

9-30-2018

## The Intertwined Existence of Families and Religion

L. Steven Brooks

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

Part of the [Family Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

L. Steven Brooks, *The Intertwined Existence of Families and Religion*, 1 BYU J. Pub. L. 229 (2013).  
Available at: <https://digitalcommons.law.byu.edu/jpl/vol1/iss1/4>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# UTAH GOVERNMENTAL IMMUNITY ACT - IMMUNITY OR LIABILITY

## I. [§ 1] THE GOVERNMENTAL IMMUNITY DOCTRINE AND THE UTAH GOVERNMENTAL IMMUNITY ACT

### A. [§ 1.1] DOCTRINE OF GOVERNMENTAL IMMUNITY

The Utah Governmental Immunity Act, referred to herein as the Act,<sup>1</sup> was enacted in 1965,<sup>2</sup> became effective prospectively on July 1, 1966, and since enactment has been revised substantially. Its purpose was to alter the common law doctrine of governmental immunity. That ancient doctrine held governmental entities immune from suit on certain claims. Justice Crockett, in his dissent in *Scott v. School Board of Granite School District*,<sup>3</sup> gave several possible theories for development of the doctrine. First, "the king (or his government) can do no wrong." Second, members of society should bear the risk of injury when the government is acting in their behalf. Third, the doctrine eliminates improper and spurious claims brought against the government because it is considered a "deep pocket." Justice Crockett also said that whatever the reasons for the doctrine, "the principle of sovereign immunity has been firmly engrained in our law ever since the origin of this sovereign state."<sup>4</sup>

The Act retains common law immunity except for specific types of claims for which immunity is waived. The Utah Supreme Court concluded in *Greenhalgh v. Payson City*,<sup>5</sup> that the plain intent of the statute was to retain immunity and liability as under the common law unless specifically altered by the statute. The common law immunity doctrine permitted recovery on equitable claims and claims against the government resulting from operation of proprietary functions. Claims of those types are outside the act. Claims for just compensation under Constitutions of the United States or of Utah are also excluded because the Constitutions preempt state statute. The Act is misnamed because it expands rather than diminishes exposure to suit.

The Utah Supreme Court stated in *Stevens v. Salt Lake County*:<sup>6</sup> "This statute does not create any liability where none would have theretofore

---

<sup>1</sup>UTAH CODE ANN. § 63-30-1 et seq. (1978 & Supp. 1985).

<sup>2</sup>1965 Utah Laws 390.

<sup>3</sup>568 P.2d 746, 748 (Utah 1977) (Crockett, J., dissenting).

<sup>4</sup>Id. at 748.

<sup>5</sup>530 P.2d 799, 801 (Utah 1975).

<sup>6</sup>25 Utah 2d 168, 478 P.2d 496 (1970)

existed. Its sole purpose and effect is to waive sovereign immunity in situations where there would have been liability, but where sovereign immunity formerly prevented recovery.”<sup>7</sup> The courts construe the Act’s provisions for waiver narrowly because the legislature intended that the Act be strictly applied.<sup>8</sup> Any waiver of immunity “must be found in the express language of the Act and the requirements of the statute must be strictly complied with.”<sup>9</sup>

The Act has been amended several times since it became effective in 1966. Due to judicial interpretations and legislative changes, the immunity once enjoyed by the state is mostly eliminated. This article is intended to inform the practicing attorney of three aspects of the Act. First, what limitations are placed on claims coming within the Act. Second, which claims are outside the Act. Third, which claims, although within the Act, are recoverable because immunity is waived.

## **B. [§ 1.2] LIMITATIONS THE ACT IMPOSES ON CLAIMS**

Claims outside the Act are recoverable as if the governmental entity were a private entity. However, claims within the Act are subject to two significant limitations not present under the common law. First, a notice of claim must be submitted prior to filing suit within a shorter limitations period. Second, judgment amounts are limited.

### **1. [§ 1.2.1] Notice of Claims and Statute of Limitations**

Claims which come within the Act must comply with the Act provisions. Section 63-30-11(2) of the Utah Code requires a claimant to file a notice of claim with the governmental entity prior to filing a complaint. The notice of claim must contain (1) a brief statement of the facts, (2) the nature of the claim asserted, (3) the damages incurred, and (4) the signature of the claimant or claimant’s representative.<sup>10</sup> Failure to give notice will bar the action and failure to plead compliance with notice requirements is a fatal defect in the pleadings.<sup>11</sup> The purpose of the notice of claim requirement is to “provide the governmental unit with an opportunity to promptly investigate and to remedy any defect immediately, before additional injury is caused; it helps avoid unnecessary litigation; it minimizes difficulties that might arise from changes in administrations.”<sup>12</sup>

---

<sup>7</sup>Id. at 172, 478 P.2d at 499.

<sup>8</sup>Holt v. State Road Commission, 30 Utah 2d 4, 6, 511 P.2d 1286, 1287 (1973).

<sup>9</sup>Scott, 568 P.2d at 748.

<sup>10</sup>UTAH CODE ANN. § 63-30-11(3) (Supp. 1985).

<sup>11</sup>Roosendaal Construction & Mining Corporation v. Holman, 28 Utah 2d 396, 399, 503 P.2d 446, 448 (1972).

<sup>12</sup>Sears v. Southworth, 563 P.2d 192, 193 (Utah 1977).

Sections 63-30-12 and 63-30-13 provide shortened statutes of limitation on claims to encourage claimants to promptly notify the entity. The claimant has one year after the claim arises to file a notice of claim or the claim is barred.<sup>13</sup> The entity has 90 days to respond to the claim. If no response is received by the claimant within that period, the claim is deemed rejected.<sup>14</sup> The claimant then has one year from the date of rejection to file a complaint in the district court or the claim is barred.<sup>15</sup>

District courts have exclusive original jurisdiction over claims<sup>16</sup> and venue depends on whether the governmental entity being sued is the state, a county, or other political subdivision.<sup>17</sup> When a complaint is filed, the claimant must also file an undertaking of at least \$300 to cover costs incurred by the entity if the claimant fails to prosecute or recover judgment.<sup>18</sup> Failure to comply with any of the statutory requirements may result in dismissal or barring of the claim.

## **2. [§ 1.2.2] Judgment Limitations**

The Act limits the amount a claimant can recover on a judgment. Punitive damages are not recoverable under the Act.<sup>19</sup> Section 63-30-34 limits damages recoverable under the Act. Recovery is limited in personal injury cases to the higher of \$250,000 per person, \$500,000 maximum per incident for two or more persons, or the government's insurance policy limits. Property damage is limited to \$100,000 in any one occurrence or the government's insurance policy limits. These limits apply to the liability of the entity and to any employee which the entity must indemnify.

## **C. [§ 1.3] EXCEPTIONS TO THE IMMUNITY DOCTRINE**

Three exceptions to the doctrine not covered by the Act are 1) equitable claims, 2) claims against governmental entities performing a proprietary function, and 3) claims for just compensation for property taken or damaged under the Utah or United States Constitution.

<sup>13</sup>UTAH CODE ANN. §§ 63-30-12 & 63-30-13 (Supp. 1985).

<sup>14</sup>Id. at § 63-30-14 (1978).

<sup>15</sup>Id. at § 63-30-15 (Supp. 1985); and *Cornwall v. Larsen*, 571 P.2d 925, 926 (Utah 1977).

<sup>16</sup>Id. at § 63-30-16 (Supp. 1985).

<sup>17</sup>Id. at § 63-30-17 (Supp. 1985) provides that venue is proper in actions against the state in the county in which the claim arose or in Salt Lake County. Venue is proper in actions against a county in the county in which the claim arose or in the defendant county. A district court judge can grant leave to bring the action in a contiguous county for good cause. Venue is proper in actions against all other political subdivisions in the county in which the claim arose or in the county in which the political subdivision is located.

<sup>18</sup>Id. at § 63-30-19 (1978).

<sup>19</sup>Id. at § 63-30-22 (1978).

### 1. [§ 1.3.1] Equitable Claims

The Utah Supreme Court recognized equitable claims were not barred by the immunity doctrine prior to the Act.<sup>20</sup> The Act itself indicates that it only applies to legal claims. Section 63-30-3 says that governmental entities are “immune from suit for any injury.” Claim is defined in 63-30-2(5) as “any claim or cause of action for money or damages.” Although the Act does not expressly exclude equitable claims, these definitions state legal rather than equitable remedies thereby implying that the Act applies only to legal claims. Subsequent to the Act, the supreme court held that “governmental immunity is not a defense to equitable claims.”<sup>21</sup> Therefore, equitable claims are outside the Act.

The immunity doctrine may not be avoided by couching a legal claim in equitable terms. In *Walton v. State Road Commission*,<sup>22</sup> the court said that although Walton’s first and second causes of action sound in equity, “their presentment and urgency does not create or pose an enforceable cause of action, since simply alleging an equitable claim does not ipso facto warrant such relief.”<sup>23</sup> Therefore, to escape the requirements of the Act, the claim must be one on which equitable relief is proper.

### 2. [§ 1.3.2] Proprietary Functions

Claims against a governmental entity performing a proprietary function are outside the immunity doctrine. The Act codifies the common law in section 63-30-3: “Except as may be otherwise provided in [the Act], all governmental entities are immune from suit for any injury which results from the exercise of a governmental function. . . .” Therefore, if the claim results from the exercise of a governmental function, it is within the Act. If the claim results from the exercise of a proprietary function, the Act’s provisions do not apply.

“Governmental entity” is defined in section 63-30-2(3) as “the state and its political subdivisions.” Those terms are also defined in that section. “‘State’ means the State of Utah and includes any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality of the state.”<sup>24</sup> Political subdivision includes “any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other gov-

---

<sup>20</sup>Auerbach v. Salt Lake County, 23 Utah 103, 63 P. 907 (1901); and Wall v. Salt Lake City, 50 Utah 593, 168 P. 766 (1917).

<sup>21</sup>Bowles v. State, 652 P.3d 1345, 1346 (Utah 1982) (summarizing *El Rancho Enterprises, Inc., v. Murray City Corporation*, 565 P.2d 778 (Utah 1977)).

<sup>22</sup>558 P.2d 609 (Utah 1976).

<sup>23</sup>Id. at 610.

<sup>24</sup>UTAH CODE ANN. § 63-30-2(1) (Supp. 1985).

ernmental subdivision or public corporation.”<sup>25</sup> Under these definitions, the term “governmental entity” embraces entities controlled by the state as well as those entities which derive their governmental authority from the state legislature or constitution.

Once it is determined the claim is against a governmental entity, the next step is to determine whether the entity was performing a proprietary or governmental function. Difficulties arose in distinguishing between the two. The old *Jopes* test<sup>26</sup> considered three elements to determine the proprietary/governmental nature of an act. First, whether the activity was performed for the public good and was regarded a public responsibility. Second, whether the entity received any pecuniary benefit from the activity. Third, whether the activity was in competition with private enterprise. The nature of the activity was fact sensitive.

The *Jopes* test caused some confusion. Governmentally operated golf courses, sledding hills, and sewer systems were classified as governmental functions while operation of a swimming pool was proprietary. Waterworks systems and hospitals enjoyed the unique label as both governmental and proprietary.<sup>27</sup> *Standiford* expressly overruled *Jopes*, overruled the three step test mentioned above and established a new test. The court said:

We therefore hold that the test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental liability.<sup>28</sup>

After *Standiford*, it is arguable that any activity which can be performed by private enterprise and which is not “essential to the core of governmental activity” is a proprietary function. The court reasoned in *Thomas v. Clearfield City*,<sup>29</sup> that a sewer system under the new standard is no longer a governmental function because,

[i]n many rural and recreational areas of our state, individual homeowners or small clusters of homes legally provide their own sewer services with septic tanks. Larger developments having common ownership, such as condominiums or trailer courts, currently can and do provide their own collection and disposal of sewage. . . .

We conclude that the collection and disposal of sewage is not “of such a unique nature that it can only be performed by a

---

<sup>25</sup>Id. at § 63-30-2(2) (Supp. 1985).

<sup>26</sup>*Jopes v. Salt Lake County*, 9 Utah 2d 297, 343 P.2d 728 (1959).

<sup>27</sup>*Standiford v. Salt Lake City Corporation*, 605 P.2d 1230, 1233 (Utah 1980).

<sup>28</sup>Id. at 1236-1237.

<sup>29</sup>642 P.2d 737, 739 (Utah 1982).

governmental agency,” in the sense that these are activities that “government alone must do.” by the same token, these activities are not “essential to the core of governmental activity,” because they are not “essential to the performance of those activities that are uniquely governmental.”<sup>30</sup>

*Standiford* does not eliminate the governmental/proprietary distinction. It redefines governmental function to substantially narrow its immunity coverage. The supreme court recognized “this new standard broadens governmental liability.”<sup>31</sup> In *Sears v. Southworth*,<sup>32</sup> which was prior to *Standiford*, Sears claimed that the maintenance of public highways was a proprietary function and outside the Act. The court rejected the argument under the *Jopes* test but, under *Standiford*, the argument might have been successful. Many governmental activities which would have been immune under *Jopes*, are no longer governmental but proprietary functions which are outside the Act.

Prior to *Standiford*, the court determined in *Greenhalgh v. Payson City*,<sup>33</sup> that operation of a hospital was a proprietary function and outside the Act. This prompted the legislature to make substantial changes in section 63-30-2.<sup>34</sup> Those changes defined the operation of all governmentally-owned hospitals, nursing homes, or other governmental health care facilities, as well as all approved medical, nursing, or other professional health care clinical training programs conducted in either private or public facilities as a governmental function.

Although this change brings hospitals within the Act as a governmental function, it does not bar all claims against the entities. In fact, most of the claims against these entities are based on negligent acts of employees. Immunity is waived in section 63-30-10 for many of the negligent acts of employees. Discussed *infra* in section 2.5.1. However, defining the entities as an exercise of a governmental function brings claims against them within the Act and limits the entity’s liability exposure. By redefining governmental functions statutorily, the legislature could reduce the impact of *Standiford*.

Another change in section 63-30-3 added a new paragraph in 1984<sup>35</sup> and amended it in 1985.<sup>36</sup> The paragraph now reads:

The management of flood waters and other natural disasters

<sup>30</sup>Id. at 739 (citation omitted).

<sup>31</sup>*Standiford*, at 1237.

<sup>32</sup>563 P.2d at 192 (Utah 1977).

<sup>33</sup>530 P.2d at 801 (Utah 1975).

<sup>34</sup>1978 Utah Laws 92.

<sup>35</sup>1984 Utah Laws 148, 149.

<sup>36</sup>1985 Utah Laws 170.

and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.<sup>37</sup>

The activities listed are governmental functions which were already immune and many of the decisions of persons performing those acts are discretionary and immunity is not waived. However, without the new paragraph, some claims were recoverable. This paragraph retains absolute immunity for the listed governmental acts and the waiver sections of the Act do not apply.

### **3. [§ 1.3.3] Taking Property Without Just Compensation**

The Utah Supreme Court has never clearly resolved whether Constitutional claims for taking or damaging of property are recoverable. The cases consider two types of damages or taking although the court does not clearly distinguish between the two. The first type of damage is consequential damage arising from the proper exercise of the police power. This damage occurs when the exercise of the police power does not invade the damaged property. The second type arises from improper exercise of police power causing an invasion of the property or a destruction of property rights which result in a constitutional damaging or taking. A third type of damage or taking occurs when the governmental entity takes or damages property under its power of eminent domain but fails to compensate the owner. The Utah Supreme Court has not considered a case regarding this type of damage or taking.

The Utah Supreme Court has consistently held that proper exercise of the police power causing only consequential damage to property, the first type of damage listed above, is non-compensable and recovery is barred under the governmental immunity doctrine.<sup>38</sup> Only two Utah Supreme Court cases have considered damages arising from an invasion or destruction of the property by an improper exercise of the police power.<sup>39</sup> In *Hampton v. State Road Commission*, the court held that immunity applied to consequential damages from exercise of the police power, but "insofar as [Hamptons] allege a substantial and material impairment of access to their property, constituting a 'taking,' the trial court erred in

---

<sup>37</sup>UTAH CODE ANN. § 63-30-3 (Supp. 1985).

<sup>38</sup>*Springville Banking Co. v. Burton*, 10 Utah 2d 100, 103, 349 P.2d 157, 158 (1960); and *Fairclough v. Salt Lake County*, 10 Utah 2d 417, 421, 354 P.2d 105, 108 (1960).

<sup>39</sup>*Webber vs. Salt Lake City*, 40 Utah 221, 120 P. 503 (1911); and *Hampton v. State Road Commission*, 21 Utah 2d 342, 445 P.2d 708 (1968).



granting| the state's| motion to dismiss.”<sup>40</sup> The court said that the rights of access, light, and air appurtenant to land are so fundamental that they “cannot be so embarrassed or abridged as to materially interfere with| the land's| proper use and enjoyment, and they are, in effect, property which the owners cannot be deprived without just compensation.”<sup>41</sup> The U.S. Supreme Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>42</sup> that a New York Statute requiring a landlord to permit installation of cable television facilities on and in the building and limiting payment from the cable company to a nominal sum of one dollar was a violation of the Fifth and Fourteenth Amendments. The Supreme Court said, “When the character of the governmental action . . . is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”<sup>43</sup>

The third type of damage to property arises when the governmental entity damages or takes property under its power of eminent domain without just compensation. This is generally called inverse condemnation because the landowner must then bring suit to compel condemnation by the entity. The Utah Supreme Court has not heard an inverse condemnation case against a governmental entity. However, if a “taking” under improper exercise of the police power is not immune from suit, an inverse condemnation action should also escape the immunity bar.

In *Andrus v. State*,<sup>44</sup> Andrus' property was damaged by the State's alleged negligent construction of a highway project. Recovery was permitted under the waiver in section 63-30-9 regarding defective public improvements. Judge Bullock, a district court judge sitting with the court, expressed in his dissent that recovery should have been through the doctrine of inverse condemnation because the limits of the Act would not apply. He argued that the great weight of authority in the United States permits an inverse condemnation action despite statutory or common law immunity. He cites twenty-five states with constitutional provisions similar to Utah's Article I, Section 22. He also cites cases in twenty-two of those states which permitted inverse condemnation actions against governmental entities. These authorities in conjunction with the *Loretto* case indicate that a claim of inverse condemnation should succeed in Utah.

#### **D. |§ 1.4| CONSTITUTIONAL CHALLENGES**

The Act has been challenged under both the United States and Utah Constitutions. Constitutional challenges on Due Process and Equal Pro-

---

<sup>40</sup>*Hampton* at 712.

<sup>41</sup>*Id.* at 710, (quoting Justice Wolfe's dissent in *State v. District Court, Fourth Judicial District*, 94 Utah 384, 406, 78 P.2d 502, 512 (1938)).

<sup>42</sup>458 U.S. 419 (1982).

<sup>43</sup>*Id.* at 434.

<sup>44</sup>541 P.2d 1117 (Utah 1975).

tection grounds have been raised against two provisions of the Act. First, the Act requires filing a notice of claim. Second, claims are subject to a shorter limitation period than claims against private persons or entities.

In *Crowder v. Salt Lake County*,<sup>45</sup> the Act faced its first constitutional attack. When the case arose, the time for filing a claim for injury due to defective streets or bridges against a county was 90 days, against a city was six months, and against the state was one year. It was argued that the different times for filing were not based on a reasonable classification and did not provide Equal Protection. The court refused to strike down the statute simply because the legislature picked three different times for filing a claim. The limitations period is now one year regardless of the entity.<sup>46</sup>

Another attack on Due Process and Equal Protection grounds arose in *Scott v. School Board of Granite School District*.<sup>47</sup> Because a minor was normally afforded an extension of the limitations period under section 78-12-36 until one year after obtaining majority, the court held that the minor was constitutionally entitled to the extended limitations period under 78-12-36. The legislative response to *Scott*<sup>48</sup> permits the courts to extend the limitation period for claimants who are minors, mentally incompetent, or imprisoned but the extension may not exceed the applicable statute of limitations.<sup>49</sup>

In *Madsen v. Borthick*,<sup>50</sup> the plaintiff argued that the Act was unconstitutional under the Utah Constitution Article I, Section 11 which provides that all courts shall be open for persons to obtain redress for their injuries. Although the court thought the argument "ingenious," it was not sufficient to reverse the trial court's dismissal of the action.<sup>51</sup>

These constitutional attacks have guided the legislature toward changes in the Act. However, had these attacks succeeded in striking down the law as unconstitutional, common law immunity may have barred the claim and left the claimant without remedy.

## II. | § 2 | WAIVER OF IMMUNITY

A specific waiver must be granted for recovery on a claim which comes under the Act. The following text reviews the specific waiver sections of the Act in sections 63-30-5 through 63-30-10.

<sup>45</sup>552 P.2d 646, 647 (Utah 1976).

<sup>46</sup>UTAH CODE ANN. §§ 63-30-12, 63-30-13, and 63-30-15 (Supp. 1985).

<sup>47</sup>568 P.2d 746 (Utah 1977).

<sup>48</sup>1978 Utah Laws 92-93.

<sup>49</sup>UTAH CODE ANN. § 63-30-11(4) (Supp. 1985).

<sup>50</sup>658 P.2d 627 (Utah 1983).

<sup>51</sup>Id. at 628-629.

**A. | § 2.1| WAIVER FOR CONTRACTUAL CLAIMS  
—SECTION 63-30-5**

The provisions for waiver of claims on contractual obligations reads as follows:

Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.<sup>53</sup>

To recover on contract claims, the contract must comply with any authorizing statute or ordinance permitting the entity to enter contractual obligations. Without compliance with the statute, no contractual liability exists and the claim necessarily fails.<sup>53</sup> In *Baugh v. Logan City*,<sup>54</sup> the city refused to perform an oral agreement with Baugh to exchange deeds to certain property. The agreement was unenforceable under the statute of frauds so the court refused Baugh's request for specific performance and damages.

In order to recover on a contract claim, it must arise out of a breach of a contractual duty. In *Johnson v. Salt Lake County Cottonwood Sanitary District*,<sup>55</sup> sewage backed into Johnson's basement. Johnson sued for damages claiming that the sanitary district had a contractual duty to prevent the blockage and resulting damage. The court cited the Idaho Supreme Court in *Trimming v. Howard*,<sup>56</sup> as dispositive of the contractual claim. That case indicated *ex contractu* claims are those which arise from a breach of contractual duty or promise and *ex delicto* claims arise from a duty implied from the nature of the contract.<sup>57</sup> As applied to the facts in *Johnson*, if the contract specifically provided that the sewer lines were to be maintained by the district to prevent blockages, then the claim is *ex contractu*. If the contract does not provide for maintenance of the sewer lines to prevent blockage, but the duty is implied from the nature of the contract, the claim is *ex delicto*. Immunity is waived under 63-30-5 for *ex contractu* claims but not *ex delicto* claims. Therefore, for waiver on a contractual claim to apply, the claim must arise from the breach of a stated rather than implied contractual obligation.

Chief Justice Crockett's dissent in *Schmitt v. Billings*,<sup>58</sup> suggested that

---

<sup>52</sup>UTAH CODE ANN. § 63-30-5 (Supp. 1985)

<sup>53</sup>Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974).

<sup>54</sup>27 Utah 2d 291, 495 P.2d 814 (1972).

<sup>55</sup>20 Utah 2d 389, 438 P.2d 706 (1968).

<sup>56</sup>52 Idaho 412, 16 P.2d 661 (1932).

<sup>57</sup>Id. at 662.

<sup>58</sup>600 P.2d 516, 520 (Utah 1979) (Crockett, C.J., dissenting).

implied contracts were within the waiver. Although soundly reasoned, the view has not been accepted by the court. However, a truly equitable claim, such as unjust enrichment, is outside the Act and is recoverable.<sup>59</sup> Therefore, to recover on a contractual claim, it must be for breach of a contract which is legally binding on the entity and which fulfills all legal requirements as to form and contents.

## **B. [§ 2.2] PROPERTY LIEN OR TITLE CLAIMS—63-30-6**

Waiver of immunity in an action to recover the rights or interests in property was granted in section 78-11-9 which was enacted in 1951. The Act duplicated the property rights waiver in section 63-30-6. In 1971, section 78-11-9 was repealed leaving section 63-30-6 which reads as follows:

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

In *Holt v. Utah State Road Commission*,<sup>60</sup> Holt claimed he was damaged by road construction which impaired access to his property but not to the extent of a taking. It was argued that the damages to the property constituted a loss of property or possession thereof and should come within section 63-30-6 to permit recovery. The court held that the Act requires strict application to preserve sovereign immunity and that immunity should only be waived if clearly expressed. Holt's claim for consequential damages was not within the property waiver of the Act.<sup>61</sup>

## **C. [§ 2.3] NEGLIGENT OPERATION OF MOTOR VEHICLES 63-30-7**

Waiver is granted under Utah Code section 63-30-7 for injury resulting from motor vehicles negligently operated by state employees:

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment during the performance of his duties, within the scope of employment, or under color of authority; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of section 41-6-14.

---

<sup>59</sup>*El Rancho Enterprises, Inc. v. Murray City Corporation*, 565 P.2d 778, 780 (Utah 1977).

<sup>60</sup>30 Utah 2d 4, 511 P.2d 1286 (1973).

<sup>61</sup>*Id* at 6, 511 P.2d at 1287.

Amendments in 1983<sup>62</sup> changed the conditions of vehicle use which waive immunity. Before the amendment, the section read "while in the scope of his employment," but now reads "during the performance of his duties, within the scope of employment, or under color of authority." This amendment enlarges the scope of negligent operation of vehicles for which recovery is possible and exceeds liability imposed under the doctrine of *respondeat superior*. Although immunity is generally waived in this area, it is not waived for negligent operation of a vehicle by an employee who has abandoned his duties and is not acting with color of authority. Recovery in this instance must be obtained from the employee as would be the case under the *respondeat superior* doctrine.<sup>63</sup> Section 63-30-29.5 provides that when an employee is driving a governmental entity's vehicle outside the "course and scope of the driver's employment," the entity is liable only for the minimum insurance coverage required of the entity under the Motor Vehicle Safety Responsibility Act (section 41-21-1 et seq.). The employee is liable for any additional damages not covered by that insurance.

The section waives immunity for negligent operation of a "motor vehicle or other equipment," "Other equipment" is not defined in the statute or case law. Broadly speaking the term could include the operation of equipment such as a paper cutter, shop machinery, and earth-moving equipment. This broad interpretation is unlikely because the Utah Supreme Court has repeatedly said that "where there is a general preservation of governmental immunity, any exception must be found to be clearly stated within the provisions of the act."<sup>64</sup> Equipment probably includes only earth-moving equipment and transportation equipment such as airplanes, helicopters, and boats because these are similar to "motor vehicles" and insurance covering their operation is common.

Although the section waives immunity for operation of motor vehicles, immunity is retained for emergency vehicles operated in emergency conditions as defined in section 41-6-14. That section permits drivers of emergency vehicles to violate certain laws when responding to an emergency call, fire alarm or when in pursuit of a suspected violator of the law. An employee may only operate the vehicle in this manner when sounding a siren and when displaying a red light. Police may, in their judgment, forego the red light. However, the employee is not relieved "from the duty to drive with due regard for the safety of all persons."<sup>65</sup>

In *Cornwall v. Larsen*,<sup>66</sup> a deputy Salt Lake County Sheriff was responding to an emergency call in his patrol car without lights or siren

---

<sup>62</sup>1983 Utah Laws 546.

<sup>63</sup>UTAH CODE ANN. § 63-30-29.5 (Supp. 1985).

<sup>64</sup>*Epting v. State*, 546 P.2d 242, 244 (Utah 1976).

<sup>65</sup>UTAH CODE ANN. § 41-6-14(3) (a) (1982).

<sup>66</sup>571 P.2d 925 (Utah 1977).

when it collided with the car in which the minor plaintiff was riding. The complaint alleged that the deputy's actions were "reckless, willful, unlawful, and in excess of his authority."<sup>67</sup> The trial court dismissed the sheriff and deputy on the court's motion and it granted summary judgment in favor of the county because the notice of claim was filed one month late. The supreme court affirmed the summary judgment but reversed the dismissal of the deputy and sheriff. The legislature amended the Act in 1978,<sup>68</sup> and again in 1983<sup>69</sup> to further protect governmental employees. Section 63-30-4(4) was added and changed to provide immunity for employees acts or omissions "occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice."<sup>70</sup> Under this provision, the sheriff and deputy in Cornwall would have been immune. If the limitation period had not expired, the claimant could have recovered because the vehicle was not operated as an emergency vehicle under section 41-6-14.

**D. [§ 2.4] DEFECTIVE, UNSAFE, OR DANGEROUS CONDITIONS OF PUBLIC IMPROVEMENTS 63-30-8 & 63-30-9**

Sections 63-30-8 and 63-30-9 waive immunity from suit for injury caused by a dangerous, defective or unsafe condition of a public improvement. Section 63-30-8 waives immunity from suit "for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon."<sup>71</sup> Section 63-30-9 waives immunity from suit "for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir, or other public improvement."<sup>72</sup> The two sections essentially waive immunity for almost all dangerous or defective conditions of public structures or improvements.

Originally, there were two factors distinguishing the sections. First, claims against a city arising under 63-30-8 were to be filed under section 10-7-77. This separate claim statute provided a shorter limitation period than the Act's notice of claim section.<sup>73</sup> In 1978, the city claim statute was repealed eliminating this factor.<sup>74</sup> Second, section 63-30-9 retains im-

<sup>67</sup>Id. at 926.

<sup>68</sup>1978 Utah Laws 92-93.

<sup>69</sup>1983 Utah Laws 5-15.

<sup>70</sup>UTAH CODE ANN. § 63-30-4(4) (Supp. 1985).

<sup>71</sup>Id. at § 63-30-8 (1978).

<sup>72</sup>Id. at § 63-30-9 (1978).

<sup>73</sup>Id. at § 63-30-13 (Supp. 1985)

<sup>74</sup>1978 Utah Laws 96.

munity for latent defective conditions of the public structures listed in that section. Section 63-30-8 does not. Why immunity was not retained for latent defects in that section is unclear and may have been an oversight. Logically, if immunity is retained for latent defective conditions of some public improvements, it should be retained for all.

A latent defective condition was defined in *Vincent v. Salt Lake County*.<sup>75</sup> In that case, a leaky underground storm drain caused Vincent's garage foundation to crack and settle. Quoting Black's Law Dictionary, the court stated that a latent defective condition is "[a] defect which reasonably careful inspection will not reveal."<sup>76</sup> The court noted that the leak in the storm drain was not a latent defect because the county crews discovered the leaks and grouted them with cement. This definition was affirmed in *Thomas v. Clearfield City*.<sup>77</sup> Because the latent/patent defective condition distinction still exists, a claimant must determine under which section the claim arises and whether the claim is latent or patent.

#### **E. [§ 2.5] NEGLIGENCE ACTS OR OMISSIONS OF GOVERNMENTAL EMPLOYEES. 63-30-10(1)**

Section 63-30-10(1) waives immunity for negligent acts or omissions of employees which are the proximate cause of injuries or damage to the claimant. However, the negligence must occur while the employee is acting "within the scope of employment."<sup>78</sup> This is narrower than the scope for negligent operation of motor vehicles by employees<sup>79</sup> as well as other claims in which the entity must indemnify the employee.<sup>80</sup>

Section 63-30-10(l) lists twelve exceptions to the waiver of immunity in cases of employee negligence. The exceptions of paragraphs (a) through (l) are listed and discussed below.

##### **1. [§ 2.5.1] Performance of Discretionary Functions**

Paragraph (a) of section 63-30-10(1) retains immunity for negligent acts which arise out of the performance or non-performance of a discretionary function even if the discretion is abused. Whether an act is a discretionary or operational function of governmental employees is a difficult question with conflicting answers. In *Velasquez v. Union Pacific Railroad Company*,<sup>81</sup> the Public Service Commission had statutory author-

---

<sup>75</sup>583 P.2d 105 (Utah 1978).

<sup>76</sup>Id. at 107.

<sup>77</sup>642 P.2d 737 (Utah 1982).

<sup>78</sup>UTAH CODE ANN. § 63-30-10(1) (Supp. 1985).

<sup>79</sup>Id. at § 63-30-7 (Supp. 1985).

<sup>80</sup>Id. at § 63-30-4 (Supp. 1985).

<sup>81</sup>24 Utah 2d 217, 469 P.2d 5 (1970).

ity to set standards for railroad crossing signals and could require railroads to install appropriate signals. This was held a discretionary function which was immune from suit. However, in *Bigelow v. Ingersoll*,<sup>82</sup> it was held that the design of traffic control lights was an operational function subject to suit.

In *Carroll v. State Road Commission*,<sup>83</sup> the court indicated that the distinction is not based strictly on the definition of the term “discretionary” because every employee performs “discretionary” functions and every act of an employee which had alternatives would be immune. The definition selected by the court in *Carroll* and rephrased in *Morrison v. Salt Lake City Corporation*,<sup>84</sup> is:

A discretionary function has been defined by this court as one which requires a “basic policy decision essential to the realization or accomplishment of some basic governmental policy, program, or objective.” any decision which does not require the “exercise of basic policy evaluation, judgment, and expertise” is not discretionary, but operational, and is not protected.<sup>85</sup>

The court has subsequently held that, “The decision to build the highway and specifying its general location were discretionary functions, but the preparing of plans and specifications and the supervision of the manner in which the work was carried out cannot be labeled discretionary functions.”<sup>86</sup>

In *Little v. Utah State Division of Family Services*,<sup>87</sup> the court listed four requirements:

To be purely discretionary, an act by the state must be affirmed under four preliminary questions:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

<sup>82</sup>618 P.2d 50, 53-54 (Utah 1980).

<sup>83</sup>27 Utah 2d 384, 496 P.2d 888 (1972).

<sup>84</sup>600 P.2d 553 (Utah 1979).

<sup>85</sup>*Id.* at 555.

<sup>86</sup>*Andrus v. State*, 541 P.2d 1117, 1120 (Utah 1975).

<sup>87</sup>667 P.2d 49 (Utah 1983) (quoting *Evangelical United Brethren Church of Adna v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965)).



- (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?<sup>88</sup>

These four requirements substantially narrow the acts which qualify as discretionary acts and increases the liability exposure of governmental entities.

Medical malpractice is a negligence claim for which immunity is waived in 63-30-10(1). In *Frank v. State*,<sup>89</sup> a psychiatrist at the University of Utah Medical Center allegedly failed to take reasonable precautions to prevent a suicidal patient from committing suicide. Subparagraph (1) (a) was held not applicable in the suit for wrongful death. The court said:

The court recognizes the high degree of careful observation, evaluation, and educated judgment reflected in any modern medical prognosis, and makes no suggestion that a large measure of "discretion," as commonly defined, is not involved. The exception to the statutory waiver here under consideration, however, was intended to shield those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseeable ways. . . . the one-to-one dealings of physician and patient in no way reflect this public policy-making posture, and should not be given shelter under the Act. We therefore hold that immunity is waived by operation of the Act. . . .<sup>90</sup>

Claims against a governmentally owned health care facility is within the Act because operation of such facilities is defined as a governmental function in 63-30-3. However, immunity for most claims against such entities is waived under *Frank*. By complying with the provisions of the Act and the claim requirements of the Utah Health Care Malpractice Act,<sup>91</sup> recovery of these claims is possible.

## 2. [§ 2.5.2] Tortious Acts

Paragraph (b) of 63-30-10(1) retains immunity "if the injury: arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights."

By definition, the intentional torts listed cannot be negligent acts for which immunity is waived and are meaningless. The legislature probably intended that governmental entities retain immunity from suit or any

---

<sup>88</sup>Id. at 51.

<sup>89</sup>613 P.2d 517 (Utah 1980).

<sup>90</sup>Id. at 520.

<sup>91</sup>UTAH CODE ANN. § 78-14-1 et seq. (1981 & Supp. 1985)

injury arising out of the torts listed whether or not the acts are negligent. The last item is grammatically erroneous. Put in context it reads, "Immunity from suit . . . is waived for injury proximately caused by a negligent act or omission of an employee . . . except if the injury . . . arises out of civil rights." The probable legislative intent was to retain immunity for negligent violations of a person's civil rights.

After eliminating the items which are irrelevant, only false arrest, malicious prosecution, and infliction of mental anguish remain. The retention of immunity in these areas is proper because false arrest and malicious prosecution are likely to occur when the government is performing its law enforcement function. Preservation of immunity also bars spurious claims brought to "get even." Suit should not be permitted against the entity when it is performing such an important governmental function. Also, recovery for infliction of mental anguish may be included because the injury is too intangible and subject to spurious claims.

Although this paragraph bars many claims, only one Utah Supreme Court case concerning this paragraph has been decided. In *Connell v. Tooele City*,<sup>92</sup> the court clerk failed to record Connell's payment of a fine on a traffic ticket. Connell was arrested, jailed, and required to post bond. The court held that Tooele City was immune.

Although this paragraph of the Act has major flaws, it properly retains immunity in some important areas.

### 3. [§ 2.5.3] Licensing Claims

Paragraph (c) of section 63-30-10(1) retains immunity when the employee's negligence causes an injury arising out of "the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permits, license, certificate, approval, order, or similar authorization." Although no Utah Supreme Court cases have arisen under this paragraph, it retains immunity from suits, for example, against the state for wrongful death when the State Driver's License Division negligently licenses a dangerous driver who subsequently kills someone. Recovery may not be allowed although the clerk or officer in the Division was clearly performing an operational function by issuing the license.

The example above is similar to *Little*,<sup>93</sup> where a wrongful death action was brought against the state for negligently placing a child in a home in which she was subsequently abused and beaten to death by a foster brother. The fact patterns in both situations include acts of negligence by a governmental employee performing an operational function. The distinguishing factor is that in *Little*, the employee was a highly trained professional where the licensing process is clerical. Understand-

---

<sup>92</sup>572 P.2d 697 (Utah 1977).

<sup>93</sup>667 P.2d 49.

bly, the trained professional is held to a higher standard of care. Immunity is properly retained in paragraph (c) because of the great potential for negligence claims in licensing persons.

#### **4. [§ 2.5.4] Failure to Inspect Property**

Paragraph (d) of section 63-30-10(1) retains immunity for “failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property.” However, if an undiscovered defect is a dangerous or defective condition of a public improvement, immunity is waived in sections 63-30-8 and 63-30-9 for suit from injuries caused by the defect. See discussion in section 2.4 *supra* this paragraph does little to preserve immunity except for injury resulting from natural conditions on governmentally owned property.

#### **5. [§ 2.5.5] Prosecution Claims**

Paragraph (e) of section 63-30-10(1) retains immunity from suit on claims of negligence resulting from prosecution against the claimant. As mentioned in the discussion of paragraph (b) in section 2.5.2, *supra*, prosecuting is part of the government’s law enforcement function and suit for negligence should not be permitted in performing such a fundamental governmental purpose.

#### **6. [§ 2.5.6] Misrepresentation of an Employee**

Paragraph (f) of section 63-30-10(1) retains immunity from suits for misrepresentations by governmental employees whether the misrepresentation is intentional or negligent. Intentional misrepresentation is not a negligent act for which immunity is waived and its inclusion in the Act is superfluous. In *Boyce v. State*,<sup>94</sup> the court held that a cause of action for misrepresentation was barred. No inquiry regarding intent or negligence was necessary because the claim was barred regardless of intent.

Under paragraph (f), a governmental entity is not liable for damages caused by the misrepresentation of an employee. However, an employee may be personally liable if the misrepresentation was fraudulent or committed with malice.<sup>95</sup> The employee may also be held liable if the misrepresentation was outside the employee’s scope of authority, not committed while in the course of employment or while acting within the color of authority.<sup>96</sup>

#### **7. [§ 2.5.7] Riots and Mob Violence**

Paragraph (g) of section 63-30-10(1) retains immunity from suit on injuries resulting from “riots, unlawful assemblies, public demonstra-

---

<sup>94</sup>6 Utah 2d 138, 486 P.2d 387 (1971).

<sup>95</sup>UTAH CODE ANN. § 63-30-4(4) (Supp. 1985).

<sup>96</sup>*Id.*

tions, mob violence, and civil disturbances.” The potential for a governmental employee’s act to injure a claimant during violence and disruption is high, yet it is an essential part of law enforcement to control unruly crowds. Therefore, immunity is rightfully retained.

## 8. [§ 2.5.8] Tax Collection

Paragraph (h) of section 63-30-10(1) retains immunity for negligent injuries caused by an employee in connection with the collection and assessment of taxes. Taxation is another fundamental governmental issue which should retain immunity. However, the breadth of the coverage of the paragraph was tested in *Morrison*.<sup>97</sup> In that case, Morrison’s stolen motorcycle was recovered and held as evidence at the alleged thief’s trial. It was subsequently sold by the Tax Commission allegedly without proper notice to Morrison. As an affirmative defense, the Tax Commission claimed that the sale came under paragraph (h) as a function of collecting and assessing taxes. The court concluded that because the possession, retention, and disposition of the motorcycle was not tax related, the defense of tax assessment and collection was invalid. The court reversed and remanded the case to determine the issues of negligence.<sup>98</sup>

## 9. [§ 2.5.9] Utah National Guard

Paragraph (i) of section 63-30-10(1) retains immunity from suit for injuries arising out of activities of the Utah National Guard. Again, this governmental function is so fundamental that immunity should be retained. However, a claim which arises out of the activities of the National guard may be waived elsewhere in the act. If waiver is found, recovery may be had on the claim. However, as in *Morrison*,<sup>99</sup> the breadth of the immunity may be narrowed for some claims if the act is not directly related to acts of the Utah National Guard.

## 10. [§ 2.5.10] Incarceration

Paragraph (j) of section 63-30-10(1) retains immunity from suit for injuries arising out of “the incarceration of any person in any state prison, county, or city jail or other place of legal confinement.” The term “‘other place of legal confinement’ obviously referred to something other than a ‘jail’ or ‘state prison,’ including a hospital where one cannot be released without some kind of permission.”<sup>100</sup> In *Emery*, a voluntary patient at the State Hospital died while confined and the guardian of the patient’s minor children sued for wrongful death. Even though the patient had

---

<sup>97</sup>600 P.2d 553.

<sup>98</sup>*Id.* at 556.

<sup>99</sup>*Id.*

<sup>100</sup>*Emery v. State*, 26 Utah 2d 1, 2, 483 P.2d 1296, 1297 (1971).

voluntarily admitted herself, she could not leave without permission and the director of the hospital could obtain a court order preventing her departure. She was therefore “incarcerated” and the state was immune.

The definition of “arises out of the incarceration” has also been challenged. In *Sheffield v. Turner*,<sup>101</sup> Sheffield lost an eye when he was stabbed by an inmate at the state prison. The court held that the injury arose out of the incarceration and the state was immune.<sup>102</sup> Immunity bars many suits which would interfere with the operation and effectiveness of the prisons. Therefore immunity should be preserved.

Although immunity should be preserved, inmates should not be stripped of all their rights because they are incarcerated. In *Madsen v. State*,<sup>103</sup> governmental immunity prevented recovery for wrongful death of an inmate resulting from an operation which was performed at the prison hospital. Allegedly, lack of expertise, inadequate facilities, and negligence of the employees caused the death. The court held that the injury arose out of the incarceration and the state was immune.

*Madsen* takes immunity from claims arising as a result of incarceration too far. If the operation were performed at a governmentally owned hospital on a person other than a convict, then, under *Frank*<sup>104</sup> immunity is waived. A person’s conviction is irrelevant when prison medical staff diagnose and treat an illness. Therefore the conviction should be irrelevant when the convict sues for medical malpractice whether occurring at the state prison or elsewhere. The court has defined “arising out of the incarceration” too broadly in this case.

## 11. [§ 2.5.11] State Lands

Paragraph (k) of section 63-30-10(1) retains immunity from suit for injuries arising “from any natural condition on state lands or the result of any activity authorized by the State Land Board.” This section again expresses the retention of immunity for failure to inspect property.<sup>105</sup> Immunity is also retained for claims arising out of the negligent acts of the State Land Board.

## 12. [§ 2.5.12] Providing Emergency Assistance

Paragraph (l) of section 63-30-10(1) retains immunity from suit on injuries arising out of the negligent acts of employees “arising out of the activities of providing emergency medical assistance, fighting fire, handling hazardous materials, or emergency evacuations.” Because emergency

<sup>101</sup>21 Utah 2d 314, 445 P.2d 367 (1968).

<sup>102</sup>Id. at 316, 445 P.2d at 368.

<sup>103</sup>583 P.2d 92, 93 (Utah 1978).

<sup>104</sup>613 P.2d 517.

<sup>105</sup>UTAH CODE ANN. § 63-30-10(1) (d) (Supp. 1985); and see section 2.5.4 supra.

powers are held by governmental entities, leadership should be permitted to make problem solving decisions in an emergency without first obtaining the advice of counsel. Although these activities are probably governmental functions, immunity is properly retained in this paragraph.

#### **F. [§ 2.6] WAIVER FOR VIOLATION OF 4TH AMENDMENT RIGHTS**

Section 63-30-10(2) was added in 1982<sup>106</sup> and waives immunity for violation of Fourth Amendment rights as provided in the Actions For Violations Of Fourth Amendment Rights Act, referred to herein as the "Violations Act."<sup>107</sup> The term "Fourth Amendment rights" is defined as "those rights of individuals or entities protected by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Constitution of Utah."<sup>108</sup>

Legislative intent for the waiver is to deter violation of an individual's 4th Amendment rights by peace officers and other governmental employees.<sup>109</sup> Under the Violations Act, the individual gains the right to sue for damages caused by violation of his rights. Damages include nominal damages of \$100 plus damages

including but not limited to injury to person, property, or reputation, as may be established by a preponderance of the evidence. If a plaintiff further establishes by a preponderance of the evidence that the violation by the peace officer or the employing agency was substantial, grossly negligent, willful, or malicious, damages may include . . . exemplary or punitive damages.<sup>110</sup>

Damages may not include loss as a result of a conviction.<sup>111</sup>

The waiver in the Act is not necessary because consent to be sued is expressly granted in section 78-16-3. One provision of the Violations Act eliminates the exclusionary rule for illegally obtained evidence unless the violation is "substantial."<sup>112</sup> In this trade-off, the individual may sue for damages and, in exchange, illegally obtained evidence may be introduced against him.

Since the Violations Act and the related provision in the Immunity

<sup>106</sup>1982 Utah Laws 85.

<sup>107</sup>UTAH CODE ANN. § 78-16-1 et seq. (Supp. 1985).

<sup>108</sup>Id. at § 78-16-2 (Supp. 1985).

<sup>109</sup>Id. at § 78-16-5 (Supp. 1985).

<sup>110</sup>Id. at § 78-16-6(2) (Supp. 1985).

<sup>111</sup>Id.

<sup>112</sup>Id. at § 78-16-5 (Supp. 1985).

Act provision are both recently enacted, cases have not interpreted their provisions. However, the constitutionality of section 78-16-5 will likely be challenged. If it is declared unconstitutional, immunity is retained.<sup>113</sup>

### G. [§ 2.7] WAIVER BY GOVERNMENTAL AGENTS

Instances can occur where an action by the governmental entity foreseeably may injure a potential claimant. Rather than sue for an injunction to stop the injurious act, the potential claimant may want to enter a stipulation with the entity providing that if the injury occurs, suit may be brought. However, even though immunity has been waived for contractual claims, the contract must be valid for the waiver in section 63-30-5 to apply.

Contractually waiving immunity is good in theory but governmental entities have no authority to waive immunity. In *Bailey Service & Supply Corporation v. State Road Commission*,<sup>114</sup> Bailey entered into a stipulation with the Road Commission which purported to waive immunity. When suit was brought, the State claimed immunity. The court said that “only the legislature can waive sovereign immunity and the Road Commission’s attempt to do so was without legal effect.”<sup>115</sup> A claim based on contract must be a valid contract with the governmental entity.<sup>116</sup> A claim based on employee misrepresentation is also immune.<sup>117</sup>

Therefore, rather than waive immunity by contract, it is better to settle the claim prior to the entity’s action if possible. If settlement is not possible, an equitable suit for an injunction can be brought to prevent the injurious act. If the act will cause compensable damages, then the court may grant the injunction preventing the act or it may order the entity to commence condemnation proceedings to determine the compensation required.

### H. [§ 2.8] OTHER STATUTORY WAIVER

The Act provides, “Except as may be otherwise provided in this chapter, governmental entities are immune from suit.” However, there are other statutes which specifically permit suit against governmental entities or require the entity to compensate for certain acts. The question arises whether the claim for compensation under such a statute is within the Act. An example of this is the Disaster Response and Recovery Act in Chapter 5a of Title 63. This act authorizes the governor, in a declared state of emergency, to take or use property without first commencing

---

<sup>113</sup>UTAH CODE ANN. § 63-30-10(2) (Supp. 1985).

<sup>114</sup>533 P.2d 882 (Utah 1975).

<sup>115</sup>Id. at 883.

<sup>116</sup>See section 2.1 *supra*.

<sup>117</sup>UTAH CODE ANN. § 63-30-10(1) (f) (Supp. 1985); and *supra* section 2.5.6.

legal action and without first compensating for the taking or use. However, section 63-5a-10 establishes a \$2,000,000 fund out of which compensation of the owner is required. If the governor exercises this authority and does not compensate the owner, a claim has arisen against the state. The Immunity Act might not waive immunity for such a claim.

Claim for violations of a person's civil rights arising under 42 U.S.C. § 1983 (1981) are probably recoverable despite governmental immunity. However, that topic is too expansive to be dealt with in this article. Other state or federal statutes may authorize claims to be brought. Therefore, it is probable that claims authorized in other statutes, particularly state statutes, need not comply with the immunity act provisions. However, the prudent practitioner should comply with the notice of claim procedures of the Act and affirmatively plead compliance with those requirements.

### **III. [§ 3] CONCLUSION**

The Utah Governmental Immunity Act was intended to modify the common law doctrine of sovereign immunity. Under the common law, equitable claims, constitutional claims, and claims arising out of the exercise of a proprietary function were not barred by the government's immunity from suit. The Act retained the immunity previously enjoyed but waived immunity for contract claims, property lien and title claims, motor vehicle negligence claims, claims arising from defective public improvements, and some categories of employee negligence.

Claims which are within the Act are barred by immunity unless immunity has been waived by the Act. Those claims must comply with the provisions of the Act or they are barred. The notice of claim provision requires a notice to the governmental agency informing them of the nature of the claim and requesting payment for the damages incurred. The claim must be filed within one year of the date the cause of action arises or it is barred. The entity has 90 days to approve or deny the claim. A claim is deemed denied if not approved within 90 days.

A complaint for recovery on a denied claim must be filed within one year after denial or it is barred. The complaint must affirmatively plead that notice was given to the entity and denied. Failure to do so is a fatal defect in the pleading. The district court has exclusive original jurisdiction over claims against governmental entities. Along with the complaint, the claimant must file an undertaking for at least \$300 to cover costs incurred by the entity if the claimant does not prosecute the claim or if the claim is unsuccessful.

Judgments are limited for claims under the Act. Personal injury claims are limited to the higher of \$250,000 per person or \$500,000 per incident or the policy limits of the applicable insurance policy. Property damage claims are limited to the higher of \$100,000 or the policy limits of the applicable insurance policy.

Employees may be joined in a complaint against a governmental entity in a representative capacity but the entity must indemnify the



employee if the claim arose from acts or omissions of the employee during the course of employment, within the scope of employment, or while acting under the color of authority. If the entity can prove the employee was acting outside those parameters or was acting fraudulently or with malice, the employee may be held liable.

Since enactment, the Utah Supreme Court has interpreted “proprietary functions” very broadly to exclude from the Act many functions which were traditionally considered governmental functions. Also, interpretation of the discretionary acts of employees has been substantially narrowed. These two interpretations in conjunction with the waiver sections of the Act have eliminated much of the immunity once enjoyed by Utah’s governmental entities. Because immunity is nearly eliminated, governmental entities are finding it difficult to obtain insurance to cover their liability exposure. This difficulty will probably be addressed by the legislature soon.

**L. STEVEN BROOKS**