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THE STATE AS A PARTY DEFENDANT: ABROGATION OF SOVEREIGN IMMUNITY IN TORT IN MARYLAND

Under the doctrine of sovereign immunity, the State of Maryland is immune from liability for its torts. The doctrine is well settled in Maryland and has roots in the development of the law of the states and the federal government. The essence of the doctrine is that neither the state nor its agencies and instrumentalities can be sued in the state courts for tortious conduct without prior legislative consent. Many jurisdictions have abrogated the doctrine, either judicially or legislatively. Although


4. As applied in Maryland, the doctrine of sovereign immunity is not only applicable to the State, itself, as a governmental agency, but is also applicable to its agencies and instrumentalities, including its municipal political sub-divisions, if engaged in a governmental function as an agent of the State, unless the General Assembly either directly or by necessary implication has waived the immunity. Godwin v. County Comm'rs, 256 Md. 326, 334, 260 A.2d 295, 299 (1970). See Comment, Municipal Responsibility in Tort in Maryland, 3 Md. L. Rev. 159, 160-61 (1939).


the judiciary has often served as a catalyst for legislative reform, the Court of Appeals' insistence that abrogation must come, if at all, from the legislature reduces the likelihood of such an initiative by the Maryland courts. Since consent to be sued has rarely been granted in Maryland, tort victims often bear the entire cost of their injuries when the state government is the tortfeasor.

This Comment first examines the development of the doctrine of sovereign immunity, focusing on the historical context in which it arose in England and the early rationales advanced for its use in the United States. The application of the doctrine in Maryland indicates that it has been based not only on a theory of sovereignty but also on considerations of public policy. Analysis of the various public policy considerations, however, reveals that the state should retain its immunity only in those limited areas related to the performance of governmental functions that are unique to the government or involve discretionary decision-making. Outside these perimeters, the legislature should abrogate the state's immunity. Several types of liability statutes are evaluated, and recommendations are made for legislative change.

HISTORY OF SOVEREIGN IMMUNITY AND TREATMENT BY MARYLAND JUDICIARY

Sovereign immunity originated as one of the personal prerogatives of the King of England and derived from the theory that the highest feudal lord was not subject to suit in his own courts. How the doctrine came

10. Cf. Mikva, Sovereign Immunity: In a Democracy the Emperor Has No Clothes, 1966 U. ILL. L.F. 828, 830 (Mikva discusses the consequences when the federal government is the tortfeasor; however, the impact is the same when the state government is the tortfeasor).

The immunity of the King of England from suit "was not based on any idea that he could do no wrong; his was . . . simply a further application of the ordinary and generally accepted principle that no feudal lord could be sued in his own courts." R. WATKINS, THE STATE AS A PARTY LITIGANT 7 (1927) [hereinafter cited as WATKINS]. See 3 W.S. HOLDSWORTH, THE HISTORY OF THE ENGLISH LAW 462 (1922). Until the decline of the feudal system in the sixteenth century, the sovereign's immunity was a purely personal right; the king "was not considered as endowed with any non-natural attributes." WATKINS, supra at 8.

The doctrine operated as a jurisdictional bar to suits against the king in his law courts. Note, Equal Protection, supra, at 716 n.4. Relief was usually available, however, by means of the "petition of right" to the courts of equity, which could be
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to be applied to the state in addition to the monarch is "one of the mysteries of legal evolution." There is some evidence that the ancient maxim "the king can do no wrong" was misunderstood and was thought to apply generally to the substantive acts of the king. Regardless of its source, the doctrine of sovereign immunity, which had become firmly embedded in the law of England, was adopted by the legal system of the newly established American democracy. Although its application in the post-revolutionary era appeared inconsistent with a theory of government in which the people were considered sovereign and in which there was no denied only by the king's affirmative exercise of his prerogative rather than by an automatic jurisdictional bar. Holdsworth, The History of Remedies Against the Crown, 38 L.Q. Rev. 141, 149-50 (1922); Pollack & Maitland, supra at 512-18. 12. Borchard, Government Liability in Tort, 34 Yale L.J. 1, 4 (1924). See Watkins, supra note 11, at 11-13.


[T]he expression "the King can do no wrong" originally meant precisely the contrary to what it later came to mean. "[I]t meant that the King . . . was not . . . entitled to do wrong . . . ." It was on this basis that the King, though not suable in his court . . . nevertheless endorsed on petitions "let justice be done," thus empowering his courts to proceed.


The Supreme Court in Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), held that article III, section 2 of the United States Constitution gave jurisdiction to federal courts to adjudicate "[c]ontroversies . . . between a State and Citizens of another State" irrespective of an assertion of sovereign immunity by the defendant state. The reaction in the country was so strong that the eleventh amendment was enacted, effectively reversing the result in Chisolm. See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 683-88 (1976). Nevertheless, Chisolm reflects the Court's early view that the doctrine of sovereign immunity was alien to the prevailing notions of governmental responsibility.

It has been suggested that the fourteenth amendment might limit the availability of the defense of sovereign immunity, even in an action not involving federal legislation expressly mandating that result. See, e.g., Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976). The fifth circuit in Jagnandan held that the fourteenth amendment "does not preempt the operation of the Eleventh Amendment's bar against recovery of . . . excess tuition payments from the state in a federal court." Id. at 1184. The court noted, however, that its holding might be affected by a case currently pending before the Supreme Court, Rabinovitch v. Nyquist, petition for cert. filed 44 U.S.L.W. 3739 (U.S., June 14, 1976) (No. 75-1809). 538 F.2d at 1185. Rabinovitch raised the question "whether the Fourteenth Amendment, of its own force and absent enforcement legislation, constitutes a limitation to the Eleventh Amendment's bar to awarding money judgments against the state in a federal court." Id. (footnote omitted). See also Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976); Edelman v. Jordan, 415 U.S. 651 (1973); Comment, Edelman v. Jordan: The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity, 12 Hous. L. Rev. 891 (1975).

15. Langford v. United States, 101 U.S. 341, 343 (1879). The Maryland Court of Appeals in Godwin v. County Comm'rs, 256 Md. 326, 333, 260 A.2d 295, 298 (1970), and the United States Supreme Court in Langford, 101 U.S. at 343, have
central figure from whom authority derived, the immunity doctrine prevailed.

One practical consideration arose at the conclusion of the American Revolution that provided a compelling justification for retaining the immunity doctrine. The federal and state governments were heavily in debt and this precarious financial condition necessitated the protection of government coffers from further strain. Early American cases, both federal and state, provided little additional justification for invoking the doctrine, and after the initial financial crisis subsided, it was perpetuated primarily by rules of stare decisis.

Theoretical explanations of the American doctrine came much later. Long after the first application of the doctrine in this country, Justice Holmes observed that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law upon which the right depends." This theory resembled the "personal prerogative" justification that had developed in feudal England; because the government acts as the representative of the people, who are sovereign, it is vested with attributes of sovereignty and is thereby im-

rejected application of the maxim "the King can do no wrong" to the American system of government.


17. Watkins, supra note 11, at 52-54; Molberg, The Texas Tort Claims Act — Problems in Federal Court, 29 S.W.L.J. 600 (1975); Sherry, The Myth that the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims, 22 Ad. L. Rev. 39, 56 (1969); Note, Sovereign Immunity — Should the King Remove His Armor?, 53 N.C.L. Rev. 1114, 1115 n.7 (1975) [hereinafter cited as Note, Sovereign Immunity]; 8 U. Rich. L. Rev. 372, 373 (1974). The concern over fiscal consequences even extended to a fear that suits would be brought for restitution of property taken from loyalists during the American Revolution. See Tribe, supra note 14, at 683 n.5.


It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).


21. See notes 11 to 14 and accompanying text supra.
The Maryland Court of Appeals embraced this theory of sovereignty as a rationale for immunity in its 1871 decision in *State v. Baltimore & Ohio R.R.* The court stated that sovereign immunity "belongs to the State by reason of her prerogative as a sovereign, and on grounds of public policy. Parties having claims or demands against her must present them through another department of the Government — the Legislature — and cannot assert them by suit in the courts." The continuing validity of this sovereignty rationale in Maryland is doubtful, however, in view of the statement of the Court of Appeals in *Godwin v. County Commissioner* that

> [t]he application of the doctrine in this country was most likely based more upon reasons of public policy than upon the concept of the new States or the United States being successors, as it were, of the former king. Indeed, it is clear in Maryland that public policy was a consideration for the application of this doctrine.

The *Godwin* court thus suggested that considerations of public policy constituted the major rationale for the tort immunity of the State of Maryland. Public policy has long been asserted as a basis for immunity. An early Maryland case indicated that the fact that some state agencies were "charged with the exercise of an important government function" was sufficient to mandate treatment different from that accorded other party defendants. Only recently has the Court of Appeals identified the aspects of public policy that require immunity. In *Godwin*, the court stated that "[w]hen one considers the financial and other problems which might arise if the doctrine of sovereign immunity were not applicable, it was probably wise that our predecessors did apply it in Maryland." Additional policy considerations were identified in *Jekofsky v. State Roads Commission*.

23. 34 Md. 344 (1871).
24. Id. at 374. Several Maryland cases have expressly relied upon *Baltimore & O.R.R.* See, e.g., *Godwin v. County Comm’rs*, 256 Md. 326, 260 A.2d 295 (1970); *Williams v. Fitzhugh*, 147 Md. 384, 128 A. 137 (1925).
26. Id. at 333, 260 A.2d at 298.
27. Public policy justifications were first advanced in a general, unspecific manner in *State v. Baltimore & O. R.R.*, 34 Md. 344, 374 (1871).
29. 256 Md. at 333, 260 A.2d at 298.
30. 264 Md. 471, 287 A.2d 40 (1972). In *Jekofsky*, the plaintiff brought an action to recover for injuries sustained when he lost control of his automobile and struck a utility pole. He alleged that the accident was caused by negligent construction of the highway.
which held that the doctrine immunized the State Roads Commission. The court in *Jekofsky* stated that judicial abrogation of the doctrine would be unwise in view of several policy considerations, such as "fiscal considerations, administrative difficulties and other problems in balancing the rights of the State and its agencies with new possible rights of the individual citizens."  

Because the "sovereignty" rationale is no longer viewed as a persuasive basis for the doctrine of sovereign immunity, the doctrine's continued application must be explained by reference to considerations of public policy. While the Court of Appeals has not assessed the relative importance of the various policy considerations, its recognition that the doctrine depends on dynamic economic and political foundations of public policy is significant. In view of the court's continued insistence that abrogation must come from the legislature, however, further judicial scrutiny of the underlying policies appears unlikely. Therefore, the remaining sections of this Comment will analyze the competing policy considerations and explore different forms of statutory abrogation.

**Policy Considerations**

The adoption and perpetuation of sovereign immunity in this country has been justified on five policy grounds. First, state funds that are devoted to public purposes should not be diverted to compensate private injuries. Second, the imposition of liability would have disastrous financial consequences. Third, sovereign immunity ensures that the govern-

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31. *Id.* at 474, 287 A.2d at 42.


Nor may a state agency waive the defense of sovereign immunity without legislative consent. In *Dunne v. State*, 162 Md. 274, 288-89, 159 A. 751, 757, *cert. denied*, 287 U.S. 564 (1932), the Court of Appeals stated that "[c]ourts should not hold that immunity from suit, one of the highest attributes of sovereignty, has been waived, except in cases of positive consent given, or by necessary and compelling implication." Sovereign immunity is not automatically waived by the purchase of liability insurance or the authorization to purchase such insurance. *Jones v. Scofield*, 73 F. Supp. 395 (D. Md. 1947).

Counsel for the state or one of its agencies may not waive the defense of governmental immunity — either intentionally or by failure to plead the defense via a motion raising preliminary objections, Md. R.P. 323(b) — in the absence of express or clearly implied statutory authority. Board of Educ. v. Alcrymat Corp., 258 Md. 508, 266 A.2d 349 (1970).

33. 2 F. HARPER & F. JAMES, LAW OF TORTS 1611-12 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER, supra note 18, at 975. *See Repko, American Legal Commentary on the Doctrine of Municipal Tort Liability, 9 LAW & CONTEMP. PROB. 214, 220 (1942).*

Sovereign immunity is not subject to "endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." Fourth, some functions of government are so uniquely governmental and involve such a high degree of risk that the government should not be subjected to liability for undertaking to perform them. Finally, it is contended that the threat of liability would hamper the effective exercise of discretionary functions.

Each of these policy arguments can be countered in turn by persuasive arguments against immunity. Furthermore, these countervailing arguments are consistent with the two primary reasons for imposing tort liability — compensation of injured persons and deterrence of tortious conduct. An evaluation of the immunity doctrine therefore entails analysis of these contrary policy considerations.

Diversion of Public Funds

Sovereign immunity has been justified on the ground that it would be improper to divert public funds to private purposes. It is asserted that funds already allocated to specific purposes are held in "trust" for those ends and that the remainder of the nonallocated general revenues

35. J. STORY, AGENCY LAW § 319 (9th ed. 1882). See also PROSSER, supra note 18, at 975.


39. See Repko, supra note 33, at 220; cf. Fuller & Casner, Municipal Tort Liability in Operation, 54 HARM. L. REV. 437, 440 (1941) (where municipal entities are involved, immunity has been based on the argument that liability is precluded in the absence of statutory establishment of a fund that could satisfy tort judgments).

40. See, e.g., Jekofsky v. State, 264 Md. 471, 287 A.2d 40 (1972); Lohr v. Upper Potomac River Comm'n, 180 Md. 584, 26 A.2d 547 (1942); State v. Rich, 126 Md. 643, 95 A. 956 (1915). Where governmental powers and functions have been delegated by statute to agencies of the state, the state's immunity extends to them. Compare Godwin v. County Comm'r's, 256 Md. at 334, 260 A.2d at 298 with State v. Rich, 126 Md. at 645, 95 A. at 957 and Jones v. Scofield Bros., 73 F. Supp. 395, 396 (D. Md. 1947). Once it is determined that the entity is an agency of the state, the inquiry focuses upon whether the statute creating the agency subjects it to tort liability. See Lohr v. Upper Potomac River Comm'n, 180 Md. at 588-90, 26 A. at 548-50. The conclusion that a statute creating a state agency or instrumentality does not permit it to be held liable in tort has often been based upon the theory that the agency's funds are held in "trust" for specific purposes, which do not include paying damages in tort cases. Compare State v. Rich, 126 Md. at 646, 95 A. at 957 with
should not be applied to a few tort judgments affecting only a minute segment of the community. But this argument does not adequately consider the expansion of government activities and the growth of the state budgets in recent decades. When government weakness and an apprehension of financial collapse were legitimate concerns, sovereign immunity may have been an appropriate response; on balance, the need for ensuring forthright decision-making and a solid economic structure outweighed the unfortunate result of individuals suffering uncompensated losses. Yet in the course of social and economic growth, the need for adequate protection of the private person may have been overlooked. One commentator has remarked that the increased productivity and wealth resulting from growth of government "makes it unnecessary that risks assumed by the individual 200 years ago be assumed by him today." Where the pursuit of the public purpose causes injury, the cost of injury should merely be considered part of the cost of that activity, as in any private business. That it would not be inherently inappropriate to compensate private injuries from government funds is further supported by the imposition of municipal liability according to the "governmental function"/"proprietary function" dichotomy. Under this approach, a municipality is liable where its tortious activity is proprietary or corporate in nature. The courts have thus recognized that in a wide range of func-

Weddle v. Board of County School Comm'rs, 94 Md. 334, 336, 51 A. 289, 290-91 (1902) and Jones v. Scofield, 73 F. Supp. at 397-98.

The "no funds" or "trust fund" rationale, first applied in Maryland to the state as a party defendant in Rich, has its roots in Russell v. Men of Devon, 100 Eng. Rep. 359 (1788), an early English case involving an action in tort against the individual members of an unincorporated town. The King's Bench refused to impose liability because there was no fund available to satisfy a judgment. Id. at 360-61. The court stated that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Id. at 362.

41. See David, Public Tort Liability Administration: Basic Conflicts and Problems, 9 LAW & CONTEMP. PROB. 335, 340-41 (1942).
42. See note 17 and accompanying text supra.
44. See Anderson, Claims Against States, 7 VAND. L. REV. 234, 245 (1954).
46. Repko, supra note 33, at 216-17.
47. For discussion of the governmental/proprietary function dichotomy, see Note, Liability of Municipal Corporations Under the State's Statutory Waiver of Tort Immunity, 20 Md. L. REV. 353 (1960); Comment, Municipal Responsibility in Tort in Maryland, 3 Md. L. REV. 159 (1939). See also E. Kelleher, Sovereign Immunity in Maryland 5-6, 8-9 (Feb. 1976) (This study was prepared for the Maryland Technical Advisory Service, Bureau of Governmental Research, Division of Behavioral and Social Sciences of the University of Maryland. The study is on file at the Maryland Law Review.).
tions, the public funds of governmental entities can be properly diverted to the satisfaction of tort judgments.

Financial Impact

The second policy argument for maintaining the doctrine of sovereign immunity in tort assumes the theoretical propriety of spending public funds to compensate private injuries but emphasizes the potentially disastrous financial consequences of liability. The concern over financial consequences has been particularly acute where dangerous government activities, such as fire fighting, law enforcement, highway maintenance, and incarceration are involved. Since these vital services are likely to be a source of many injuries, it is feared that the cost of tort liability would increase so drastically that other services, such as parks and recreation, would have to be curtailed to ensure the performance of more essential functions. Adherents to this point of view therefore argue that elimination of liability should be conditioned upon a limitation on the scope of liability or the availability of reasonably priced insurance.

Although there is evidence that the cost of liability would be substantial, "the spectre of the crippling judgment" is unrealistic. Jurisdictions that have abrogated immunity generally have not suffered undue economic strain, and the existing empirical data do not reveal a rash


50. Kennedy & Lynch, supra note 37, at 177.

51. Id. at 178. See Mayor of Baltimore v. State, 173 Md. 267, 276, 195 A. 571, 576 (1937).

52. See Payne v. County of Jackson, 484 S.W.2d 483, 486 (Mo. 1972).

53. See Letter from Robert S. Spear, Assistant Attorney General, Claims and Compensation Section, State of Indiana, to Hon. Nolan H. Rogers, Chairman, Maryland Commission to Study Sovereign Immunity, October 9, 1975. (The letter is on file at the Maryland Law Review). The letter indicates that two hundred and sixty-three lawsuits were then pending against the State of Indiana in the amount of $96 million. It should be noted, however, that this is the amount of the prayers in all suits then pending and may not reflect the ultimate fiscal impact since it is unlikely that the plaintiff will prevail in every case.

54. David, Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit 8-14, 6 U.C.L.A. L. Rev. 1 (1959) [hereinafter cited as Tort Liability of Local Government]. See also Parrish v. Pitts, 244 Ark. 1239, 1250-51, 429 S.W.2d 45, 51 (1968).

55. Governor's Commission to Study Sovereign Immunity, Report of the Governor's Commission to Study Sovereign Immunity 41 (November 1976) [hereinafter cited as Report], where it was reported that "the impact in most cases has not been fiscally disastrous." (The study is on file at the Maryland Law Review); cf. Comment, Sovereign Immunity in Alabama, supra note 6, at 483 (relying on Ayala v. Board of Public Educ., 305 A.2d 877, 882-83 (Pa. 1973)).
of excessive judgments. Moreover, private corporations have weathered the imposition of liability without severe financial difficulty; there is little reason to believe that the government experience will differ greatly. Nevertheless, the virtual impossibility of accurately predicting the economic ramifications of abrogation might favor the selection of a statute retaining some limitations on the scope of liability.

Regardless of the severity of the adverse judgments, the availability of liability insurance should substantially alleviate the deleterious financial effects. By purchasing insurance a state can plan the fiscal consequences of liability on a more predictable basis and thereby temper the burden on its resources. Some authorities, however, doubt that the procurement of liability insurance will reduce the ultimate financial impact because "[i]nsurance premium rates naturally depend on loss experience, and if a high degree of public liability is imposed . . . the cost to taxpayers of insurance will be correspondingly great." The problem would be particularly acute in a state with a blanket waiver of immunity, because insurance carriers might confront an uncertain degree of risk. In this regard, the recent experience in the State of Florida is significant. Florida abrogated state and municipal immunity by enacting a blanket waiver statute that extended the general principles of tort law to state and municipal tortfeasors. Florida has a population 85 percent larger than that of

56. See Tort Liability of Local Government, supra note 54, at 8-14; Spanel v. Mounds View School Dist., 264 Minn. 279, 290-92, 118 N.W.2d 795, 802-03 (1962).


58. See notes 114 to 122 and accompanying text infra.

59. See Decade of Change, supra note 57, at 921 & n.18; Tort Liability of Local Government, supra note 54, at 45-47, 51; cf. Note, Need for Reform, supra note 36, at 249 (it is noted that liability insurance will not completely eliminate the effects since the cost of insurance may be substantial in proportion to the degree of liability assumed).

60. Cf. 4 California Law Revision Commission, Recommendation Relating to Sovereign Immunity 811 (1963) [hereinafter cited as Recommendation] (insurance, under a statute providing for immunity except in specified areas, will provide a basis upon which to plan the fiscal consequences of liability).

61. Kennedy & Lynch, supra note 37, at 178. "A further observation is that liability insurance plays a major role in tempering the fiscal impact of the abrogation of sovereign immunity in tort." Report, supra note 55, at 42.

62. See generally Note, Need For Reform, supra note 36, at 249. It is noteworthy that Kennedy and Lynch concluded that under an open-end waiver approach to abrogation the cost of insurance would be difficult to calculate. Kennedy & Lynch, supra note 37, at 179. It would appear that the cost would be even less predictable with the blanket waiver approach.

Maryland and employs 50 percent more government workers. In fiscal year 1974, Florida paid a premium of approximately 5.5 million dollars to cover claims arising under the statute, which limits the maximum recovery by any one individual to $50,000. Given the differences in demographic factors and the fact that the premium in Florida covers both state and municipal liability, a Maryland state liability insurance premium should be substantially lower than that of Florida. In fiscal year 1974, the total net cash expenditures by the State of Maryland were 2.5 billion dollars; a premium of even 5.5 million dollars would constitute less than one-fifth of one percent of annual expenditures. Thus, while abrogation of immunity will have some fiscal impact, it does not appear that the financial burden on state resources will be oppressive.

**Effect Upon Functioning of Government**

Sovereign immunity has been justified on the ground that the imposition of liability would entangle the government “in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests” by inhibiting performance of government functions. This policy rationale raises the question whether society is better served by a system of government immunity that leaves tort victims uncompensated or by a system of liability that spreads the financial burden but permits interference with government activity. The purpose of state immunity, like the corresponding doctrine of official immunity, is to ensure uninhibited “vigorous, and effective administration” of the government. One of the serious effects of imposing liability is that the government official whose

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64. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 12 (1974). Maryland ranked 18th in population size with 4,070,000 persons; Florida ranked 8th in population size with 7,678,000. These were the July 1, 1973 figures.

65. Id. at 266. The State of Maryland employed 62,000 persons in the state government; the State of Florida employed 96,000 persons in its state government. These were the July 1, 1973 figures.

66. Letter from Philip F. Ashler, Florida Insurance Commissioner and Treasurer, and James E. Bearden, Chief, Florida Bureau of Casualty Risk Retention, to Nolan H. Rogers, Special Assistant Attorney General, State Highway Administration (Sept. 3, 1975). (The letter is on file at the Maryland Law Review.) Mr. Rogers is the Chairman of the Commission to Study Sovereign Immunity which was established by Governor Marvin Mandel in 1975. The Florida statute is located at FLA. STAT. ANN. § 768.28-.30 (1973).


68. MARYLAND DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT, MARYLAND STATISTICAL ABSTRACT 1975, at 164.


70. Public officers are immune from suit for tortious conduct because society desires that they make decisions freely, and it is feared liability might hamper the governmental process. See PROSSER, supra note 18, at 987.

conduct was allegedly tortious might be distracted by discovery, trial preparation, investigations, and other factors inherent in the litigation process. Nevertheless, tort defendants in the private sector have often tolerated such distractions so that individuals could be made whole. Arguably, government officials ought to be equally tolerant of such intrusions so that the objective of compensation can be realized.

Liability clearly imposes burdens upon the government, but these burdens may become a less compelling basis for immunity when compared to the harm inflicted upon tort victims. In measuring the competing needs, it is significant that the victim "bears the entire, sometimes calamitous, burden resulting from [government activity] . . . undertaken for the benefit of the entire community" while the government assumes little or no responsibility. This allocation of risk is incongruous because the government is in the ideal position to spread the losses occasioned by its activities, much in the same manner as large businesses absorb the financial impact of adverse judgments. Application of principles derived from the recently developed risk theory of tort liability might provide a method

72. For example, in discussing sovereign immunity in a federal civil rights case, Judge Celebrezze observed that "[t]he burden upon state officials to defend against these suits — the nonmeritorious as well as the meritorious — is but a small price to pay for the protection of constitutional rights." Krause v. Rhodes, 471 F.2d 430, 458 (6th Cir. 1972) (Celebrezze, J., dissenting), rev'd sub nom. Scheuer v. Rhodes, 416 U.S. 232 (1974). While liability burdens the government and immunity burdens the injured citizen, a balancing of these interests does not involve constitutional questions. Yet many victims of government torts who have suffered serious injury or death have been denied recovery merely because of the fortuitous circumstance that the government was the tortfeasor. See, e.g., State v. Rich, 126 Md. 643, 95 A. 956 (1915) (plaintiff's decedent fell over an unmarked roadside embankment and was killed); Weddle v. Board of School Comm'rs, 94 Md. 334, 51 A. 289 (1902) (school girl was thrown to the ground and received fatal injury due to a negligently strung wire on school grounds). See generally Mikva, supra note 10, at 830-31.

73. Parrish v. Pitts, 244 Ark. 1239, 1247, 429 S.W.2d 45, 49 (1968).


75. See Davis, Tort Liability of Governmental Units, 40 MINN. L. REV. 751, 811 (1956).

The risk concept imposes liability without regard to fault on the theory that losses should be spread equally throughout the community receiving the benefit from the injury-producing activity. Moreover, this assumption of responsibility may induce change in the structure and policies of government by prompting an evaluation of the circumstances that allowed the injury to occur. The benefits of applying the risk-sharing theory of tort liability appear to outweigh the potential interference with general government functions attributable to the defense of tort litigation. Nevertheless, the risk theory should not completely replace the notion of liability based upon fault because a no-fault system of absolute liability might allow recovery by the risks of potential injury producing activity are undertaken. Justice Traynor articulated some of the reasoning behind this risk theory in a products liability case:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . [T]he manufacturer is best situated to afford such protection.

Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion). By accepting liability and distributing the losses as widely as possible, the government has ameliorated the results of the defective social engineering that placed the entire risk on the victim. Borchard, supra note 12, at 8.

Tort liability rests upon one of two major theories, the fault theory, PROSSER, supra note 18, at 492-93, or the risk theory, SOVEREIGN IMMUNITY STUDY, supra note 37, at 271-72. See 2 HARPER & JAMES, supra note 33, at 759-84. Under the more traditional fault theory, liability falls on the person or entity at fault for the injury; imposition of liability reflects the view that personal responsibility, "individualism and self-reliance" should be the standard of social policy. SOVEREIGN IMMUNITY STUDY, supra note 37, at 271. See PROSSER, supra note 18, at 492-93. "[M]odern tort law appears to consist of an amalgam of both fault and risk theories, with steadily developing pressures in favor of extending the latter approach." SOVEREIGN IMMUNITY STUDY, supra note 37, at 272.

See Comment, Role of the Courts In Abolishing Governmental Immunity, 1964 DUKE L.J. 888, 890; Kennedy & Lynch, supra note 37, at 176. See generally Stason, supra note 75, at 1323-24. See also PROSSER, supra note 18, at 493-94.

Note, State Immunity From Suit Without Consent — Scope and Implications, 1971 Wis. L. REV. 879, 880 n.8. The writer suggests that the provision for state liability would provide a beneficial institutional channel for social change:

Each society must provide adequate means to facilitate social change. Otherwise, social institutions become so rigid and outdated that they fail to provide for the society's basic needs. Full liability of the state in tort is essential to such a scheme for three reasons: (1) the possibility of full recovery for injury provides the injured with the initial incentive to bring his action against the state in a court of law, thereby maximizing uses of institutional channels for bringing about change; (2) when the state is ordered to compensate the injured individual its compliance serves as a recognition of mistake; and (3) decisions against the state in a court of law are likely to motivate change in the governing structure that caused the injury to occur.

Id.
plaintiffs whose injuries were caused by their own conduct. A system of circumscribed liability would protect many innocent victims from suffering uncompensated injuries and would enable the risk-spreading mechanism to distribute the losses.

Unique Governmental Functions

Sovereign immunity has also been justified on the basis that liability would interfere with performance of unique government functions. Functions generally characterized as "unique" include highway maintenance, law enforcement, fire fighting, incarceration, licensing, and quarantine. It has been argued that immunity should be retained for these unique governmental functions because they cannot be performed by the private sector, they involve a high degree of unavoidable risk, or they involve unprofitable services that private enterprise might readily abandon whereas the state government must continue to perform them for reasons of public health, safety, or welfare. Although compensation might be desirable because these activities expose the community to a greater risk of injury than many other government activities, the financial impact from providing compensation may impose an undue burden on the government.

The basic rationale for immunizing unique functions is that these activities are particularly beneficial to society and should therefore be protected from the effects of liability. Yet it has been suggested that since society benefits from both unique and nonunique governmental functions,

79. Kennedy & Lynch, supra note 37, at 176-77. See generally 2 Harper & James, supra note 33, at 761-77.

80. See Decade of Change, supra note 57, at 921. See generally Comment, The Role of The Courts In Abolishing Governmental Immunity, 1964 Duke L.J. 888 [hereinafter cited as Comment, Role of the Courts]. See also Leflar & Kantrowitz, supra note 1, at 1414, where the authors state:

[T]he accepted social policy is that the [private] employer, who ordinarily is big enough to carry the risk either by self-insurance or by a liability policy covering his whole operation, should carry it, and that the employee, who ordinarily is not financially big enough to handle the risk, will not be held. The economic basis for this policy is as applicable to employees of the state and its subdivisions as to employees of private corporations.

81. See, e.g., Kennedy & Lynch, supra note 37, at 177; Note, Need for Reform, supra note 36, at 250.

82. See Decade of Change, supra note 57, at 922-23; Note, Need for Reform, supra note 36, at 250; Comment, Role of the Courts, supra note 80, at 894.

Some functions are so unique to government and so necessary to society that the government cannot discontinue an unprofitable activity as private companies can and often do. For an example of private industry terminating an unprofitable line of business, see St. Paul Fire & Marine Ins. Co. v. Insurance Comm'rs, 275 Md. 130, 339 A.2d 291 (1975) (abandonment of medical malpractice insurance).

83. Kennedy & Lynch, supra note 37, at 177; Comment, Role of the Courts, supra note 80, at 893-94.
the public should assume the cost of resulting injuries. Further, there is no evidence that unique operations of government would be curtailed by the imposition of liability in this area. For example, in Maryland the State Highway Administration is immune from liability for its torts, but municipal governments engaged in identical functions of control, maintenance, and operation of roads are liable because their activities constitute proprietary functions. Although society benefits from highway maintenance whether the performance is by a state or by a municipal government, the injured plaintiff may recover only when the tortfeasor is a municipality. That municipalities have continued to function despite the imposition of liability for negligent performance of these operations indicates that the "unique functions" rationale for immunity is not unassailable.

Certainly, the state must be able to carry out these unique activities, but it is not clear that their continued performance requires absolute immunity. One solution might be to lower the standard of care required of government officials, employees, and agencies conducting unique government functions. A standard might immunize the agencies or officials performing the unique function if they were able to demonstrate a substantial basis for believing that their conduct was reasonable and proper under the circumstances. Such a subjective standard of care would allow an injured party to recover when the government acted unreasonably but would limit the scope of the state's liability, thus enabling the state to perform those high risk functions essential to society.

Discretionary Functions

The final policy justification for sovereign immunity is that the threat of liability might hamper the effective exercise of discretionary functions and impair the free and unfettered decision-making of the government. Of the various policy considerations, the discretionary function issue has attracted the greatest degree of general agreement. Few contend that all

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86. Highway maintenance has been considered a unique governmental function. See note 81 and accompanying text supra.
87. This standard is analogous to the subjective standard of care required of a police officer with respect to the tort of false imprisonment in cases involving felonies. A warrantless arrest by a police officer is not tortious where he has reasonable grounds (probable cause) to believe that a felony has been committed and that the person arrested has committed it. See Robinson v. State, 4 Md. App. 515, 243 A.2d 879 (1968). Compare Shaw v. May Department Stores Co., 268 A.2d 607 (D.C. App. 1970) with Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970).
88. See note 37 supra. See generally notes 127-34 and accompanying text infra.
discretionary functions should be open to liability. Indeed, the public interest in the efficient operation of government requires that public officials make discretionary decisions, for "it is not a tort for the government to govern." Although it has been stated that immunity generally "fosters neglect and breeds irresponsibility, while liability promotes [the] care and caution" that avoid future tortious conduct, the deterrence gained through imposition of liability might exert an in terrorem effect upon the willingness of public officials to execute their duties with the necessary decisiveness and judgment. Allowing a court or jury to substitute its views for those of the decision makers and then to award damages against the agency or officials might result in overly cautious government. In this respect, it is noteworthy that the Federal Tort Claims Act expressly recognizes a discretionary function exception.

**Legislative Approaches to Abrogation**

Once it is determined that alteration in the immunity doctrine is desirable, the proper statute must be chosen. The degree or scope of liability contained in the statute should reflect the cost of liability, both in terms of adverse judgments and the curtailment of other state programs, and the impact of liability upon the effective administration of state government. There are four basic approaches to the abrogation of sovereign immunity and the establishment of a system for providing relief. First, thirteen states, including Maryland, retain their common law immunity; injuries suffered as a result of tortious conduct by the state are uncom-

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A discussion of the discretionary functions of the state necessarily touches upon the doctrine of official immunity, which is related to, but distinct from, sovereign immunity. When a suit is filed against a state agency, the conduct alleged to be tortious will often be a direct result of a discretionary decision by an official. The official's immunity is not always as broad as that which protects the state; if a showing of malice is made, the official will be deemed to have acted outside his official capacity, and may be subject to personal liability. See, e.g., Eliason v. Funk, 233 Md. 351, 196 A.2d 887 (1964).


94. Sovereign Immunity Study, supra note 37, at 269-70; Note, Need for Reform, supra note 36, at 248-49.
Several of these states provide relief in extremely limited areas. Second, ten states retain their traditional sovereign immunity, but provide limited relief through administrative claims boards or special courts of claims. Third, another eighteen states have completely waived their immunity and allow recourse to the courts in the same fashion as in actions against private party defendants. Finally, nine states provide for


judicial relief but require the injured party to seek initial redress before administrative claims boards.99

In those states that have provided some form of administrative or judicial relief, the waiver of immunity has followed one of three approaches. One jurisdiction, New York, provides a blanket waiver of immunity that enumerates no substantive exceptions or limitations.100 A second approach, characterized as closed-end liability,101 uses statutes that expressly retain sovereign immunity except for specifically enumerated causes of action.102 Finally, many jurisdictions provide for a general waiver of immunity — open-end liability103 — with enumerated exceptions for which immunity has been retained.104

There are two variations of blanket waiver statutes. One method simply grants statutory permission to “sue and be sued.” The Court of Appeals of Maryland has held that an effective waiver must satisfy two conditions: there must be an express provision or necessary implication from a statute indicating that the legislature intended to waive sovereign immunity and there must be funds with which to satisfy tort judgments.105 Therefore, this formulation would not achieve abrogation of immunity in Maryland. Another method is an express blanket waiver of sovereign immunity with the provision of funds to pay awards. A possible blanket waiver statute would read:

The State of Maryland hereby waives its immunity from liability and suit and assumes liability. Such liability shall be determined according to the same rules of tort law as applied by the Maryland courts to individuals and corporations.106


100. N.Y. Court of Claims Act § 8 (McKinney, 1963).


103. Kennedy & Lynch, supra note 37, at 179.


105. Lohr v. Upper Potomac River Comm'n, 180 Md. 584, 589-91, 26 A.2d 547, 548-49 (1942). A statutory scheme that did not provide funds might do more harm than good. While it would encourage the filing of suits, it would not provide for recovery, and thus it would “[d]o no more than allow plaintiffs to visit the courthouse.” Leflar & Kantrowitz, supra note 1, at 1365.

106. This is modeled after the N.Y. Court of Claims Act § 8 (McKinney 1963). If enacted, such a statute would necessarily include a mechanism for the provision of funds with which to satisfy judgments.
The advantage of the blanket waiver approach is that it would allow the body of tort law applied when the state is a party defendant to parallel current tort law for nongovernmental defendants. Such an approach would obviate the need for extensive legislative consideration of the merits of each possible exception; instead, the judiciary would be left with the determination whether sufficient care had been exercised by a defendant in a particular factual setting. Under such a broad statute, however, the judiciary would be responsible for balancing all policy considerations beyond the rule of general liability. The government’s ability to perform its functions might be hindered by the initial uncertainty about the type of conduct that would incur liability. Such uncertainty would also interfere with state budgeting because of the difficulty in predicting annual liability. Moreover, the cost of commercial insurance might become prohibitive because the carriers would have to provide coverage against the outer range of potential exposure. Finally, a blanket waiver does not provide exceptions for discretionary and uniquely governmental functions. Although such functions may merit continued immunity, there is no guarantee that the judiciary will create an exception to the waiver and grant immunity in those areas.

At the other extreme of the consent statutes is the closed-end approach, which expressly retains immunity except for enumerated areas in which it is waived. Such a statute restricts the opportunity for judicial policy making, and its certainty would enable private citizens and the government to plan their activities more effectively. A closed-end statute constitutes a legislative declaration that immunity is the general rule and liability is the exception. Such a statute reflects a determination by the legislature that broad exposure to liability is financially impracticable or otherwise undesirable. This system of liability would require the legislature to review each element of the state’s exposure to liability. One likely consequence of this review would be an insurance premium lower than the other two statutory models because the scope of liability would be specifically enumerated and therefore fairly predictable. But a closed-end statute is extremely difficult to formulate; an exceptionally large amount of time would be required in order to adequately consider each potential

107. Sovereign Immunity Study, supra note 37, at 267-68; see Van Alstyne, supra note 36, at 467; Note Need for Reform, supra note 36, at 250-51.

108. See Van Alstyne, supra note 36, at 469.


110. For discussion of unique governmental functions see notes 81 to 87 and accompanying text supra. For discussion of discretionary functions see notes 130 to 135 and accompanying text infra.


112. See Kennedy & Lynch, supra note 37, at 179-80.
cause of action and the resulting legislation would be voluminous. Further, the innumerable factual patterns that could be encountered by courts applying such a statute might expose situations unanticipated by the legislature; absent a clear statement of legislative purpose, the courts might continue to immunize those areas on the theory that the designation of specific liability by the legislature was intended to be exclusive.  

Open-end liability, or selective immunity, combines the advantages of the blanket waiver and closed-end approaches but avoids the disadvantages. A typical open-end statute would read in part:

§ A. Subject to the exceptions enumerated in section B, the State of Maryland is liable for its torts and those of the State's agencies, instrumentalities, and employees, acting within the scope of their authority or employment.

The selection of an open-end statute by the legislature would achieve the objective of circumscribed liability, but would avoid the meticulous consideration that a closed-end scheme demands; it is easier for a legislature to specify those areas in which sovereign immunity is to be retained than to sift through the numerous areas in which immunity might be waived. Moreover, because this approach avoids the detailed enumeration of a closed-end statute, the courts possess more flexibility for dealing with new and unusual situations. Accordingly, it would appear that the open-ended scheme would be the best approach.

113. Note, Need for Reform, supra note 36, at 254.

The opportunity for the Maryland General Assembly to give adequate attention to such a voluminous bill is considerably less than in states such as California and New Jersey, which have enacted closed-end liability statutes. The Maryland General Assembly meets for only ninety days, whereas the legislative sessions in California and New Jersey are year-long. Compare Md. Const. art. 3, § 15(a) (1972) with N.J. Const. art. 4, § 1 §3 (1971) and Cal. Gov't Code § 9020 (West 1966).


The Court of Appeals has held that no abrogation will take effect unless funds are specifically provided by the legislature to satisfy judgments, see note 105 and accompanying text supra. Accordingly, the statute should contain a provision requiring the state to allocate funds for that purpose. The language of the recently enacted statute abrogating the doctrine of sovereign immunity in contract, 1976 Laws of Md., ch. 450, at 1180, might be adequate:

In order to provide for the implementation of this section, the Governor annually shall provide in the State budget adequate funds for the satisfaction of any final judgment, after the exhaustion of any right of appeal, which has been rendered against the State, or any officer, department, agency, board, commission, or other unit of government in an action in contract as provided in this section. 1976 Laws of Md., ch. 450, at 1182.

115. Note, Need for Reform, supra note 36, at 254.

An open-end approach statute would specify several exceptions. In addition to the general provision waiving immunity, the statute might provide:

§ B. The State shall retain its immunity in all circumstances for:

1. any claim arising out of the exercise or failure to exercise a discretionary act or function or decision or duty on the part of a State officer or employee, which act or function or decision or duty involves the exercise of judgment requiring policy determinations;  

2. any claim arising out of an act or omission of the State in the exercise or failure to exercise an act or function or decision or duty which is uniquely governmental in nature — including, but not limited to law enforcement, fire fighting, incarceration, licensing, and quarantine, but not including highway or road construction or maintenance — in which there is a substantial basis that the individuals performing such unique function believed their conduct to be reasonable under the circumstances.

It has been argued that a blanket waiver approach grants too much discretion to the judiciary and leaves the government too vulnerable to suit. These objections do not undermine an open-end statute, however, because the exceptions to the waiver of immunity under the open-end approach outline the perimeters "within which a court, in the context of a specific factual situation, can balance the policies in favor of governmental immunity against the social value of distributing individual losses among the body of taxpayers." Furthermore, the jurisdictions that have adopted open-end liability have not experienced disastrous financial consequences;

117. See text accompanying note 114 supra.

118. This is modeled after the Federal Tort Claims Act, 28 U.S.C. § 2680(a) and (h) (1970), as amended, 28 U.S.C. § 2680(h) (Supp. IV 1974).

119. This is modeled after the statute proposed by the writer of Note, Need for Reform, supra note 36, at 256.

Under this statutory scheme, tortious conduct involving road building and highway maintenance would not be immunized as a unique governmental function. There are several reasons for this. First, much of the litigation in which sovereign immunity has provided a bar to recovery has involved the state activities of building, maintenance, or operation of roads. See e.g., Jekofsky v. State, 264 Md. 471, 287 A.2d 40 (1972); Godwin v. County Comm'rs, 256 Md. 326, 260 A.2d 295 (1970); State v. Rich, 126 Md. 643, 95 A. 956 (1915). Second, municipal governments are not immune for tortious conduct arising out of building, maintenance, or operation of their roads. See notes 85 to 86 and accompanying text supra. Third, building and maintenance would appear less dangerous than law enforcement or fire fighting, and are therefore less inherently unique to government, as evidenced by the fact that road-building functions are often contracted to commercial enterprise.

120. See Van Alstyne, supra note 36, at 467; Note, Need for Reform, supra note 36, at 250-51.

121. Note, Need for Reform, supra note 36, at 254.
the open-end scheme therefore appears to present a reasonable financial alternative to complete immunity.  

**Exceptions**

There are three generally recognized exceptions to an open-end statute that are consistent with policy considerations concerned with minimizing the burden on government operations. The first exception grants immunity for intentional torts. Of the three exceptions, the one for intentional torts is perhaps least compelling; retention of this immunity has not been explained beyond a balancing of the financial and administrative cost to government against the social policy of compensating innocent victims for their injuries. Those who oppose the retention of immunity for intentional torts argue that there is little evidence that liability would deter competent people from seeking government positions or that liability would encumber the decision-making process of officials. Immunity in this area seems to have the illogical result that the state would be liable for negligence but would be immune for conduct involving intent, a more culpable state of mind; in the private sector, on the other hand, there is liability for both negligent and intentional conduct. Many jurisdictions have simply chosen to limit their liability to negligent conduct, leaving the tort victim the option of attempting to sue the official directly. In this respect, it is significant that Congress recently amended the Federal Tort Claims Act to eliminate the exception for intentional torts committed by law enforcement officers of the United States. Since it is not clear why the balance has been struck in favor of retaining immunity in this area, the proposed statute provides no exception for intentional torts.

A second exception provides immunity for discretionary functions. Such an exception would be desirable because judicial scrutiny of every government decision might induce excessive caution. The governmental process requires uninhibited decision making, and it is difficult to justify


124. An exception for intentional torts does not necessarily leave the victim without a remedy. Instead of suing the state, the tort victim might seek to recover directly from the individual tortfeasor.


128. *See* notes 88 to 93 and accompanying text *supra*. Many government duties require policy determinations and involve calculated risks. Decisions often reflect existing circumstances and pressures. Government officials may become overly cautious
penalizing or inhibiting the government in its reasonable efforts to implement general social policies. Shielding discretionary functions under a closed-end statute would be difficult because it would entail the treacherous task of identifying and excluding all nondiscretionary conduct. An exception for discretionary functions under a blanket waiver statute would be even more problematic because there is no guarantee that the judiciary would immunize the proper range of discretionary functions, or any discretionary functions at all.

The Federal Tort Claims Act retains immunity for the performance of discretionary functions. In order to qualify for this discretionary function exception, the activity must involve the exercise of judgment concerning a matter of policy. In interpreting this discretionary function immunity the Supreme Court has distinguished between operational and planning-level decisions. In Dalehite v. United States, the Court held that "discretion" under the Act "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." Construction of the term "discretionary" under any

if courts or juries are allowed to award damages by substituting their judgment for that of the officials on policy matters.

129. 28 U.S.C. § 2680(a) (1970) provides that the abrogation of immunity does not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.


132. Cf. Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955) (maintenance of a navigational light by the United States Coast Guard considered an "operational" function for which liability would attach upon proof of negligence).

133. 346 U.S. 15 (1953). This suit was brought to recover damages from the United States for the death of a man who was killed by an explosion of fertilizer manufactured under government specifications. The Court decided that the government's role had been discretionary and did not hold it liable for the injuries.

134. Id. at 35-36 (footnote omitted). In Seaboard Coastline R.R. v. United States, 473 F.2d 714 (5th Cir. 1973), the court held that the government was liable for damage caused by the negligent design of a drainage ditch on the ground that this was an operational function. "Once the government decided to build a drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the drainage ditch in a non-negligent manner." Id. at 716. The court noted, however, that the original decision to construct the system was a judgment involving policy considerations and therefore was within the scope of the discretionary function exception.
future Maryland legislative enactment should parallel the interpretation of the Federal Tort Claims Act. Adoption of the Dalehite standard would ensure that the immunized conduct was an essential component of the decision-making process at the planning level. Accordingly, an appropriate statutory abrogation of the doctrine would immunize the performance of truly discretionary functions but would narrowly define the perimeters of protected conduct so that only planning-level decisions, requiring the exercise of judgment, would be exempted.

A third possible exception to an open-ended scheme would preserve the immunity for unique governmental functions. This unique function exception ensures that the government would not incur massive financial burdens and administrative interference in the performance of essential public functions. As in the case of the exception for the performance of discretionary activities, a blanket waiver statute could not ensure that the judiciary would fashion a unique governmental function exception. Similarly, it would be nearly impossible for the General Assembly to identify every general government function not a unique function, as would be required under the closed-end approach. It thus appears that the open-end formulation best provides well-defined immunity in the desired areas, avoids placing unreasonable demands on the legislature, and offers reasonable guidance to the judiciary.

Judicial or Administrative Tribunal

Those jurisdictions that have either abrogated the doctrine of sovereign immunity or have provided other forms of recovery provide relief by three different methods: claims boards, judicial relief in the courts of general jurisdiction, and judicial relief in special courts of claims. Claims boards have been used primarily where the jurisdiction has chosen to retain immunity but permits limited recourse against the state. Under a typical claims board statute, the claimant presents his case to the board, which operates according to informal rules of evidence. There is usually no right of appeal to the judiciary, and the board findings bind the legislature only if the legislature has provided a fund from which the board’s awards can be satisfied. Recommendations and findings of the board are ordinarily reported to the legislature, which may accept, reject, or modify the board’s decisions. The claims board approach thus does not compensate every person who is able to establish the state’s liability.

135. See notes 81 to 87 and accompanying text supra.
136. See notes 112 to 113 and accompanying text supra.
137. See notes 95 to 99 and accompanying text supra.
140. See Note, State Immunity from Suit, supra note 38, at 882-83; Leflar & Kantrowitz, supra note 1, at 1364, 1412.
Achieving the first of the two reasons for imposing tort liability — compensation of injured persons — is therefore problematic.\footnote{141} Although the claims board procedure appears to be an adequate method for processing smaller and uncomplicated claims,\footnote{142} the inconvenience of creating an additional bureaucracy, and the expense and time needed to develop the board's expertise in handling litigation may not be warranted because a fully developed judicial system already exists. Moreover, legislative consideration of hundreds of claims recommendations by the claims board might result in ineffective handling because of the time constraints placed on the legislature.\footnote{143} Another reason for avoiding legislative approval or disapproval of claims is that the legislature may be susceptible to influences, such as constituent pressure, that are not relevant to a proper determination of the substantive liability of the state.\footnote{144} One of the chief reasons for assigning all claims to the same tribunal is to obtain consistent decisions and to establish a standard by which the state, its agencies, instrumentalities, and employees can gauge their conduct. Administrative boards traditionally act on a case-by-case basis; where there is legislative modification of the board's findings, clear precedents are not likely to be established. It therefore becomes difficult to forecast the proper scope of future permissible conduct. The second of the two reasons for imposing tort liability — the deterrent effect — is thus diminished.\footnote{145}

A primary consideration in deciding whether to establish a special court of claims or to rely on courts of general jurisdiction is the amount of anticipated litigation.\footnote{146} The volume of litigation is difficult to forecast, though the form of immunity waiver that appears to best satisfy Maryland's needs — the open-end liability — might produce a wide range of litigation.\footnote{147} The assignment of tort actions against the state to a special court of claims would likely result in speedier trials and would not burden further the already overcrowded dockets of the present judiciary. Additionally, a court of claims system might allow a tribunal to develop expertise in handling claims against the state. It is not possible to predict whether

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141. See note 38 and accompanying text supra.
142. See Anderson, supra note 44, at 240.

Some have suggested that members of a claims board, because of the sources from which they are often drawn, are likely to be too sensitive to demands for austerity with respect to government funds. See Ross, supra note 116, at 187; Note, State Immunity from Suit, supra note 38, at 884.

144. See Note, State Immunity from Suit, supra note 38, at 884.
145. See note 38 and accompanying text supra.
146. See Note, Need for Reform, supra note 36, at 254.
147. See Attorney General's Report, supra note 143, at 12. It is noteworthy that the New York Court of Claims has created an extensive bureaucracy and has a huge operating budget. N.Y. Court of Claims Act § 8 (McKinney 1963).
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the amount of litigation would be so extensive as to require a separate court system. The California Law Revision Commission in its study of the implications of abrogation of the sovereign immunity doctrine determined that many jurisdictions have successfully handled the suits through their courts of general jurisdiction. This question whether to establish a separate judicial structure will likely remain unresolved until experience indicates its necessity; thus, it may be prudent initially to allow recourse to the present courts rather than to establish an entirely new court system.

CONCLUSION

The doctrine of sovereign immunity was transformed from the personal prerogative of the king into the automatic prerogative of the state. Over time, the primary reasons advanced for retaining the doctrine have been considerations of public policy. Analysis of these policy justifications reveals that they cannot prevail against opposing arguments. The predominant trend in the United States toward providing compensation to tort victims makes it more difficult to justify the current application of immunity in Maryland. It is necessary, however, to ensure that the operational and economic well-being of the state is not impaired as a consequence of abrogating the doctrine. Therefore, the General Assembly should enact legislation abrogating the broad doctrine of sovereign immunity and establishing an open-end form of liability that provides for immunity in two narrowly defined areas — unique functions and discretionary acts.

148. Sovereign Immunity Study, supra note 37, at 316.

149. It is noteworthy that the Sovereign Immunity Committee of the Bar Association of Baltimore City has recommended legislative abrogation of the doctrine of sovereign immunity. See Recommendations of Sovereign Immunity Committee, March 19, 1976, attached to letter from Edward C. Mackie, Chairman of the Sovereign Immunity Committee of the Bar Association of Baltimore City, to Jeffrey B. Smith, President of the Bar Association of Baltimore City, March 19, 1976. (The letter and recommendations are on file at the Maryland Law Review.)