Summer 1976

Torts: Sovereign and Governmental Immunity in New Mexico

Ruth Kovnat

Recommended Citation
Ruth Kovnat, Torts: Sovereign and Governmental Immunity in New Mexico, 6 N.M. L. Rev. 249 (1976). Available at: https://digitalrepository.unm.edu/nmlr/vol6/iss2/4

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the New Mexico Law Review website: www.lawschool.unm.edu/nmlr
TORTS: SOVEREIGN AND GOVERNMENTAL IMMUNITY IN NEW MEXICO

RUTH L. KOVNAT*

Ordinarily, if a person employed to perform services for the benefit of another is subject to a right of control by his employer, the employer is liable for the injury which the employee negligently or even intentionally causes within the scope of his employment. The vicarious liability of the employer for the torts of his employees rests on the principle that if the employer reaps the benefit of the conduct of his employee, he as well as the careless employee should be financially responsible for injuries to innocent third parties resulting from the negligent performance of such acts.

If, however, the employer is the state, its agency, or a political subdivision whose employee is engaged in a governmental activity, it is not liable for the torts of its employees, since the doctrine of sovereign immunity protects it from being sued without its consent. Whatever the historical basis for the protection of the sovereign from suit, it seems clear that the ready judicial acceptance of the im-

---

*Associate Professor of Law, UNM School of Law.


3. Restatement (Second) of Agency § 228 (1957).


5. The paradigm of a political subdivision is the municipal corporation which is regarded as a dualistic entity. On one hand, it possesses governmental powers, and on the other hand it is a corporate body, providing services, often for a fee, that might be as well provided by another sort of corporation. When an agent of a municipal corporation tortiously performs an act in the governmental capacity of the municipality, the municipality is protected from suit by sovereign immunity. If the agent’s tort occurs during the performance of a corporate or proprietary activity, the municipality is in the same position as any other corporation would be; hence, it is not immune. See Harno, Tort Immunity of Municipal Corporations, 4 Ill. L.Q. 28, 1921; Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41, 1949. See also Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974).

munity in the United States and its preservation into the twentieth century is substantially based on reluctance to permit invasion of the public coffers from the satisfaction of liability judgments instead of for the public purposes for which they were appropriated.

Furthermore, the individual who is injured may not have a claim against the public employee whose conduct injured him either, because if the employee is engaged in a discretionary activity within the scope of his duty, he is also immune from suit on the grounds that fear of liability for his actions might chill him in the exercise of his official duties and rebound ultimately to the public detriment.

It is clear, then, that the victim of the tortious conduct of a public official or employee is in a far worse position to shift and spread his loss than is the victim of the tortious conduct of anyone else. Absent a grant of legislative consent or a judicial reconsideration of the doctrine of sovereign immunity, he certainly will be barred from suing the employer and, in some instances, from suing the employee as well. This disparity of treatment between victims and the avail-


9. There are, of course, limitations on the immunity even of discretionary employees acting within the scope of their duties. The most prominent limitation is contained within 42 U.S.C. § 1983 (1971): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." When a state officer acts under state law in a way which violates the federal constitution, he comes into conflict with the supreme law of the United States and is stripped of his official character. In such a case, a state has no power to grant him any immunity from responsibility under the federal constitution. Scheuer v. Rhodes, 416 U.S. 232 (1974).

10. The argument that the doctrine of sovereign immunity arbitrarily and unreasonably creates two classes of plaintiffs and thus violates the guarantee of "equal protection of the laws" has been made. The question has never been presented to the Supreme Court of New Mexico and was specifically rejected by the Court of Appeals in Dairyland Ins. Co. v. Board of County Comm'nrs, 88 N.M. 180, 538 P.2d 1202 (1975). The U.S. Supreme Court dismissed an appeal from the Supreme Court of Ohio which might have squarely raised the question. Krause v. Ohio, 409 U.S. 1052 (1972). The Ohio Court of Appeals had held that sovereign immunity conflicts with the fourteenth amendment, 28 Ohio App.2d 1, 274 N.E.2d 321 (1971). The case was reversed by the Ohio Supreme Court, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), on the grounds that substantive differences justify the special treatment of states and their political subdivisions. In Brown v. Wichita State Univ., 217
SOVEREIGN IMMUNITY

ability of liability insurance to protect the fiscal integrity of governments has caused modern courts and legislatures to reconsider the traditional approach to immunity.

In New Mexico the liability of the State, its agencies, and its political subdivisions has received the attention of two successive legislative sessions and the state Supreme Court during the span of a calendar year. The second legislative effort, The Torts Claims Act,\(^1\) is a direct response to Hicks v. State,\(^2\) in which the New Mexico Supreme Court abolished the common law rule that no sovereign state can be sued in its own courts without its consent and permission. Since such volatile activity may suggest uncertainty of policy, this article will develop an understanding of New Mexico’s present position on governmental immunity and that of public employees or officials.

SOVEREIGN AND GOVERNMENTAL IMMUNITY BEFORE 1975

Prior to 1975 the New Mexico law on sovereign and governmental immunity was contained in several legislative acts as well as in a number of judicial decisions.\(^3\) The common law in New Mexico was

Kan. 279, 540 P.2d 66 (1975), a statute conferring immunity on the state, its boards, commissions, departments, agencies, etc. from liability and suit on implied contract, or for negligence or any other tort was found to be in conflict with the equal protection clauses of the fourteenth amendment and of the Kansas constitution because it conferred full immunity on the state irrespective of the nature of the activity. Cities, on the other hand, are not immune for tortious conduct occurring in the course of proprietary activities. Persons injured are thus classified by the type of governmental entity involved. The court could find no practical or important distinctions to justify the classification, and so found it arbitrary, discriminatory and unreasonable. See also Hunter v. North Mason High School & School Dist., 85 Wash.2d 810, 539 P.2d 845 (1975), which held that a statutory provision which required that notice of claim be made to a school district within a time period shorter than that required by the applicable statute of limitations as a condition precedent to filing a claim in the district court offended equal protection guarantees. Accord, Reich v. State Highway Dep’t, 386 Mich. 617, 194 N.W.2d 700 (1972); Turner v. Stages, 89 Nev. 230, 510 P.2d 879 (1973), cert. denied, 414 U.S. 1079 (1974).

summarized by Justice Oman in 1973 in *Sangre de Cristo Development Corp. Inc. v. City of Santa Fe*, in which the defendants were the City of Santa Fe and the Board of County Commissioners of Santa Fe County:

Regardless of what may be the law in other states, this Court has consistently held the State of New Mexico may not be sued in its courts without its permission or consent. (citations omitted). Also in New Mexico, municipalities... are clothed with this immunity from suit, insofar as their governmental functions are concerned.  

It was thus expressly recognized that municipalities were clothed with immunity only to the extent that the activity in question was governmental rather than proprietary. Such activities as operation of a municipal swimming pool in a public park, construction and repair of sewers and sewage plants, and construction and maintenance of streets to avoid defects and obstructions were characterized as proprietary functions of municipalities, whereas activities such as operation of a police department, a county hospital and a firefighting service, installation of stop signs and maintenance of roads had all been held to be governmental activities, immunizing the municipality from liability despite an allegation of negligence. 

The legislative grant of consent to sue the state was limited. The earliest statute on the subject, enacted in 1941 and repealed in 1975, authorized the state Board of Finance to require the purchase of liability and property damage insurance to protect against loss which occurred because of negligent operation of motor vehicles by employees of the state, its agencies or political subdivisions in the course of their employment. It preserved the common law bar

---


against suing the state and provided instead that the action should be brought against the allegedly negligent state employee. The insurer was prohibited from raising the defense of sovereign immunity to any claim covered by the policy, and the claimant was required to waive any portion of his claim in excess of the liability limit stated in the policy. The statute was construed so that municipal corporations were included as political subdivisions of the state and so protected by the terms of the statute. 26

It is unclear, however, whether the statute could properly have been construed to obliterate the proprietary-governmental distinction previously developed by the courts. If so, actions against municipalities would have been barred for injuries resulting from negligent operation of motor vehicles in the performance of proprietary functions even though such actions would have been permitted under common law. Such an interpretation is inconsistent with the legislative intent to protect the public against injury expressed in the statute. Furthermore, the silence of the legislature as to the common law distinction would seem to have compelled the conclusion that the common law remained unchanged.

A 1959 statute, also repealed in 1975, 27 permitted recovery of damages for death, personal injury, or property damage resulting from either the employer's or the employee's negligence occurring during the course of employment for the state, county, city, school districts, and other state agencies and institutions. The statute authorized purchase of liability insurance covering public employees for harm caused by their negligence during the course of their service. It also authorized the purchase of insurance against liability for damages resulting from false arrest or false imprisonment. Consent to sue the state and its agencies was granted. No judgment could run against the state, however, unless there was liability insurance to cover the amount and cost of such judgment. The legislative pattern was consistent with the purpose of protecting the fiscal integrity of the public agency from the inroads of liability judgments. In this act too the legislature was silent as to a distinction between governmental and proprietary activities.

The relationship between the 1941 and 1959 statutes was considered by the Supreme Court in Galvan v. City of Albuquerque, 28 in which suit for personal injuries was brought against the City of Albuquerque for the negligent operation of one of its motor vehicles by a city employee. The plaintiff proceeded under the 1959 statute,

which permitted actions to be brought against the state and subdivisions, and the city moved to dismiss on the ground that it was immune from suit under the earlier statute, relying on the provision that only suit against the operator of the vehicle was permitted. The district court dismissed the complaint, and the Court of Appeals affirmed. Finding the two statutes irreconcilable, the Supreme Court, through Justice Stephenson, ruled that the later statute was so broad, clear and explicit that it showed a legislative intent to repeal the earlier statute. It remanded to the district court with directions to reinstate the city as defendant.

In interpreting the 1959 statute to be so broad as to repeal by implication the 1941 statute, the court expressly indicated its displeasure with the doctrine of sovereign immunity. The court considered the 1959 statute to go further in restricting the operation of the doctrine than did the 1941 statute in that it permitted an action to be brought against the state or a political subdivision.29

PUBLIC OFFICER IMMUNITY BEFORE 1975

The legislature had not been silent on the question of the personal liability of a public officer either. In a section of the Municipal Code enacted in 196530 and repealed in 1975, personal actions were barred against any officer of a municipality for tortious acts done under authority of the municipality or in execution of its orders. The municipality was instead responsible. By limiting the bar to members or officers of municipalities31 the legislature seemed to preserve the distinction developed at common law between employees typically performing discretionary acts and those typically performing ministerial acts.32 At common law if an officer were at a sufficiently high policymaking level, he was immune from suit for injuries caused by his discretionary activities to avoid "dampen[ing] the ardor of all but

29. Such an interpretation of the 1959 statute may be considered technical, since the effect of both statutes is to permit an action if the municipality has purchased insurance to cover the risk and to limit recovery to the value of the insurance. The difference consists merely in whether the city is a proper defendant. If insurance has not been purchased by the municipality to cover the risk of negligent driving of municipal employees, action may not be brought against the municipality, irrespective of which statute is deemed to apply. The common law action against the individual tortfeasor is still available to the victim, but he probably has a judgment proof defendant.


32. The predecessor statute had been employed to bar actions against police officers. Taylor v. City of Roswell, 48 N.M. 209, 147 P.2d 814 (1944). But see Rascoe v. Farmington, 62 N.M. 51, 304 P.2d 575 (1956), where the court assumed that city employees who filled an irrigation ditch would be protected from suit. This hardly seems a discretionary act.
the most resolute, or the most irresponsible, in the unflinching discharge of their duties" which would result if the officer feared liability actions in the event his judgment miscarried and resulted in injury. While preserving the common law protection of officers, the legislature seemed to relinquish the common law immunity of its municipalities, at least as to their governmental activities, by declaring that a municipality was responsible in all cases where the officer's suit was barred. Predecessor legislation containing substantially identical language was so construed. However, most cases interpreting this statute and predecessor legislation decided in favor of the municipality on the ground that the complained of conduct was not authorized by the city. The consequence of such a finding was to immunize the municipality and reinstate the personal liability of the public officer. Accordingly, the meaning of the legislation on the scope of the municipality's liability to victims of tortious acts of public officers has never been clear.

In an analogous provision the legislature barred personal actions against any employee of the New Mexico State Police for any tort done under authority of the state, but the liability of the state was limited to the extent of liability insurance coverage. No such limitation was placed on the municipality's liability for the torts of its officers or members.

Finally in the Peace Officers Liability Act the legislature attempted to address systematically the problem of injury inflicted by peace officers during the performance of their duties. It was a necessary effort because by this time the legislature had apparently modified the common law rule that if a peace officer injured someone by an act within the scope of his duties, the state would be immune on grounds of sovereign immunity and the municipality would be immune on grounds that police work is governmental, but that in both cases the officer would be personally liable. The two statutes discussed above eliminated the personal liability of the officer if he acted under authority of his employer, the state police

or municipality. Under the Municipal Code Section the municipal peace officer was immune from suit, and the municipality liable to the extent of proved damage.\(^3\)

The provisions of the 1959 act overlapped the municipal code section, however. If the offensive act of the municipal peace officer consisted of negligence or false arrest or imprisonment and the 1959 act were applied, the liability of the municipality would be limited by the extent of its liability insurance, if any.\(^4\) The relationship between the statute barring suit against the municipal officer and the statute consenting to suit against the city but limiting recovery to liability insurance has never squarely come before the court.\(^4\) If the peace officer were a state police employee, it seems clear that the state's liability would be limited by the existence of liability insurance.

In *Montoya v. City of Albuquerque*,\(^4\) the Supreme Court substantially limited the potential reach of the Municipal Code in imposing liability on the municipality. It affirmed a dismissal of a complaint against the City of Albuquerque on grounds that municipal officers' suits were barred and the city liable only when the governing body or its authorized agents specifically directed the municipal officer to do the complained of act and not when the complained of act occurred in the performance of his general duties. The consequence of that interpretation of the Municipal Code was that the victim of municipal officers' torts neither had a remedy against the municipality in the majority of cases nor was the municipal officer protected from suit. To remedy that result, the legislature in 1973 enacted the Peace Officers Liability Act,\(^4\) which provided a means for the state or local public body to protect peace officers from liability and at the same time compensate the individuals wrongfully harmed by the officer's actions.

Although no state agency or local public body was required to subject itself to liability under the Peace Officers Liability Act, it might do so either by purchasing liability insurance up to maximum limits or by filing a notice of election with both the Superintendent

---

39. It is remarkable that N.M. Stat. Ann. § 14-9-7, which barred the officer's suit and imposed liability on the municipality did not limit the municipality's liability to the extent of liability insurance coverage.

40. See text accompanying note 25 supra.

41. In Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970), summary judgment for the city was affirmed. Plaintiff alleged that four police officers committed false arrest, false imprisonment, malicious prosecution and assault and battery. Since the city had no insurance, the court did not consider the 1959 statute to be applicable.

42. Id.

of Insurance and the Department of Finance and Administration. The notice indicated the governmental entity’s waiver of immunity and had to be approved by the Department of Finance and Administration. Approval might be conditional on the purchase of insurance if in the judgment of the Department the governmental entity was insufficiently solvent to be a self-insurer.44

The waiver of the defense of sovereign immunity was permitted for any bodily injury caused by a peace officer acting within the scope of his duties as well as personal injuries arising from false arrest, false imprisonment, erroneous service of civil papers, malicious prosecution, libel, slander, defamation, violation of property rights and civil rights.45 Immunity was not waived under this statute where liability arose out of fraud with affirmative dishonesty, operation of a motor vehicle, watercraft or aircraft, or willful violation of a penal statute.46 Although the statute was directed toward elimination of the personal liability of the officer for the statutory injuries and imposed the duty to defend the officer on the state or local public body, it did not expressly bar suit against the officer, nor provide for his indemnification if a judgment was entered against him.

THE PUBLIC OFFICERS AND EMPLOYEES LIABILITY ACT

The legislature in 1975 passed the short-lived Public Officers and Employees Liability Act,47 the stated legislative purpose of which was to “modify the common law doctrines of sovereign immunity by providing a permissive method whereby the state or local public body may elect to protect itself and its officers and employees from personal liability arising out of certain acts committed during the performance of governmental and proprietary activities and to compensate the individuals wrongfully harmed by these actions.”48 The legislature repealed the legislation considered in Galvan v. City of Albuquerque and also that portion of the Municipal Code that barred suit against a municipal officer but let stand the Peace Officers Liability Act.

For the first time the legislature purported to deal with compensation of injuries caused by acts of municipal employees in performance of proprietary activities. At common law, if an activity is in furtherance of corporate or proprietary, as distinguished from

governmental, goals the liability of the municipality is determined in the same manner as is that of any other corporation. Ordinary rules of vicarious liability apply. Municipalities were expressly included within the coverage of the Act.\(^4\)\(^9\) Governmental entities might but were not required to waive immunity as to all of their activities, both proprietary and governmental, by either purchasing insurance or filing a notice of election of waiver of immunity. If a municipality did not waive immunity by either of these means, it was immune from liability as to a proprietary activity, even though it might have been liable under ordinary common law rules. Despite the admitted difficulty in ascertaining whether a particular activity is governmental or proprietary and the triviality of differences upon which the distinctions are made,\(^5\)\(^0\) this narrowing of right to compensation to persons injured through wrongful acts of public employees is inconsistent with a general legislative purpose of expanding compensation to such persons.

But it is not at all clear that the legislature did intend to expand compensation opportunities for victims of the acts of public employees. In at least two areas the legislative purpose of expanding relief does seem clear: as to the wrongful acts of public employees of the state and its agencies and as to the public employees of "local public bodies" performing governmental activities. Under prior law the grant of authority to purchase insurance to cover liability went only to injuries resulting from negligence, false arrest or false imprisonment. And suits could be brought against the state, county, city, etc. only for the negligence of public officers\(^5\)\(^1\) with judgment running only to the extent of liability insurance. The 1975 act expanded the covered risks to include injuries such as false arrest, false imprisonment, erroneous service of civil papers, malicious protection, libel, slander, and violation of civil rights.\(^5\)\(^2\) The act also permitted waiver of sovereign immunity other than by purchase of insurance by filing a notice of election of waiver, so that judgment was theoretically possible against a state agency or local public body even in the absence of insurance.\(^5\)\(^3\)

In other respects, however, the legislation limited liability even when the waiver was exercised. Under prior law, at least as to negligence, if a state agency, city, county, etc. purchased liability

---

50. See text accompanying notes 14-21 supra.
51. See text accompanying note 25 supra.
insurance, the amount of recovery possible against the state, city, or county was limited to the extent of the coverage provided.\textsuperscript{5} \textsuperscript{4} Under the 1975 law if an agency or local public body elected to purchase liability insurance to cover the expanded list of risks, its liability would nevertheless not exceed $100,000 for death or $200,000 in any other case or $1,000,000 for any number of claims arising out of a single occurrence.\textsuperscript{5} \textsuperscript{5} Furthermore any state or local public body had the authority to establish its actual limits of liability at levels lower than those set forth above.\textsuperscript{5} \textsuperscript{6}

The vice of the Public Officers and Employees Liability Act, however, is the permissive waiver it provided. Quite simply, agencies and local public bodies were not required to waive their immunity. The acts of a public employee resulting in injury gave rise to liability of the state or local public body only if the employer agency had waived its immunity, whereas the very same acts of a similarly situated employee would not if his employer agency had not elected to waive its immunity. If the doctrine of sovereign immunity is at least partially explained by the perceived need to protect the public treasuries from dissipation in the payment of tort judgments, that purpose may have been well served by this statute. An agency with great exposure could avoid liability completely. But the inequities inherent in the application of the doctrine of sovereign immunity were exaggerated in the Act. The remedies available to the victim of tortious conduct turned not on the nature of the conduct and not even on a general concern for protection of the public treasury, but on the vagaries of choice of scores of state agencies and local public bodies.

In 1975 the Supreme Court was faced with \textit{Hicks v. State},\textsuperscript{5} \textsuperscript{7} which squarely raised the question of the continued vitality of the

\textsuperscript{5} 54. N.M. Stat. Ann. \S \S 5-6-18 through -22 (Repl. 1974). \textit{See} text accompanying notes 25 and 26 \textit{supra}.


\textsuperscript{5} 56. N.M. Stat. Ann. \S 5-13-5B (Supp. 1975). Another possible limitation in the 1975 law involves the legislative definition of an act within the scope of duties. Under the common law and presumably under prior legislation, except the Municipal Code section repealed by this act, an act within the scope of duties included acts within the apparent authority of the employer or officer. Section 5-13-4B of the 1975 law sets out the circumstances under which an officer shall be deemed to be within the scope of his duties:

(1) when he is engaged in the immediate and actual performance of any duties which he is authorized to perform;

(2) when he is engaged in the immediate and actual performance of any duties which he is requested to perform by any governmental entity or agency whether or not his employer.

Unless “authorized to perform” is interpreted to include apparent authority as well as actual authority, a victim’s right to recover is more limited under this act than under prior law.

\textsuperscript{5} 57. 88 N.M. 588, 544 P.2d 1153 (1975); rehearing 88 N.M. 544 P.2d 1158 (1976).
doctrine of sovereign immunity. The case arose prior to passage of the Public Officers and Employees Liability Act, but the Court noted its enactment. In a suit to recover damages for the wrongful death of plaintiff's wife and daughter allegedly due to the highway department's negligence, the district court granted defendant's motion to dismiss on the grounds of sovereign immunity. The highway department carried no liability insurance. The Supreme Court reversed the district court's order.

The court said that sovereign immunity is a judicially created principle which can be abolished by the courts; adequate insurance can be purchased to eliminate any intolerable financial burden on the state; placing the burden on the state which can distribute losses is more just and equitable than forcing the individual who suffers the injury to bear the burden alone. The principle that one may seek a remedy for every substantial wrong is weightier than the protection of the state in light of the availability of liability insurance. The court overruled all cases recognizing governmental immunity from tort liability and applied the new rule to the case at bar, all similar pending actions, and all cases arising in the future. On motion for rehearing, the court modified its ruling and ordered that the Hicks decision apply only to torts occurring after July 1, 1976. Justice McManus, speaking for himself and Justice Stephenson, based the modification which deprived Hicks of the benefits of his day in court on the injustice of depriving the state of a defense upon which it had a right to rely. In his view, better policy would permit the state to


59. 88 N.M. 588, 444 P.2d 1153, 1158 (1976). Courts have generally been sympathetic to the view that the abolition of governmental immunity should have prospective effect to permit governmental entities which have relied on the defense to purchase insurance to cover the risks of their activities. As a rule, however, abrogation of the defense has been given effect in the case at bar, because otherwise the announcement might be considered mere dictum, and the plaintiffs would be deprived of any benefit from their efforts in challenging the rule found to be obsolete. See, e.g., Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974); Becker v. Beaudoin, 106 R.I. 562, 838, 261 A.2d 896 (1970);
plan for insurance and to develop procedures for investigating accidents. Mr. Justice Oman agreed on the prospectivity point but specially concurred because he did not agree that the doctrine of sovereign immunity could or should be abolished by judicial action.\textsuperscript{6,6} Justices Montoya and Sosa dissented. They particularly emphasized that the benefit of the abolition of the doctrine should run to Hicks himself whose litigation efforts gave the court the opportunity to abolish the doctrine.\textsuperscript{6,1}

THE TORT CLAIMS ACT OF 1976

Judicial abolition of sovereign immunity for torts occurring after July 1, 1976, shifted the burden of policymaking to the legislature. The legislature responded by enacting the Tort Claims Act,\textsuperscript{6,2} which repealed the Public Officers and Employees Liability Act and the Peace Officers Liability Act.

The declaration of legislative purpose recognizes the unfair and inequitable results which occur from strict application of the doctrine of sovereign immunity.\textsuperscript{6,3} It justifies that inequity on grounds that a private individual is free to choose not to engage in an activity at all. It is, therefore, fair to charge an individual for liability, presumably because he exercises his choice to act in consideration of his exposure to that liability. If he chooses to act, it must be in expectation of a benefit which in his judgment outweighs the cost of his exposure to liability. The government, on the other hand, is obliged to act for the public good: It cannot choose not to govern in consideration of liability exposure. Thus, when it acts liability ought not be imposed on it to the same extent as liability may be imposed on an individual. The declaration suggests that governmental entities have no discretion to refrain from an activity even in the face of a finding that the public good is outweighed by the risk of public loss occasioned by a possible liability judgment. The inference is that the government lacks discretion to avoid public detriment. The legislature surely cannot have meant that. Indeed examination of the statutory structure compels the conclusion that the purpose of the act is to treat the State and other governmental entities differently

Holtz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). The purely prospective abrogation of the defense to a date certain, announced on rehearing in Hicks has been followed in Minnesota. See Nieter v. Blondell, Minn. 235 N.W.2d 597 (1975).

60. 88 N.M. at 544 P.2d at 1159.
61. 88 N.M. at 544 P.2d at 1160 and 1161.
from individuals because to do otherwise threatens the public treasuries too much. Even though the state is in a much better position to spread the loss than is the victim of a public employee’s tort, protection of the public treasuries to some extent justifies the partial retention of immunity.

The declaration of purpose further purports to abolish all judicially-created categories previously used to determine immunity or liability and says that liability under the Act will be based on traditional negligence concepts and in no event on strict liability. It attempts, however, to modify the common law standard of care by including as factors to be considered in the determination of the standard the financial limitations of the agency as well as the agency’s discretion in determining the extent and nature of its activities.

The pattern of the Act is relatively simple. It reinstates immunity from tort liability for a governmental entity, including law enforcement officers. It then waives

64. Id. § 5-14-2B.
65. Id. One can only speculate on the sort of modification of the ordinary standard of care that is intended by the legislature to run on the financial limitations of the governmental entity. The usual jury instruction on ordinary care is that care which a reasonably prudent person exercises in the management of his own affairs. “Ordinary care” is not an absolute term, but a relative one. In deciding whether ordinary care has been exercised, the conduct in question must be considered in light of all the surrounding circumstances, as shown by the evidence. What constitutes “ordinary care” varies with the nature of what is being done. As the danger that should reasonably be foreseen increases, so the amount of care required also increases, N.M. Uniform Jury Instruction 12.2. The financial capacity of a defendant is not usually a factor in the determination of ordinary care. The legislative purpose would seem to permit a finding that ordinary care has been exercised even in face of evidence that a governmental entity failed to use available and customarily used safety devices if only the devices were costly in relation to the entity’s resources. No such consideration would be permitted a corporate or individual defendant.
66. Id. § 5-14-3A, B, and F.
   A. “[G] overnmental entity” means the state or any local public body as defined in subsections B and F of this section.
   B. “[L]ocal public body” means all political subdivisions of the state and their agencies, instrumentalities and institutions.
   F. “[S] tate” or “state agency” means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.
67. Id. § 5-14-3D.
   “[P] ublic employee” means any officer, employee or servant of a governmental entity, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in any official capacity whether with or without compensation, but the term does not include an independent contractor.
68. Id. § 5-14-3C.
   “[L] aw enforcement officer” means any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order, or to make arrests for crimes, or members of the national guard when called to active duty by the governor.
immunity for both governmental entity and public employee for particular acts set forth in Sections 5 through 12. Because the prefatory language of the Act abolishes the judicially-created distinctions between governmental and proprietary activities and discretionary and ministerial acts, it is fair to assume that a municipality whose employee is engaged in an activity formerly considered proprietary is immune under the Act even though it would not have been under prior law, unless the activity is specifically listed in Sections 5 through 12. Furthermore, even if the complained of act of the employee is purely ministerial, he too will be immunized from tort liability even though under the common law he would have been personally liable, again unless his act fits within the waiver. And the ultimate limitation on the waiver of immunity is that, notwithstanding any other provision of the Tort Claims Act, the liability assumed under the Act is limited to insured risks and the amount of insurance coverage. So, in any event, if the governmental entity fails to purchase insurance to cover the risk, both it and its employee acting within the scope of his duties are immune.

If, however, insurance coverage is provided, neither the governmental entity nor the public employee is immune for bodily injury, wrongful death or damage to property caused by:

Section 5 negligent operation of any motor vehicle, aircraft or watercraft;\(^7\)\(^6\)

Section 6 negligent operation or maintenance of any building, public park, machinery equipment or furnishings;\(^7\)\(^1\)

Section 7 negligent operation of airport unless the liability is due to a condition arising out of a compliance with a federal or state law or regulation governing the use and operation of airports;\(^7\)\(^2\)

Section 8 negligent operation of utilities, specifically, gas, electricity, water, solid or liquid waste collection or disposal, heating, and ground transportation, but not including damages caused either by a failure to provide an adequate supply or from polluting the land, air, or water;\(^7\)\(^3\)

Section 9 negligent operation of any hospital or outpatient health care facility;\(^7\)\(^4\)

Section 10 negligent providing of health care if the public employee is

---

69. Id. § 5-14-18.
70. Id. § 5-14-5.
71. Id. § 5-14-6.
72. Id. § 5-14-7.
73. Id. § 5-14-8.
74. Id. § 5-14-9.
a doctor of medicine, doctor of osteopathy, chiropractor, podiatrist or nurse anesthetist;\(^7\)

Section 11 negligent maintenance or operation of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area, but not including liability for any plan or design defect in any of the above;\(^7\)

Section 12 assault, battery, false imprisonment, false arrest, malicious prosecution, of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by federal and New Mexico constitutions when caused by law enforcement officers while acting within the scope of their duties.\(^7\)

The Section 12 waiver of immunity for law enforcement officers seems to contain a significant drafting error. In both the Peace Officers Liability Act and the Public Officers and Employees Liability Act immunity was waived not only for bodily injury, sickness or disease occasioned by the tortious conduct of the employee or officer, but also for personal injury that flows from such torts as malicious prosecution, false arrest, false imprisonment, libel, slander and violation of civil rights.\(^7\) The kind of harm sustained when these torts are committed is typically not bodily harm, but harm to personal dignity, reputation, privacy and emotional tranquility. The Tort Claims Act waives the immunity of the law enforcement officer and the governmental entity only for bodily injury, wrongful death, or damage to property. Unless the sort of personal harm flowing from the dignitary torts listed in Section 12 can be fitted into either the category of damage to property or bodily injury, it seems that the officer and the governmental entity are immune even though the invasion of personal interests is substantial. Because in other respects Section 12 is simply a restatement of the provisions of the Peace Officers Liability Act, it may be that the omission was inadvertent. If this is so, the oversight should be corrected by amendment.

The omission assumes even greater significance in light of two recent U.S. Supreme Court decisions, *Paul v. Davis*\(^7\) and *Imbler v. Pachtman*.\(^8\) *Paul* involved a claim that libel published under color of state law violated rights secured by the fourteenth amendment,

---

75. *Id.* § 5-14-10.
76. *Id.* § 5-14-11.
77. *Id.* § 5-14-12.
giving rise to relief under 42 U.S.C. § 1983, the Civil Rights Act of 1871. The conduct complained of by the plaintiff was distribution of a flyer by two chiefs of police which displayed plaintiff's picture and name and described him as an "active shoplifter." In holding that damage to reputation alone is neither deprivation of property nor liberty protected by the due process clause and the Civil Rights Act of 1871, Mr. Justice Rehnquist left the plaintiff to his state common law action in libel for relief for his injury. In this precise situation, it is possible that plaintiff has no claim under the present Tort Claims Act in New Mexico, even if the governmental entity purchased insurance to cover the claim. Since Section 12 waives immunity only with respect to bodily injury, wrongful death or damage to property, plaintiff might be without remedy under either state or federal law for damage to his reputation. In *Imbler* the Court held that malicious prosecution by a state prosecuting attorney did not state a claim redressable under § 1983. Section 12, as it now reads, could result in immunity under state law as well.

Although the immunity of the public employee is waived for conduct specifically set out in Sections 5 through 12, the governmental entity has a statutory duty to indemnify the employee unless the employee acted maliciously, fraudulently, or without justifiable cause, and even then, if the conduct of the employee, although malicious, fits within one of the categories set out in Section 12. And in any event the governmental entity must provide a defense for the employee. Furthermore, a governmental entity has no right to contribution, indemnity or subrogation against a public employee.

The Act imposes maximum limits of liability of $100,000 for property damage, $300,000 for other damages, and $500,000 aggregate damages from a single occurrence. A government entity is authorized, however, to purchase liability insurance coverage in amounts up to $1,000,000, and if it does so the limits of liability are extended to the actual amount of such coverage.

The Act retains the provision that liability is limited to insured risks and the amount of insurance coverage in broad language, "notwithstanding any other provision of the Tort Claims Act, the liability assumed under that act shall be limited to insured risks and the amount of liability insurance." It goes farther than prior legisla-

---

82. Id.
83. Id. § 5-14-4C.
84. Id. § 5-14-17.
85. Id. § 5-14-18.
tion, however, in requiring governmental entities to purchase and maintain insurance coverage for the liabilities under the Act. Prior legislation authorized the purchase of insurance. And the purchase of insurance constituted a \textit{pro tanto} waiver of immunity. The Act sets forth those activities for which immunity does not apply, and the duty is imposed on a governmental entity to make a good faith effort at the earliest practical time to purchase and maintain reasonably available insurance coverage in a competitive market.\textsuperscript{86} Even if it is determined that no competitive market exists, the governmental entity is authorized to purchase insurance by negotiation so long as the superintendent of insurance finds that rates are not unreasonably

\footnotesize
\textsuperscript{86} Id. Whether this statutory language supports an action in mandamus if a governmental entity fails to purchase insurance is questionable. The Tort Claims Act itself expressly provides that it shall not be construed to prohibit any proceedings for mandamus (Section 15A), but it remains to be seen whether anyone is in a position to challenge governmental inaction to provide insurance by means of a mandamus proceeding. The mandamus statute, N.M. Stat. Ann. \textsection\textsection 22-12-1 through 22-12-14 (1953) sets out the requirements for challenging official lack of action. There must be no plain, speedy and adequate remedy at law, the party seeking the writ must be beneficially interested, and the purpose of the writ must be to compel performance of an official duty and not to control official discretion. \textit{See} Dumars \& Browde, \textit{Mandamus in New Mexico}, 4 N.M.L. Rev. 155 (1974) in which the authors conclude that if there is no remedy in damages, or by appeal to a higher court or administrative agency, there is no remedy in the ordinary course of law. If that principle is applied to the immunity problem, it is clear that if the immunity of the governmental entity persists because of its failure to purchase insurance, there is no remedy other than mandamus. The authors also conclude that a broad standing rule is applied in mandamus in New Mexico and a petitioner in mandamus acts like a private attorney-general enforcing public rights. That would suggest that after July 1, 1976, any citizen of New Mexico would have sufficient interest to seek mandamus to compel governmental entities to purchase insurance. Since governmental activities are so widespread that they create risks of injury to large numbers of persons, the waiver of the immunity of governmental entities from suit is a matter of wide public interest and should be enforceable at the instance of any member of the public. For the current New Mexico law of standing see \textit{Walden, Civil Procedure}, infra at . The major theoretical roadblock to the mandamus proceeding is the nature of the duty imposed by the language "good faith effort to purchase and maintain insurance coverage... to the extent such coverage may be reasonably available in a competitive market. Ordinarily mandamus will not lie to correct or control the discretion or judgment of a public officer, but only to compel the performance of a clear legal duty. The qualifying language in the act might be read to mean that the insurance purchasing decision is discretionary. However in \textit{Conston v. New Mexico State Board of Probation and Parole}, 79 N.M. 385, 444 P.2d 296 (1968), the court recognized that while revocation of parole rests within the discretion of the Parole Board and is unreviewable, nevertheless mandamus is available to assure that the Board in revoking parole complies with the relevant statutory provisions. It would seem that mandamus would similarly be available to permit petitioner to show that insurance was reasonably available. There remains, however, a considerable practical problem. The person with the greatest motivation to challenge governmental inaction in purchasing insurance is the victim of governmental torts. Even a successful mandamus proceeding will not result in the availability of insurance to cover his injury, which would necessarily have arisen before insurance was obtained. So if mandamus is available, the measure of damages should properly include the recovery he would have had, had the governmental entity not been immune. \textit{See} N.M. Stat. Ann. \textsection 22-12-12 (1953).
The Act permits avoidance of the duty to purchase insurance, and thus full immunity, in the event rates of coverage are found to be "unreasonably high."\textsuperscript{87, 88} 

Even though an affirmative duty to purchase liability insurance reasonably available in a competitive market is imposed alike on all governmental entities, a considerable problem arises because of the varying scope of the duty depending on the financial resources of the governmental entity. If reasonable availability takes into account the financial resources of the governmental entity as compared to the cost of insurance, that may be reasonably available to Bernalillo County, for example, may not be reasonably available to Mora County because of the differences in the financial base in the two counties. That problem is exacerbated because the Act provides funds for purchase of insurance for the state and state agencies but not for purchase of insurance for local public bodies.\textsuperscript{89, 90} A risk management division is established, the chief of which must be knowledgeable in insurance, which has responsibility to acquire and administer insurance purchased by the state.\textsuperscript{90} No counterpart provision exists for local public bodies. The only administrative assistance provided local public bodies is the duty imposed on the chief of the risk management division to consult with them.\textsuperscript{91} The Act places the state and state agencies in a better position to purchase insurance than are local public bodies and thus exaggerates the inequalities that already exist between the financial base of the state and of some local public bodies. And so long as there is no liability insurance to cover the risks specified in the Act, the relevant governmental entity and its public employees are wholly immune from suit.

Whether or not the doctrine of sovereign immunity itself conflicts with the guarantee of equal protection provided by the U.S. and New Mexico Constitutions is a question which is presently unsettled.\textsuperscript{92} A statute such as the Tort Claims Act, which may result in immunity of relatively poor governmental entities and waiver of immunity for relatively wealthy units, increases the arbitrariness of the classification of victims of government tort. The availability of a remedy to a tort victim turns not on the arguably substantive differences between

\textsuperscript{88} Id.
\textsuperscript{89} Id. § 5-14-20.
\textsuperscript{90} Id. § 5-14-21.
\textsuperscript{91} Id. § 5-14-23. Except for home rule municipalities and municipalities with a population of over ten thousand, insurance policies purchased by local public bodies must be approved by the chief of the risk management division and the superintendent of insurance to insure compliance with the Tort Claims Act.
\textsuperscript{92} See text accompanying note 10 supra.
a governmental entity and a private tortfeasor, but on the relative wealth of the governmental entity.\textsuperscript{93} Furthermore, provision of a fund to purchase insurance for the state and the absence of such a funding mechanism to aid local public bodies increases the natural disparity in wealth between the state and local public bodies; thus the Tort Claims Act affirmatively creates inequalities.

**CONCLUSION**

After a history of carving out exceptions to the general application of sovereign immunity, the legislature had the opportunity after *Hicks v. State* to reevaluate fully the policy governing the liability of the government and its employees to persons injured by the conduct of public employees. The legislature responded to that challenge by generally reinstating immunity of governmental entities and public employees. It might have instead produced a policy that recognizes that governmental entities are better able to bear and distribute losses than is the injured victim of governmental tort. While eliminating the uncertainties and inequities of judicially-created categories, the legislature has produced new artificial categories, thus inviting litigation prolonged by argument about whether an activity is included within the categories.\textsuperscript{94} It has spelled out a duty to pur-

\textsuperscript{93} The Kansas history is instructive. *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969), was a negligence action for personal injuries against the members of the Board of Regents of Kansas. Trial court granted a motion to dismiss on grounds of sovereign immunity. In reversing, the Kansas Supreme Court abolished state immunity for negligence when the state or its agencies were engaged in proprietary activities, but recognized the authority of the legislature to control the entire field of immunity including that part covered by the court's opinion. The legislative response to the court's invitation in *Carroll* to develop rational immunity policy was to reinstate the governmental immunity of the state and its boards, commissions, agencies and institutions for implied contract, negligence, or any other tort. K.S.A. 46-901 and to reaffirm the common law liability of local units of government. K.S.A. 46-902 [L. 1970 ch. 200 § 2]. In *Brown v. Wichita State Univ.*, 217 Kan. 279, 540 P.2d 66 (1975), the Supreme Court of Kansas found that legislative response to conflict with the equal protection provisions of the Fourteenth Amendment and the Kansas Constitution, because the particular classification lacked a reasonable and proper basis. The New Mexico Supreme Court has recently expressed its willingness to inquire into whether classifications in a statute are reasonable and rest on some grounds of difference having a fair and substantial relation to the objects of the legislation. See *McGeehan v. Bunch*, 88 N.M. 308, 549 P.2d 238 (1975), where the automobile guest statute was found void as a denial of equal protection.

\textsuperscript{94} Consider, for example, the opportunities for dispute provided by Section 11 of the Act. It waives immunity for negligent operation or maintenance of any street, but not for defect in plan or design. Suppose a stop sign which previously governed traffic at a busy intersection is knocked down. It is not replaced because the city engineer deems it unnecessary. Plaintiff is injured arguably as the result of driver's negligence and the concurrent lack of a stop sign. If the city engineer's conduct is characterized as negligent maintenance and the city has insurance, the city is not immune. If it is, on the other hand, a defect in plan or design, the city is immune, even if it has insurance.
chase insurance that varies from governmental entity to government-mental entity which is an obvious invitation to equal protection challenge.

The Act may be, however, little more than a holding action. The delayed repeal provision\(^9\)\(^5\) causes the Act to be effective only until July 1, 1978. By that time, the extent to which the problems inherent in the Act are either fulfilled or solved in its implementation will be apparent. Informed by that experience and aided by clarifying litigation, the legislature’s next attempt at establishing New Mexico’s policy on sovereign and governmental immunity may come closer to recognizing the loss distributing capacities of governmental entities.\(^9\)\(^6\)

---

96. The Federal Tort Claims Act, 28 U.S.C. §§ 2674, 2675, 2680, might be a point of departure.

2674. Liability of United States. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2675. Disposition by federal agency as prerequisite—Evidence.
(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure [Rules, part I by third party complaint, cross-claim, or counterclaim.
(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.
(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

2680. Exception. The provisions of this chapter and section 1346(b) of this title shall not apply to—
(a) 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.

Since sovereign immunity has been abolished by *Hicks v. State*, the legislature would have to reinstate immunity for governmental entities and officers and then follow the federal pattern.