must have had actual or constructive notice and reasonable time to correct it. *See also* MICH. COMP. LAWS ANN. §§ 691-1403 & 691-1406 (West 1982) (limiting liability for injuries arising out of defects on streets and public buildings to those where the government knew or should have known of the defect and had reasonable time to repair but failed to do so).

60. ILL. ANN. STAT. ch. 85 para. 3-102(b)(1) (Smith-Hurd 1987).

61. CAL. GOV'T CODE § 835.4.

ments<sup>62</sup> and short statutes of limitations;<sup>63</sup> (ii) limitations on damage recoveries;<sup>64</sup> and (iii) exclusion of punitive damages and prejudgment interest.<sup>65</sup> Thus, at the beginning of the eighties, the vast majority of states already provided a variety of immunity protections aimed at preserving governmental processes and purse.

### B. *Changes in State Tort Claims Acts*

Since the early 1980s there has been significant legislative activity to define more sharply governmental tort liability, and to narrow exposure to liability. For example, the National Conference of State Legislatures has called for a general revitalization of "a restricted form of sovereign immunity."<sup>66</sup> Of the various legislative reforms, one of the most common

62. Most states require the plaintiff to file a notice of claim with the defendant government within a short period of time after the claim arose or discovery of the claim. Six months is commonly used as the time period in which such notice is to be filed. *See, e.g.*, COLO. REV. STAT. § 24-10-109 (1988); IDAHO CODE § 6-906 (Supp. 1989); IOWA CODE ANN. § 613A.5 (West Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 5-404 (1984); MINN. STAT. ANN. § 466.05 (West 1977); TEX. CIV. PRAC. & REM. § 101.101 (Vernon 1986). A few states have 90-day periods, *e.g.*, OKLA. STAT. ANN. tit. 51 § 156(B) (West Supp. 1988-89), and a few have periods of one year or longer. *E.g.*, FLA. STAT. ANN. § 768.28(6)(a) (West 1989) (three years in most cases). NEB. REV. STAT. § 13-920 (1987) (one year); UTAH CODE ANN. § 63-30-13 (1986) (one year); WYO. STAT. § 1-39-113(a) (1977) (two years).

63. The typical statute of limitations period for commencement of an action is two years from filing the notice of claim. *See, e.g.*, IDAHO CODE § 6-911 (Supp. 1989); IOWA CODE ANN. § 613A.5; W. VA. CODE § 29-12A-6(a) (1986); OR. REV. STAT. § 30.275(8) (1988); S.C. CODE ANN. § 15-78-110 (Law. Co-op. Supp. 1988). In 1980 Illinois shortened its statute of limitations from two years to one year. ILL. ANN. STAT. ch. 85 para. 8-101 (Smith-Hurd 1987).

In a few states inclusion of the amount claimed for damages is prohibited. *E.g.*, CAL. GOV'T CODE § 910 (West Supp. 1990) (amended in 1987 to provide that no dollar amount is to be included if over \$10,000); OHIO REV. CODE ANN. § 2744.04(B) (Page's supp. 1988) (prohibits any specification of a dollar amount for damages sought). Louisiana does not allow jury trials. LA. REV. STAT. ANN. § 13:5105 (West Supp. 1989).

64. More than half of the states have damage caps. *See* Appendix B. Three states allow recovery against a local government of up to the amount of insurance if available. Otherwise the local government is immune. N.C. GEN. STAT. § 160A-485 (1987); GA. CODE ANN. § 36-33-1(a) (1987); VT. STAT. ANN. tit. 29, § 1403 (1986).

65. *See, e.g.*, CAL. GOV'T CODE § 818 (West 1980); KAN. STAT. ANN. § 75-6105(c) (1984); MD. CTS. & JUD. PROC. CODE ANN. § 5-403(c) (1984); LA. REV. STAT. ANN. §§ 13:5106 & 13:5117 (West Supp. 1989); MINN. STAT. ANN. § 466.04; W. VA. CODE § 29-12A-7(a) (1986); OR. REV. STAT. § 30.270(2) (1988); WIS. STAT. ANN. § 893.80(3) (1987); S.C. CODE ANN. § 15-78-120(b) (Law Co-op. 1989).

66. *See* House Hearings, *supra* note 1, at 156 (statement of Hon. Grant Jones on behalf of the National Conference of State Legislatures). A summary of actions pending before state legislatures, prepared in 1986 by the National Conference of State legislatures, listed ten states as having bills introduced dealing with sovereign immunity. National Conference of State Legislatures, *Summary of State Legislative Action* (1986).

was what might be called government's "product liability" reform which mirrors the concern in the private sector about the broad exposure of manufacturers to product liability claims. A number of states, following the lead of California,<sup>67</sup> Illinois<sup>68</sup> and New Jersey,<sup>69</sup> specifically excepted from tort liability injuries caused by design defects in public buildings and infrastructure.<sup>70</sup> Also included in this "product liability" exception is immunity for failure to upgrade, improve, or otherwise alter such public

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67. California's statute provides:

Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. [Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. . . .]

CAL. GOV'T CODE § 830.6 (West 1980) (the part in brackets was added to the statute in 1979).

68. Illinois, like California, exempts design defects if the plan or design was approved by the appropriate governmental body exercising discretionary authority. A government can be liable "if after the execution of such plan or design it appears from its use that it has created a condition that is not reasonably safe." ILL. ANN. STAT. ch. 85, para. 3-103 (Smith-Hurd 1987). In another section relating to sidewalks and streets, the statute provides immunity for failure to upgrade streets, sidewalks, traffic signs, etc. to new standards. ILL. ANN. STAT. ch. 85, para. 3-105 (West 1987).

69. N.J. STAT. ANN. § 59:4-6 (West 1982).

70. See, e.g., ARIZ. REV. STAT. ANN. § 12-820.01 (West Supp. 1983) (enacted in 1984 as part of the state's tort claims act for public entities); IND. CODE ANN. § 34-4-16.5-3(16) (Burns Supp. 1989) (added in 1987 to except design of highways where design or redesign twenty or more years old); IOWA CODE ANN. § 613A.4(7) (West Supp. 1989) (added in 1983); MISS. CODE ANN. § 11-46-9(m) (Supp. 1989) (enacted in 1984); OKLA. STAT. ANN. tit. 51, § 155(26) (West Supp. 1990) (amended in 1988); S.C. CODE ANN. § 15-78-60(15) (Law. Co-op. Supp. 1988) (enacted in 1986 as part of the state's tort claims act); WYO. STAT. § 1-39-120(a) (1988) (added in 1986).

facilities.<sup>71</sup> Similarly, a number of states have widened the immunity for decisions related to the placement of traffic controls.<sup>72</sup> A few states have gone farther and exempt from tort liability the ordinary maintenance of certain types of public property.<sup>73</sup>

Another exception adopted in recent years by a number of states exempts local governments for the operation and maintenance or inadequacy of hospitals and jails.<sup>74</sup> Other areas of reform include immunizing activities related to recreation,<sup>75</sup> waste removal,<sup>76</sup> pollution,<sup>77</sup> day care,<sup>78</sup>

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71. See, e.g., IOWA CODE ANN. § 613A.4(8) (West Supp. 1989); WYO. STAT. § 1-39-120(a) (1988).

72. See, e.g., ILL. ANN. STAT. ch. 85, para. 3-104 (Smith-Hurd 1987) (amended in 1984 to expand both scope of immunity and types of traffic controls covered; immunity is now absolute, whereas prior law incorporated the need for warnings under certain circumstances). See also COLO. REV. STAT. § 24-10-106 (1)(d) (Bradford 1988); TENN. CODE ANN. § 29-20-203(a) (Supp. 1989).

73. Wyoming amended its statute in 1986 to provide that there was no liability for injuries arising out of the maintenance of streets, highways, or bridges. WYO. STAT. § 1-39-120(a) (1989). Nebraska amended its tort claims statute in 1983 to specifically permit maintenance of highways at a minimal level. NEB. REV. STAT. § 13-914 (1987). In 1985 Minnesota exempted construction, operation and maintenance of water access sites (including those sites related to water filled mine pits), parks and open recreational areas from liability. MINN. STAT. ANN. § 466.03(6)(c) & (e) (West Supp. 1989). Similarly, South Carolina, in enacting a tort claims act in 1986, limited liability for maintenance and supervision of parks and playgrounds to situations where there was failure to repair "within a reasonable time after actual notice." S.C. CODE ANN. § 15-78-60(16) (Law. Co-op. Supp. 1988) (emphasis supplied). California adopted a series of amendments limiting liability for unimproved property, road repair of nondedicated roads, land failures and hazardous recreational activities. CAL. GOV'T CODE §§ 831.21, 831.25, 831.3, and 831.7 (West Supp. 1989) (enacted in 1987, 1984, 1981, and 1983, respectively). Illinois, in 1984, expanded its immunity for maintenance of parks, playgrounds and open areas to include all recreational buildings and enclosed facilities. ILL. ANN. STAT. ch. 85, para. 3-106 (Smith-Hurd 1987).

74. See, e.g., MINN. STAT. ANN. § 466.03(11) (West Supp. 1989) (added in 1986 to exclude liability for treatment at a municipal hospital or prison where "reasonable use of available funds has been made to provide care"); W. VA. CODE § 29-12A-5(14) (1986) (the tort claims act enacted in 1986 excludes from liability losses related to the provision, equipping, lawful operation or maintenance of any prison, jail or correctional facility); OKLA. STAT. ANN. tit. 51, § 155(23) (West Supp. 1989) (amended in 1984 to exclude losses related to the provision, operation and maintenance of prisons); S.D. CODIFIED LAWS ANN. § 3-21-8 sup. 1989) (enacted in 1986 to exclude liability for failure to provide, or any inadequacy of, jails); OHIO REV. CODE ANN. STAT. § 2744.01(C)(2)(h) & (o) (Anderson Supp. 1988) (excludes from liability the maintenance and the operation of jails and operation of mental health facilities).

75. For examples of recent legislation relating to recreational activities, see CAL. GOV'T CODE § 831.7 (West Supp. 1989) and ILL. ANN. STAT. ch. 85, para. 3409 (Smith-Hurd 1987) (both of which limit liability for hazardous recreational activities); MINN. STAT. ANN. § 466.03(6)(e) (West Supp. 1989) (added in 1986 to immunize acts related to the construction, operation and maintenance of parks and open areas).

76. See, e.g., UTAH CODE ANN. § 63-30-10(1)(l)(iii) (Supp. 1989) (amended in 1985

and emergency telephone services.<sup>79</sup> One state prohibits use of strict liability in connection with certain types of pollution cases against government defendants.<sup>80</sup>

Equally important is the expansion of the types of entities and persons which come under the immunity umbrella. States have, for example, extended immunity to volunteer boards and commissions appointed by local governments.<sup>81</sup> City managers, city council members and other individual members of government have been given immunity for their negligent acts.<sup>82</sup> In a few states athletic groups and events have also been favored with immunity.<sup>83</sup>

Reviewing these changes as a whole, without taking into account the considerable across the board tort reform changes such as the abandonment of joint and several liability,<sup>84</sup> one sees legislatures both reacting to insurance availability problems in specific areas, for example, by granting

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to provide immunity for handling hazardous materials); W. VA. CODE § 29-12A-5(16) (1986) (enacted in 1986 as part of state's tort claims act, it immunizes the operation of landfills).

77. See, e.g., N.H. REV. STAT. ANN. § 507-B:9 (Supp. 1989) (added in 1986 a requirement that plaintiff show by a preponderance of the evidence that acts of government with respect to a "pollution incident" were unreasonable, combined with a presumption that acts were reasonable if in compliance with prevailing standards). See also COLO. REV. STAT. § 24-10-106(4) (1988), discussed in *infra* note 80.

78. See, e.g., MINN. STAT. ANN. § 466.03(6)(d) (West Supp. 1989) (added in 1986 to provide immunity if day care providers, licensed by the municipality, do not meet state licensing standards unless the municipality had actual or constructive notice of the failure).

79. Two states immunize losses arising out of operation of a "911" emergency system. TEX. CIV. PRAC. & REM. § 101.062 (Vernon Supp. 1989) and IND. CODE ANN. § 34-4-16.5(17) (Burns Supp. 1989).

80. Colorado prohibits absolute or strict liability in connection with "a dangerous condition of, or the operation and maintenance of, a public water facility or public sanitation facility." COLO. REV. STAT. § 24-10-106(4) (1988).

81. See, e.g., IDAHO CODE § 6-902(2) (Supp. 1989) (amended in 1986 to include state licensed hospitals and nursing homes in the definition of political subdivisions); FLA. STAT. ANN. § 768.28(10)(a) (West 1989) (amended in 1988 to treat health care providers of prisoner health care as agents of the state).

82. ALASKA STAT. § 09.17.050 (Supp. 1988) (adopted in 1986 to immunize members of nonprofit organizations, school boards and members of governing bodies for all but gross negligence); TENN. CODE ANN. § 29-20-201(2) (Supp. 1989) (gives immunity to all members of governmental boards, commissions and authorities, except for gross negligence or willful or wanton conduct); KAN. STAT. ANN. § 75-6119 (Supp. 1988) (immunity for members of governing bodies, commissions, committees or councils).

83. OKLA. STAT. ANN. tit. 51, § 155(20) (West Supp. 1989) (no liability in connection with government sponsored athletic conferences).

84. For other tort reform legislation related to local governments defendants only (other than legislation dealing with immunity), see, e.g., N.J. STAT. ANN. § 59:9-3 (West Supp. 1989) (public entities are severally liable); N.H. REV. STAT. ANN. § 507-B:9 (Supp. 1988) (joint and several liability for injuries arising out of pollution incidents and government defendant's liability greater than 50%); IND. CODE ANN. § 34-4-33-8 (Burns



immunity for operation of landfills or day care centers or athletic and recreational activities, and anticipating future liability costs by adopting changes in the law related to the widespread neglect of public infrastructure and the consequences of that neglect. For better or worse, the legislative trend is to react to a crisis in ways that raise precisely the issues that were discussed in Part II.

#### IV. INSURANCE CRISIS FOR LOCAL GOVERNMENTS

##### A. Empirical Basis for Concern

Regardless of the causes of the liability insurance industry crisis of the mid-eighties (still a matter of political and scholarly debate), the evidence is overwhelming that the effect on local governments as a group was particularly severe. Premium increases of 200%-400% accompanied by lower coverage and higher deductibles were the norm.<sup>85</sup> Moreover, widespread policy cancellations and withdrawals of companies from the municipal liability insurance market often made insurance unavailable at any cost.<sup>86</sup> Dozens of states organized task forces during this period to investigate the causes of the liability insurance crisis. One task force, the Cuomo Commission, found that the types of activities singled out by the insurance industry as uninsurable risks tended to be publicly supplied services, such as hazardous waste removal, recreation activities, mass transit and child care centers.<sup>87</sup> The Cuomo Commission's findings were echoed in the findings of a survey of 145 cities nationwide,<sup>88</sup> in the testimony of various local government organizations before Congressional hearings and in the accompanying flurry of activity of such organizations calling for tort and insurance reform.<sup>89</sup> Similarly, a 1985 report by the

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1986) (Indiana preserves the rule of contributory negligence for government entities, whereas it has otherwise adopted comparative negligence).

85. U.S. Department of Justice, *supra* note 12, at 9; 1 *Cuomo Commission Report*, *supra* note 12, at 33.

86. *Availability and Cost of Liability Insurance, 1986: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 235 (1986) (testimony of Chuck Hardwick, Assemblyman, Speaker of the New Jersey General Assembly, on behalf of the National Conference of State Legislatures); 1 *Cuomo Commission Report*, *supra* note 12, at 24.

87. 1 *Cuomo Commission Report*, *supra* note 12, at 24, 41.

88. U.S. Conference of Mayors, *U.S. Municipal Liability Concerns, A 145 City Survey* (July 1986), *reprinted in Senate Hearings*, *supra* note 1, at 102-14.

89. *Senate Hearings*, *supra* note 1, at 84 (statement of Lee Ruck, General Counsel, National Association of Counties); U.S. Conference of Mayors, *supra* note 88; *House Hearings*, *supra* note 1, at 142-44; *Hearings before the Committee on Commerce, Science and Transportation*, *supra* note 86, at 168 (statement of William D. Gunter, Commissioner, Florida Insurance Department); *id.* at 194-97 (testimony of Jack Floyd, Executive

National Association of Independent Insurers of the Property/Casualty Insurance Industry cites municipal liability as one of four main causes of the "explosive growth of insurance costs" and hence, the reason for "affordability and availability problems in municipal liability insurance."<sup>90</sup>

### B. Reaction of States and Local Governments

The reactions of states and their local governments to the insurance crisis must be placed in the context of the swirl of theories advanced at the time about its cause or causes. For many, if not most, of the local governments who found themselves inadequately insured, past liability records bore little or no relationship to the size of premium increases or to the withdrawals.<sup>91</sup> The lack of correlation between past liability exposure and insurance costs led some governments and consumer groups to lay the blame at the feet of the insurance companies. At best, the companies were mismanaged, under regulated or ineffectively regulated.<sup>92</sup> At worst, the insurance companies were engaged in price-fixing<sup>93</sup> or a conspiracy to lasso support for the industry's tort reform agenda from local governments — perhaps the most powerful lobbying group at the state level.<sup>94</sup>

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Vice-President, Tennessee Municipal League, Risk Management Pool); *id.* at 232-34 (testimony of Chuck Hardwick, Assemblyman, Speaker of the New Jersey General Assembly, on behalf of the National Conference of State Legislatures).

90. INSURANCE SERVICES OFFICE, INC. AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS; 1985 A CRITICAL YEAR: A STUDY OF THE PROPERTY/CASUALTY INSURANCE INDUSTRY 28, 29 (May 1985); *see also Senate Hearings, supra* note 1, at 126 (statement of the Alliance of American Insurers) (citing municipal liability as one of the major problem areas of liability coverage).

91. *See Hearings Before the Senate Comm. on Commerce, Science and Transportation, supra* note 86, at 236 (testimony of Chuck Hardwick, Assemblyman, Speaker of the New Jersey General Assembly, on behalf of the National Conference of State Legislatures); *id.* at 36 (testimony of Ralph Nader, Director, Center for Study of Responsive Law).

92. *Id.* at 80 (statement of Jay Angoff, Counsel, National Insurance Consumer Organization); *id.* at 168 (statement of William D. Hunter, Commissioner, State of Florida Insurance Dept.); *id.* at 174 (testimony of Lawrence H. Thompson, Chief Economist, United States General Accounting Office). *See also House Hearings, supra* note 1, at 26 (statement of J. Robert Hunter, President, National Insurance Consumer Organization).

93. The McCarram-Ferguson Act exempts the insurance industry from federal antitrust laws. Reske, *Was There a Liability Crisis?*, A.B.A. J., Jan. 1989, at 46 (discussing lawsuits filed in 19 states alleging conspiracy to limit or exclude certain types of insurance coverage in order to cut competition and increase prices).

94. *The Costs and Availability of Liability Insurance for Small Business 1986: Hearings before the House Comm. on Small Business, Part 2*, 99th Cong. 2d Sess. 761, 765 (1986) (letter from Michael A. Hatch, Commissioner, State of Minnesota Department of Commerce); *see generally* Priest, *supra* note 4, at 1523-24; Clarke, Warren-Boulton, Smith & Simon, *Perspectives on the Insurance Crisis: Sources of the Crisis in Liability Insurance, An Economic Perspective*, 5 YALE J. REG. 367, 377-94 (1988).

In response, the insurance industry attacked the existing tort system, arguing that unpredictability of future costs due to expansive changes in liability exposure, not past liability records, was the root cause of the insurance crisis.<sup>95</sup> The industry pointed to municipalities' increased and ill-defined exposure to liability under section 1983, and the willingness of courts to impose strict liability for pollution and hazardous waste activities.<sup>96</sup>

In an immediate reaction to the crisis, states and local governments moved to self-insurance, various pooling arrangements and risk management programs.<sup>97</sup> Nearly half of the states set up task forces in 1986.<sup>98</sup> A 1986 study of current legislative activity in the area of insurance reform found eleven states had bills introduced to place tighter regulatory controls on rate fixing, mid-term cancellations, and coverage reductions by the insurance companies.<sup>99</sup> Similarly, there has been pressure to end the insurance industry's exemption from the antitrust laws or at least to increase federal regulation to counter ineffective state regulation.<sup>100</sup> And of course, as discussed in Part III, there has been the adoption of legislation to immunize certain high-risk government activities. Governments, to that extent, have acted consistently with the insurance industry's understanding of the crisis.

The debate over the cause or causes of the insurance crisis has received serious scholarly attention.<sup>101</sup> It is not within the scope of this article to review or reexamine this debate. It should be emphasized, however, that analyzing the causes of the crisis for local governments is important in

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95. See, e.g., *Senate Hearings*, *supra* note 1, at 139, 142-43 (statement of the American Insurance Association).

96. INSURANCE SERVICES OFFICE, INC. AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *supra* note 90, at 28.

97. THE MUNICIPAL YEARBOOK: 1987, 55 (noting that 12 states established pooling mechanisms, at least 20 enacted provisions for self insurance and 7 states established risk management programs); see also *The Municipal Attorney, 1986 Mid Year Seminar* 4-8 (Mar.-Apr. 1986) (reporting on workshops held concerning pooling, self insurance and risk management).

98. THE MUNICIPAL YEARBOOK: 1987, 55.

99. National State Legislative Conference, *Selected State Legislative Action Re: Affordability and Availability of Liability Insurance* (Aug. 4, 1986).

100. See, e.g., *Current State of the Liability Insurance Crisis, 1987: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. 238-41 (1987); *The Liability Insurance Crisis, 1986: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 285-87 (1986); N.Y. Times, Aug. 8, 1987, at 26, col. 1 (editorial).

101. See Priest, *supra* note 4; Clarke, Warren-Boulton, Smith & Simon, *supra* note 94; Abraham, *The Causes of the Insurance Crisis*, 37 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 54 (1988).

order to judge the appropriateness of the way in which the insurance industry and, in turn, the state legislatures have responded. Theories of insurance mismanagement, in particular the collusion theories, do not adequately explain why insurance companies have refused to sell their product to willing buyers.<sup>102</sup> Insurance unavailability, when combined with evidence of increased tort costs incurred by self-insured local governments,<sup>103</sup> suggests that it is appropriate to focus attention on the interaction of today's tort system with third-party insurance coverage. If the increase in insurance premiums and the unavailability of insurance are not attributable to increases in municipal liability,<sup>104</sup> changes in how certain activities are insured may be more appropriate than a return to wider immunity.<sup>105</sup>

Insurance has become a major burden for municipalities, regardless of the source of the problem. The point, however, is that the problem may not be the one defined by the insurance industry. As will be seen, the data suggest the need to rethink both the crisis and the "reforms" designed to resolve it.

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102. Priest, *supra* note 4, at 1527-29; Clarke, Warren-Boulton, Smith & Simon, *supra* note 94 at 383.

103. See text accompanying *infra* note 156 (self-insured New York City's increased tort costs).

104. A recent study of the insurance industry, undertaken to find empirical evidence of an insurance crisis, supports the position that the crisis was not fueled by an "explosion" of tort litigation. Nye & Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttal*, 41 VAND. L. REV. 909, 918-20 (1988). Another study, however, did find a strong relationship between the current direction of tort law in certain lines of liability insurance and the insurance crisis. Clarke, Warren-Boulton, Smith & Simon, *supra* note 94, at 389-94. This study did not look at frequency of claims, but examined income to premium ratios and underwriting gain/loss ratios for the property-casualty insurance industry. It found larger payments and more volatility, resulting in greater deterioration of operating ratios in the crisis lines (other liability and medical malpractice) than in the industry generally. *Id.* at 390-91.

See *infra* notes 106-81 and accompanying text for a discussion of empirical evidence of a tort explosion.

105. Both Priest, *supra* note 4, and Abraham, *supra* note 101, clearly link changes in the tort liability system to the insurance crisis, although neither is sanguine about the reforms generally proposed to cure the problems. Neither feels the reforms deal with the inherent problems in the structure of a third party liability insurance regime with expanded tort liability. Priest, *supra* note 4, at 1588-90; Abraham, *supra* note 101, at 63. Priest, moreover, suggests that municipalities which can shift to insurance pools and self-insurance are in a much better position than their corporate counterparts because such shifts move the insurance system from a third party liability insurance system to a first party system. This, Priest argues, should be the direction of the change. Priest, *supra* note 4, at 1581-82.

## V. AVAILABLE EMPIRICAL EVIDENCE

Immunity from suit is the one area of tort reform which is unique to government defendants. As the discussion in Part III indicates, there has been a significant amount of legislative activity broadening the scope of governmental immunity. These changes were enacted in response to claims of the increased liability costs which hamper the provision of public services. Even if one recognizes the need to protect the legislative process of resource allocation and accepts as a consequence the inherent inequities in cost distribution, what evidence is there to support the claims of local governments that they are paying too much? Much of the evidence is anecdotal. There is no dearth of horror stories about budget-busting judgments resulting in the elimination of needed public services,<sup>106</sup> the threat of bankruptcy,<sup>107</sup> and the difficulty in retaining public servants who fear potential liability.<sup>108</sup> We do know that insurance premiums increased dramatically and that many local governments have been unable to get insurance for certain types of activities.<sup>109</sup>

To approach the question systematically, we need information about changes over time (adjusted where necessary for inflation or population growth) in (i) the aggregate amount of payments made by government for claims against it; (ii) the number of claims made; (iii) the number which result in payment (whether by settlement or final judgment); (iv) the mean size of awards; (v) the distribution of awards by size; and (vi) the amounts paid in final judgments versus the amount paid in settlements. In order to better understand the deep pocket phenomenon, we also need to make comparisons between governmental and other large defendants in terms of their success in litigation. We also need information as to changes over time in the portion of total awards in multiple defendant suits which are borne by local governments.

The following discussion surveys the available empirical data. It considers three major sources of information: data from the Rand Institute for Civil Justice on civil jury verdicts; tort filing data from various sources; and data on New York City tort filings and settlements. At the outset, it should be noted that there is very little empirical evidence dealing specifically with local governments as defendants. Studies of personal

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106. See, e.g., U.S. Conference of Mayors, *supra* note 88, at 110.

107. Ranii, *Cities Drawing Legal Fire*, NAT'L L.J., Apr. 18, 1983, at 1, 20.

108. U.S. Conference of Mayors, *supra* note 88, at 109 (while claiming that resignations were perhaps the most dramatic illustrations of the dire municipal liability crisis, the survey noted only two of the 145 cities reported any resignations in responses to concern over personal liability).

109. See *supra* notes 85-87 and accompanying text.

injury litigation have either excluded government defendants from their samples or do not isolate types of defendants.<sup>110</sup> The Rand Institute for Civil Justice data, discussed below, are the only data available which differentiate among types of defendants, and then only with respect to the 1959-1979 Cook County study of jury trials.

#### A. *Rand Institute for Civil Justice Data*

The richest sources of data on tort litigation are the Rand Institute for Civil Justice studies of jury verdicts in civil cases in Cook County, Illinois and in San Francisco, California.<sup>111</sup>

The data from the first Cook County study are the most specific and will be discussed more fully below. Of the 19,000 civil cases tried before Cook County juries between 1959 and 1979, 98% were tort cases.<sup>112</sup> Municipalities and government agencies constituted 8% of the defendants, 25% were corporations and 1% were hospital and other nonprofit organizations. Data from the San Francisco study and the subsequent studies do not distinguish the types of defendants. The following summarizes some of the salient information provided by the Rand data and analyzes what it communicates about local governments and the tort crisis.

##### 1. Increases in Dollar Amounts of Verdicts

Neither the Cook County nor the San Francisco data for the twenty year period showed significant increases in the median size of plaintiffs' judgments<sup>113</sup> or in plaintiffs' overall rate of success.<sup>114</sup> On the other hand,

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110. See *supra* note 20 and accompanying text.

111. See generally M. PETERSON & G. PRIEST, *THE CIVIL JURY, TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979* (1982) [hereinafter *COOK COUNTY STUDY*]; M. SHANLEY & M. PETERSON, *COMPARATIVE JUSTICE CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES* (1983) [hereinafter *SAN FRANCISCO STUDY*]; *DEEP POCKETS STUDY*, *supra* note 13; M. PETERSON, *CIVIL JURIES IN THE 1980's, TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS* (1987) [hereinafter *1984 UPDATE*]; D. HENSLER, M. VAIANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION, THE STORY BEHIND THE STATISTICS* (1987).

112. *COOK COUNTY STUDY*, *supra* note 111, at 6. Cases were grouped as follows (the first number is the percentage of cases in Cook County, the second the percentage of cases in San Francisco): automobile accidents (66%) (48%); worker injury (5%) (15%); injury on property (9%) (13%); common carrier (6%) (8%); product liability (4%) (7%); professional malpractice (2%) (7%); contracts/business (2%) (6%); intentional tort (4%) (6%); street hazard (3%) (3%); dram shop (3%) (0%); and miscellaneous (2%) (5%). *Id.*; *SAN FRANCISCO STUDY*, *supra* note 111, at 9.

113. *COOK COUNTY STUDY*, *supra* note 111, at 22-23; *SAN FRANCISCO STUDY*, *supra* note 111, at xii. This median is "the verdict that is equal to or greater than the smallest 50 percent of judgments for the year." *COOK COUNTY STUDY*, *supra* note 111, at 21 n.17.

114. *COOK COUNTY STUDY*, *supra* note 111, at 17-18 (noting that although the

the average size of judgments showed a dramatic increase because of an increase in awards in the very large cases. During 1978 and 1979 in Cook County, after adjusting for inflation, "the largest 10 percent of judgments had values . . . almost three times greater than the largest 10 percent of judgments during the 1960s."<sup>115</sup> The "high-stakes" cases, malpractice, product liability, worker injury, and contracts and business had the largest awards.<sup>116</sup> In the four high-stakes cases plus street hazard cases both average and median awards increased in all ranges of awards.<sup>117</sup> The overall median stayed constant because of the constancy of awards found in the other five categories of cases, which accounted for more than 80% of the plaintiffs' judgments.<sup>118</sup>

The updated figures from the eighties show that average awards have increased across the board. Large increases continued to be observed in the high-stakes cases,<sup>119</sup> but, unlike the earlier period, the very large awards were not limited to these categories.<sup>120</sup> Plaintiffs' success rate also rose in both jurisdictions, continuing the trends observed the last half of the seventies.<sup>121</sup>

## 2. Number of Cases Tried

The number of jury trials changed in the twenty year period of the studies, but the changes do not correspond with the wide perception of a litigation explosion in the 1970s. Jury trials increased in the mid-sixties,

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percentage of plaintiffs' victories at jury trial remained a constant during the period, this general trend masked individual trends within the categories of cases). Plaintiffs' overall rate of victory in San Francisco was 57%. Again, the overall trend does not reflect changes within the categories. SAN FRANCISCO STUDY, *supra* note 111, at 23-24.

115. COOK COUNTY STUDY, *supra* note 111, at 22.

116. *Id.* at 24.

117. *Id.* at 27. See text accompanying *infra* notes 132-38 for a discussion of street hazard cases and the importance of this category to changes in government liability.

118. *Id.* at 28.

119. 1984 UPDATE, *supra* note 111, at 20-23. Among the low-stakes cases, significant increases in both the average and median awards occurred in "injury on property" cases. See *infra* note 137 for a discussion of this change.

120. 1984 UPDATE, *supra* note 111, at 25.

121. Success rates in Cook County increased from 49% to 64%, and the rate of success in San Francisco rose from 57% to 61%. COOK COUNTY STUDY, *supra* note 111, at 17; SAN FRANCISCO STUDY, *supra* note 111, at 11; 1984 UPDATE, *supra* note 111, at 50. Plaintiffs in Cook County were more successful in every category. Some of this increase is attributable to the switch in 1981 to comparative negligence. Not all of the increase was considered the result of the change in law, since increases in plaintiffs' success rates occurred in types of cases where plaintiffs' negligence is not likely an issue. *Id.* at 16.

peaking in 1968, and thereafter decreased until 1978.<sup>122</sup> In the eighties the trend toward fewer trials continued in San Francisco, but was reversed in Cook County, which experienced increases in trials in nearly all categories of suits.<sup>123</sup> The authors of the Rand study suggest that this phenomenon could, in part, be explained by Illinois' 1981 adoption of comparative negligence.<sup>124</sup> They attribute the decrease in San Francisco either to more settlements or to changes in judicial administration.<sup>125</sup>

### 3. Mix of Cases

While auto accident cases dominated the caseloads throughout the period, they showed steady decline from 1970 onward, as high-stakes suits increased in number.<sup>126</sup> Of particular interest are the trends in the categories of lawsuits with high government defendant representation: street hazard (involving negligent design or maintenance of roads or sidewalks or obstructions on roads or sidewalks), common carrier (involving liability to injured passengers on buses, trains, cabs, and airplanes), and injury on property (property owner's liability to tenants, guests, and trespassers).<sup>127</sup> In Cook county during the period 1959-1979,<sup>128</sup> injury on property cases were the second most numerous type of lawsuit, common carrier, the third; while street hazard cases constituted only 3% of total cases.<sup>129</sup> The number of cases tried in all three of these "government" categories declined during this period. Plaintiffs in both jurisdictions won fewer injury on property cases than the average and received modest

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122. COOK COUNTY STUDY, *supra* note 111, at 11; SAN FRANCISCO STUDY, *supra* note 111, at 19-20.

123. 1984 UPDATE, *supra* note 111, at 7-8.

124. *Id.*

125. During the period, California raised the jurisdictional requirements of its lower court and instituted a "court annexed" program of arbitration. Both changes may have contributed to the smaller number of trials. *Id.* at 8-9.

126. SAN FRANCISCO STUDY, *supra* note 111 at 66.

127. COOK COUNTY STUDY, *supra* note 111, at 6 n.3. As mentioned *supra*, published data only identify the types of defendants for the original Cook County Study. The percentages of government defendants for the three categories — street hazards, common carrier and injury on property — were 41%, 43% and 8%, respectively. DEEP POCKETS STUDY, *supra* note 13, at 15.

128. Property and street hazard jury trials declined 40% over the period, while common carrier cases declined 60%. COOK COUNTY STUDY, *supra* note 111, at 15.

129. COOK COUNTY STUDY, *supra* note 111, at 1. Automobile accident cases were the most numerous, constituting 66% of the Cook County cases. *Id.* at 7. Governments were defendants in 5% of the Cook County automobile accident cases. DEEP POCKETS STUDY, *supra* note 13, at 15. In San Francisco, automobile accidents constituted 48% of the cases, followed by worker injury with 15%, injury on property at 13% and common carrier at 8%. Street hazard cases were 3%. SAN FRANCISCO STUDY, *supra* note 111, at 7.



awards.<sup>130</sup> In common carrier cases, plaintiffs won more frequently than average, but awards were small.<sup>131</sup>

Street hazard cases concern the operation and maintenance of streets and sidewalks. As discussed in Part II above, the extent of government liability for negligent operation and maintenance of public infrastructure has been a focal point of recent legislative activity.<sup>132</sup> Hence, data on trends in these cases is especially instructive. Both Cook County and San Francisco had few street hazard cases during the periods studied.<sup>133</sup> But, although the Cook County data for 1959-1979 showed a decrease in the number of street hazard trials, the average size of plaintiffs' awards increased dramatically — 830% from 1960-1967 to 1975-1979).<sup>134</sup> This same phenomenon was not observed in San Francisco.<sup>135</sup>

The more recent data (1980-1984) revealed some changes in two of the government defendant categories: injury on property and street hazard cases. In both jurisdictions there was a three fold increase in average awards in injury of property cases and an increase in median awards. The number of jury trials for injury on property cases in Cook County increased 60%, and the number of trials did not decrease as did the number for all other personal injury cases in San Francisco.<sup>136</sup> The size of awards in street hazard cases in Cook County decreased,<sup>137</sup> reversing the trend of the earlier Cook County study. The number of street hazard cases tried, however, increased 150% from the late 1970's.<sup>138</sup>

#### 4. Defendants

How are government defendants affected by these general trends? Government defendants predominated in only two of the ten Rand categories of suits — common carrier and street hazard cases. Neither of

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130. COOK COUNTY STUDY, *supra* note 111, at 54; SAN FRANCISCO STUDY, *supra* note 111, at 71.

131. COOK COUNTY STUDY, *supra* note 111, at 52; SAN FRANCISCO STUDY, *supra* note 111, at 14. These studies do not correlate size of awards with severity of injury.

132. See text accompanying *supra* notes 67-73.

133. There were only 148 trials in the twenty year period in San Francisco. SAN FRANCISCO STUDY, *supra* note 111, at 73.

134. COOK COUNTY STUDY, *supra* note 111, at 36.

135. SAN FRANCISCO STUDY, *supra* note 111, at 74. A comparison of data shows that awards in Cook County for street hazard cases at the beginning of the period were much lower than those awarded in San Francisco.

136. 1984 UPDATE, *supra* note 111, at 23.

137. The median award fell 80%. *Id.* at 25.

138. *Id.* at 25. There were too few street hazard cases in San Francisco to calculate mean and median awards (twenty in the period 1975-1979 and twelve in the period 1980-1984). *Id.* at 11.

these categories is considered a high-stakes category. In all other categories the percentages ranged from 0.5%, in dram shop cases, to 8%, in injury on property cases.<sup>139</sup> In the original Cook County study, government agencies were usually sole defendants.<sup>140</sup>

The Rand data supports the proposition, discussed in Part II, that government defendants are more successful than other defendants.<sup>141</sup> For example, they were more successful than individual defendants in obtaining directed verdicts.<sup>142</sup> The authors suggest that this may be evidence of a tendency to join government defendants as incidental defendants. In street hazard cases, plaintiffs won 52% of trials, yet defendants lost only 40%.<sup>143</sup> The difference between plaintiffs' wins and defendants' losses is caused by multiple defendants, multiple issues or a combination. Again, this disparity in a category with high government defendant representation may be evidence of plaintiffs' practice of joining government defendants even where the case against the government is weak. Since we do not have updated data on individual categories of defendants, we do not know if plaintiffs' success rate against government defendants has changed since 1979 or if, as a result of the shift to comparative negligence, government defendants are joined more often than before.

### 5. Deep Pocket Phenomenon

The Rand data from Cook County gives some evidence that business and government are considered deep pockets. As discussed above, both paid larger awards than individuals for comparable injuries.<sup>144</sup> Moreover, plaintiffs' awards increased by one-half by adding a corporate or governmental defendant to an individual defendant.<sup>145</sup>

The Deep Pocket Study's conclusion about an overall deep pocket phenomenon raises some curious questions. Despite the dramatic finding of a deep pocket effect on government defendants, none of the three categories in which government defendants predominated showed the very large disparities in the size of awards that were observed in worker injury, product liability and malpractice cases — three of the four high stakes

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139. DEEP POCKETS STUDY, *supra* note 13, at 15.

140. Government agencies were sole defendants in 63% of the trials in the original Cook County Study. *Id.* at 17.

141. Governments had favorable jury verdicts in 59% of the cases. *Id.* at 25.

142. *Id.* at 24. Similarly, corporate and nonprofit organizations were also more likely to obtain directed verdicts in their favor.

143. *Id.* at 51.

144. *Id.* at 41-44.

145. *Id.* at 48.

cases.<sup>146</sup> This suggests that the theory that government defendants pay significantly more than individual defendants must be based primarily on awards against government defendants in the high-stakes categories. Because government defendants made up only 2% of the worker injury cases, 2% of product liability cases and 1% of the professional malpractice cases,<sup>147</sup> one should be hesitant in making generalizations about an across the board deep pocket phenomenon.<sup>148</sup>

### B. Tort Filings Data

Data compiled by the National Center for State Courts on state court filings for the period 1978-1984 do not overwhelmingly support the litigation explosion theory.<sup>149</sup> Like the Rand study, which showed an upswing in the number of jury trials beginning in 1978, the Center's figures show a significant increase in filings in the period in 1978-1981.<sup>150</sup> Filings from 1981-1984 decreased.<sup>151</sup> The number of tort cases (with data from 21 courts in 17 states), however, increased in both periods: 2% and 7%, respectively.<sup>152</sup> The population increases for each period was 4% and 4%, respectively.<sup>153</sup>

Other studies show a higher growth rate for tort filings — approximately 4% per annum from 1976 to 1986.<sup>154</sup> Even when adjusted for

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146. See Figure 4.2 in the DEEP POCKETS STUDY, *supra* note 13, at 53, which shows gross disparities in awards among categories, using the median award in injury on property cases as the norm, and then adjusts for nature of the injury and nature of the parties.

147. *Id.* at 15.

148. A subsequent study using Rand data estimated that governments pay 50% more than individuals. This number was derived by averaging of all plaintiffs' injuries, because there were *too few* cases of permanently and severely injured plaintiffs suing government defendants. Hammitt, Carroll & Relles, *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751, 754 (1985). Without additional information as to the types of cases and how representative these cases are of tort cases against government defendants generally, we still are not in a position to adequately evaluate the extent or effects of the deep pocket phenomenon.

149. National Center for State Courts, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984, 173 [hereinafter 1984 ANNUAL REPORT].

150. *Id.*

151. *Id.* See also Roper, *The Propensity to Litigate in State Trial Courts, 1981-1984, 1984-1985*, 11 JUST. SYS. J. 262, 277-81 (1986) (updating the statistics of the 1984 ANNUAL REPORT, *supra* note 149, and finding that in 1984-85 the downward trend in filings reported in the 1984 Annual Report had abated, and that there were wide differences among states as to filing rates).

152. 1984 ANNUAL REPORT, *supra* note 149, at 182.

153. *Id.*

154. See D. HENSLEY, M. VAIANA, J. KAKALIK & M. PETERSON, *supra* note 111, at 6 (discussing various estimates of tort litigation increases). The Rand Institute for Civil Justice's own estimate is 3.9%. 1984 ANNUAL REPORT, *supra* note 149, at 182.

increased population, the result is a near doubling of filings. While these figures, like the Rand and National Center for State Courts studies, do not support a theory of a sudden explosion of tort litigation in the eighties, they do show a steady growth over time. The public just may not have been conscious of the increase until the 1980s. Rand data on California tort filings, as opposed to data on verdicts, for the period 1974-1985 support the other Rand data on jury verdicts. There are two distinct trends in tort filings: one for low-stakes cases and one for high-stakes cases. The former have remained stable, but the latter have increased at a greater rate than the rate of increase in population.<sup>155</sup> To the extent that government defendants are more numerous in the low-stakes cases, filings against them should have also remained relatively stable.

### C. New York City Data

New York City has actively campaigned for tort reform, including the imposition of damage caps. Data from New York City points to a five fold increase in tort expenses in the period 1979-1985.<sup>156</sup> After adjusting for inflation, this still represents a dramatic three-fold increase. Since New York City self-insures, these costs are not attributable to the insurance market. The statistics for tort claims filed against the City for that period show a peak of 24,496 in 1978,<sup>157</sup> declining to a low of 15,012 in 1981<sup>158</sup> and climbing again to 20,379 in 1985.<sup>159</sup> The ratio of the number of filings to the number of payments made either by settlement or final judgment has remained steady throughout the period, suggesting that the increase in tort expenses was not the result of a sudden shortening in the three-year average time between filing and payment. Approximately 45 % of the cases filed between 1977 and 1985 were settled or had a final judgment for the plaintiff.<sup>160</sup>

The claims divide more or less evenly between personal injury and property damage cases.<sup>161</sup> In terms of average costs, personal injury cases

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155. D. HENSLER, M. VATANA, J. KAKALIK & M. PETERSON, *supra* note 111 at 7.

156. Koch, *supra* note 11, at 2.

157. *Id.* at Exhibit 1 (table entitled Tort Incident Volume, Fiscal 1976-Fiscal 1990) (years 1986-1990 are projected numbers).

158. *Id.*

159. *Id.*

160. *Id.* Exhibit 1 (chart entitled Historical Trends in File Volume and Settlement Volume, Fiscal 1977-Fiscal 1985).

161. *Id.* at Exhibit 1 (table entitled Tort Incident Volume, Fiscal 1976-Fiscal 1990). Property damage claims are divided into two categories, those which relate to auto accidents and those that do not. For most years the "other" category has been somewhat greater. The City projects that auto accidents claims will rise in proportion to other property

are far more significant than property damage claims. In 1985, the average personal injury cost was \$31,740 versus \$982 for a property damage claim.<sup>162</sup> Personal injury claims arising out of defective sidewalks and roadways are the most numerous.<sup>163</sup>

A preliminary review of the New York City statistics substantiates local governments' claims as to substantial increases in costs, but not claims as to substantial increases in numbers of suits filed and settled. The three areas of significantly increased filings in New York were tort suits related to public buildings and property, schools and police action. The first two categories go to the issue of operation and maintenance of public property. These findings are consistent with the Rand data, which also showed an increase in injury on property trials.<sup>164</sup>

Looking specifically at the City's figures for the different categories of personal injury suits, a number of categories showed substantial increases in costs. For example, the inflation-adjusted average costs for the combined first two years, 1977 and 1978, compared with the combined last two, 1984 and 1985<sup>165</sup> reveals that the average costs for defective roadway suits nearly tripled while the number of filings declined slightly.<sup>166</sup> Similarly, average costs increased 150% for defective sidewalks while the number of filings declined.<sup>167</sup> Average costs for recreation suits in 1984 and

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damage claims. *Id.* The City has noted that personal injuries arising out of auto accidents have increased, "and many of the crashes were caused by the large number of rookie police officers hired in recent years." *Goldin Warns of Rising Cost To City for Damage Claims*, N.Y.L.J., June 12, 1986, at 1, col. 3. Perhaps, rookie policemen are the reason for the projected increase in property damage suits involving auto accidents as well.

162. Koch, *supra* note 11, at Exhibit 1 (table entitled Average Cost Summary Fiscal 1976-Fiscal 1985).

163. Defective sidewalks claims from 1976-1985 ranged from a high of 3,418 in 1977 to an exceptional low of 1,577 in 1981. Generally, claims were around 3,000 a year. Defective roadway claims for this period ranged from a low of 788 in 1981 to a high of 1,474 in 1979. In general, the number hovered around 1,000. Koch, *supra* note 11, at Exhibit 1 (table entitled Tort Incident Volume Fiscal 1976-Fiscal 1990).

164. See *supra* note 136 and accompanying text.

165. 1977 and 1978 monetary values have been multiplied by 1.8 to give effect to the inflation for the period.

166. Combined defective roadway filings for 1977 and 1978 were 1,039; combined filings for 1984 and 1985 were 677. The average cost in the earlier period was \$10,220, and the average cost in the last two years was \$29,690. Koch, *supra* note 11, at Exhibit 1 (table entitled Fiscal 1977-Fiscal 1986, Settlement Volume/Tort Expense Summary).

167. The number of suits in 1977 and 1978 was 3,170; in 1984 and 1985 there were 1,939 filings. Average costs, however, were \$6,814 for 1977 and 1978, and \$17,431 for 1984 and 1985. *Id.*

1985 were seven times as large as in 1977 and 1987, the largest increase of any category, while the number of filings almost doubled.<sup>168</sup>

Another category which is of particular interest is suits for personal injury on public property. In 1977 and 1978 there was a total of 23 suits; in 1984 and 1985 there was a total of 248.<sup>169</sup> This represents, in effect, a new category of tort suit and lends support for state and local governments concern for this growing area of litigation. Personal injury suits involving schools and those involving police showed stable costs, but almost tripled in volume.<sup>170</sup>

The Cuomo Commission reports that New York City's payments for personal injury claims increased 372% in the period 1977-1984.<sup>171</sup> Removing malpractice claims, the increase was 306%.<sup>172</sup> Medical malpractice suits, then, are not the sole cause of the City's increased payments. In the 1977-1985 period, growth in medical malpractice payments accounted for only 27% of the total increase in personal injury claim payments.<sup>173</sup>

Tort claim payments have gone from approximately two-tenths of one percent to one-half of one percent of total City revenues.<sup>174</sup> Thus, these increases do not support a claim of the threat of imminent curtailment of public services. Without further analysis of the source of these increases, the role of the deep pocket syndrome, changes in the distribution of payments and the comparable experiences of private sector defendants, it is not possible to tell whether the costs, regardless of their significance as a portion of the total New York City budget, represent more than the City's fair share. It is also necessary to analyze how representative New York City is of other local governments. For example, it may be necessary to remove medical malpractice data from the evidence since New York's extensive system of municipal hospitals is unusual among city governments. It would also be helpful to ascertain whether changes in the

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168. The number of suits in 1977 and 78 was 89; in 1984 and 85 the number was 164. Average costs for the two periods were \$4,044 and \$27,439, respectively. *Id.*

169. *Id.*

170. Filings involving schools went from 539 to 1,327; filings involving police action went from 228 to 602. *Id.*

171. *Cuomo Commission Report*, *supra* note 12, at 37 n.1.

172. *Id.*

173. *Id.*

174. In both 1977 and 1978 total city revenues were approximately \$14.3 billion. Tort expenses in those years at \$25.5 and \$23.3 million, respectively. Revenues for 1984 and 1985 were \$20.7 and \$23 billion, respectively, and tort expenses were \$84 and \$118 million. U.S. Bureau of the Census, *City Government Finances* 1977, 1978, 1984 and 1985; City Statement, *supra* note 21, at Exhibit 1 (table entitled Fiscal 1977-Fiscal 1986 Settlement Volume/Tort Expense Summary).

underlying quality of city services, for example the condition of city property, including schools, might explain areas of particular growth in tort liability costs.

#### *D. Open Questions*

The Rand and New York City data raise a number of questions about local government tort liability. The Rand data, unlike the New York City data, give a distribution of payments which suggests that the increases in average awards was caused by a significant increase in the top percentiles as well as increases in awards across all ranges for certain types of high-stakes cases. The distribution information does not isolate types of defendants, although we know that government defendants were not significantly represented in the high-stakes cases in the period 1959-1979. The New York City data provides no clues as to the distribution of payments.

We have little data on changes in settlement behavior. The most recent Rand study of jury verdicts in the 1970's shows a decrease in the number of jury trials and an increase in the number of filings in both jurisdictions, which suggests more out of court settlements. This trend continued in the eighties in San Francisco, but in Cook County, trials increased.<sup>175</sup> The authors of the Rand studies suggest that the increase in Cook County reflects, in part, the shift to comparative negligence in 1981. At the same time changes in jurisdictional requirements affected the number of trials heard in the San Francisco Superior Court.<sup>176</sup>

For New York City, more information is needed on the interaction of the doctrines of joint and several liability and comparative negligence, and the influence of this interaction on the City's liability. The Rand data suggest that governments were most often sole defendants. Evidence of any changes in the frequency of New York City as a joint defendant would have relevance to claims of increased deep pocket verdicts against local governments arising out of the operation of these two tort doctrines. New York, however, has used the comparative negligence standard since 1975. Thus, the entire period covered by the New York City data was under the same standard. It is possible that the effects of combining the two doctrines took a period of years to appear in the cost statistics because of the time it

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175. 1984 UPDATE, *supra* note 111, at 7.

176. *Id.*

takes for a new doctrine to affect the thinking of lawyers and judges and the lag between filing and payment through settlement or judgment.<sup>177</sup>

Unlike New York, both California and Illinois changed to comparative negligence during the periods studied: California adopted comparative negligence in 1975, Illinois in 1981. The Rand data show increases in plaintiffs' success rate following the change to comparative negligence in cases likely to have plaintiff's fault at issue: automobile, common carrier and injury on property cases.<sup>178</sup> But overall, the Rand studies did not consider the shift to comparative negligence the principal cause of increases in plaintiffs' success rates. In both jurisdictions, trends in success rates were identifiable years before the change in law.<sup>179</sup>

## VI. CONCLUSION

So far, the data on tort filings do not support the existence of a "tort explosion." On the other hand, the Rand data show distinct trends in both filings and verdicts in certain types of tort cases, with high-stakes cases showing continued increases in both number and awards. The New York City data also lend support to claims of increased tort costs. Moreover, increased insurance costs and problems of insurance availability were not imagined. Together, these findings suggest that we may need to rethink our tort rules and how we insure certain risks.

Clearly, local governments play a role in the response to problems besetting the tort law system generally. The movement in the past thirty years away from broad tort immunity for state and local governments for their negligent acts corresponds with the direction of modern tort law, with its emphasis on the goals of internalization of accident costs, risk-spreading and compensation for the victim. Are the effects of the tort crisis so deleterious for local governments that they require governments to move away from the direction of modern tort law and toward the revitalization of tort immunity?

There is little empirical evidence. Questions about changes over time in filings, rates of success of plaintiffs, distribution of awards and settlement behavior and their relationship to government defendants remain largely unanswered. The evidence we do have suggests that the increasing number of tort suits involving injury on property and street hazards is a major problem for local governments. This raises two

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177. In 1987, New York limited the joint and several liability rule for all defendants as it applies to noneconomic damages.

178. SAN FRANCISCO STUDY, *supra* note 111, at 43.

179. 1984 UPDATE, *supra* note 111, at 31.



questions. First, we should ask why suits in these areas are increasing. It seems clear that increase is the result of decades of neglect of public facilities and infrastructure. People are being hurt on negligently maintained public property. Second, we should ask if reviving tort immunity is the best solution. It seems clear that tort immunity is not likely to get at the underlying problem. It allows government decisionmakers to continue their current practice of neglect. It promotes neither efficiency nor fairness in governmental decisionmaking. Thus, tort immunity sacrifices *all* of the goals of tort law, without the promise of delivering improved public services.

## APPENDIX A

## STATES WITH TORT CLAIMS ACT

- Alaska - ALASKA STAT. § 09.65.070 (1983)
- Arizona - ARIZ. REV. STAT. ANN. §§ 12-820 to -826 (Supp. 1989)
- California - CAL. GOV'T CODE §§ 800 to 867 (West 1980 & Supp 1990)
- Colorado - COLO. REV. STAT. §§ 24-10-101 to 120 (1988 & Supp. 1989)
- Delaware - DEL. CODE ANN. tit. 10, §§ 4010-4013 (Supp. 1988)
- Florida - FLA. STAT. ANN. § 768.14 (West 1939)
- Idaho - IDAHO CODE §§ 6-901 to 929 (1979 & Supp. 1989)
- Illinois - ILL. ANN. STAT. ch. 85, para. 1-101 to 9-107 (Smith-Hurd 1987 & Supp. 1989)
- Indiana - IND. CODE ANN. §§ 34-4-16.5-1 to 34-4-16.5-22 (Burns 1986 & Supp. 1989)
- Iowa - IOWA CODE ANN. §§ 613A.1 to .13 (West Supp. 1989)
- Kansas - KAN. STAT. ANN. §§ 75-6101 to -6119 (1984 & Supp. 1988)
- Louisiana - LA. REV. STAT. ANN. § 13:5101 to :5111 (West 1968 & Supp. 1989)
- Maine - ME. REV. STAT. ANN. tit. 14, §§ 8101-8116 (1980 & Supp. 1989)
- Maryland - MD. CTS. & JUD. PROC. CODE ANN. §§ 5-401 to -404 (1989)
- Massachusetts - MASS. GEN. LAWS ANN. ch. 258, §§ 1-13 (1988 & Supp. 1989)
- Michigan - MICH. COMP. LAWS ANN. §§ 691.1401 to .1415 (West 1987)
- Minnesota - MINN. STAT. ANN. §§ 466.01 to .15 (West 1977 & Supp. 1990)
- Mississippi - MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1989)
- Missouri - MO. ANN. STAT. § 537.600 (Vernon 1988 & Supp. 1990)
- Nebraska - NEB. REV. STAT. §§ 13-901 to 926 (1987)
- Nevada - NEV. REV. STAT. §§ 41.0305 to .039 (1985)
- New Jersey - N.J. STAT. ANN. §§ 59:1-1 to 12-3 (West 1982 & Supp. 1989)
- New Mexico - N.M. STAT. ANN. §§ 41-4-1 to -29 (1989)
- North Dakota - N.D. CENT. CODE §§ 32-12.1-01 to .1-15 (Supp. 1989)
- Ohio - OHIO REV. CODE ANN. §§ 2744.01.09 (Anderson Supp. 1988)
- Oklahoma - OKLA. STAT. ANN. tit. 51, §§ 151-172 (West 1988 & Supp. 1989)
- Oregon - OR. REV. STAT. §§ 30.260 to .300 (1988)
- Pennsylvania - 42 PA. CONS. STAT. ANN. §§ 8541-8554 (Purdon 1982)
- South Carolina - S.C. CODE ANN. §§ 15-78-10 to -190 (Law. Co-op. Supp. 1989)
- South Dakota - S.D. CODIFIED LAWS ANN. §§ 3-21-1 to -11 (Supp. 1989)

Tennessee - TENN. CODE ANN. §§ 29-20-101 to -407 (1980 & Supp. 1989)

Texas - TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-109 (Vernon 1986 & Supp. 1990)

Utah - UTAH CODE ANN. §§ 63-30-1 to -38 (1986, Supp. 1988 & Supp. 1989)

West Virginia - W. VA. CODE §§ 29-12A-1 to -17 (1986)

Wyoming - WYO. STAT. §§ 1-39-101 to -120 (1988)

## APPENDIX B

## STATES WITH DAMAGES LIMITATIONS FOR LOCAL GOVERNMENTS

- Alabama - ALA. CODE § 11-93-2 (1985)  
Colorado - COLO. REV. STAT. § 24-10-114 (1988)  
Delaware - DEL. CODE ANN. tit. 10 § 4013 (Supp. 1988)  
Florida - FLA. STAT. ANN. §§ 768.14, .28 (West 1989)  
Idaho - IDAHO CODE § 6-926 (Supp. 1989)  
Indiana - IND. CODE ANN. § 34-4-16.5-4 (Burns 1986)  
Kansas - KAN. STAT. ANN. § 75-6105 (1984 & Supp. 1988)  
Louisiana - LA. REV. STAT. ANN. § 13.5106 (West Supp. 1989)  
Maine - ME. REV. STAT. ANN. tit. 14 § 8105 (West 1980 & Supp. 1989)  
Maryland - MD. CTS. & JUD. PROC. CODE ANN. § 5-403 (Supp. 1989)  
Minnesota - MINN. STAT. ANN. § 466.04 (West Supp. 1989)  
Mississippi - MISS. CODE ANN. § 11-46-15 (Supp. 1989)  
Missouri - MO. ANN. STAT. § 537.610 (Vernon 1988)  
Nevada - NEV. REV. STAT. ANN. § 41.035 (Michie 1986 & Supp. 1989)  
New Hampshire - N.H. REV. STAT. ANN. § 541-B:14 (Supp. 1988)  
New Mexico - N.M. STAT. ANN. § 41-4-19 (1989)  
North Dakota - N.D. CENT. CODE § 32-12.1-03 (Supp. 1989)  
Ohio - OHIO REV. CODE ANN. § 2744.05 (Anderson Supp. 1988)  
Oklahoma - OKLA. STAT. ANN. tit. 51, § 154 (West 1988)  
Oregon - OR. REV. STAT. § 30.270 (1988)  
Pennsylvania - PA. CONST. STAT. ANN. § 42.8553 (Purdon Supp. 1989)  
Rhode Island - R.I. GEN. LAWS §§ 9-31-2 to -3 (1985)  
South Carolina - S.C. CODE ANN. § 15-78-120 (Law. Co-op. Supp. 1988)  
Tennessee - TENN. CODE ANN. §§ 29-20-311, -403 (1980 & Supp. 1989)  
Texas - TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (Vernon 1986 & Supp. 1989)  
Utah - UTAH CODE ANN. §§ 63-30-22, -34 (1986 & Supp. 1988)  
West Virginia\* - W. VA. CODE § 29-12A-6 (1986)  
Wisconsin - WIS. STAT. ANN. § 893.82 (West. Supp. 1989)  
Wyoming - WYO. STAT. § 1-39-118 (1988)

\*West Virginia has limitations only on noneconomic damages awarded against local governments.

