

9-1-1981

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### Recommended Citation

Larry A. Klein and Brad A. Chalker, *Developments in Florida's Doctrine of Sovereign Immunity*, 35 U. Miami L. Rev. 999 (1981)

Available at: <https://repository.law.miami.edu/umlr/vol35/iss5/6>

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# Developments in Florida's Doctrine of Sovereign Immunity

LARRY A. KLEIN\* AND BRAD A. CHALKER\*\*

*Since Florida waived its governmental immunity in tort actions by enacting section 768.28 of the Florida Statutes, there has been much controversy over the extent of this waiver. The decision of the Supreme Court of Florida in 1979 in Commercial Carrier Corp. v. Indian River County developed a four-pronged test for determining when a governmental entity acting in a governmental capacity would still be liable under the statute. In this article the authors examine the Commercial Carrier test and survey the Florida cases applying it. The authors also discuss several significant legislative amendments to section 768.28, and the 1979 and 1980 Florida cases that have construed the statute.*

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## I. "THE KING CAN DO NO WRONG"

That ancient maxim is often associated with the still prevalent doctrine that a sovereign is immune from suit for its tortious acts.<sup>1</sup> Despite their democratic tradition, most American states have incorporated the sovereign immunity doctrine into their common law heritage or constitutions.<sup>2</sup> The eleventh amendment to the United States Constitution, moreover, expressly exempts the states from suits by private citizens in federal court.<sup>3</sup>

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1. See Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1, 17 (1926). The concept that "the King can do no wrong," generally believed to have been an axiom of the common law, did not arise until "the Tudor despotism when much nonsense about the immaculate King of transcendental prerogative and goodness was purveyed." *Id.* at 31.

2. See Comment, *Sovereign Immunity in Contract Suits: Victim of Judicial Abrogation in Iowa*, 59 IOWA L. REV. 360, 360 (1973).

3. U.S. CONST. amend. XI provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

Florida recognizes state sovereign immunity in its case law and by implication in its constitution.<sup>4</sup> Article ten of the Florida Constitution authorizes the Florida legislature to abrogate this immunity by enacting "general law for bringing suit against the state."<sup>5</sup> In 1973 Florida exercised its authority under this constitutional provision to waive its sovereign immunity in tort.<sup>6</sup> Section 768.28 of the Florida Statutes now exposes Florida to liability "for tort claims in the same manner and to the same extent as a private individual under like circumstances."<sup>7</sup> Although this waiver appears self-explanatory at first glance, its language still demands judicial interpretation. The purpose of this article is to survey the cases defining the scope of the statute and endorsing the present viability of the concept of sovereign tort immunity in Florida.

## II. FLORIDA CASE LAW

In 1979 the Supreme Court of Florida defined the scope of the statutory waiver of municipal sovereign immunity in two factually similar cases. In the two cases, *Commercial Carrier Corp. v. Indian River County*<sup>8</sup> and *Cheney v. Dade County*,<sup>9</sup> defendants in traffic accident suits filed third-party complaints against the named counties for negligent failure to maintain intersections.<sup>10</sup> The trial courts dismissed both third-party complaints for failure to state a claim under the sovereign immunity doctrine.<sup>11</sup> The District Court

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the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

4. See, e.g., *Valdez v. State Rd. Dep't*, 189 So. 2d 823, 824 (Fla. 2d DCA 1966); *Pereira v. State Rd. Dep't*, 178 So. 2d 626, 626 (Fla. 1st DCA 1965); FLA. CONST. art X, § 13 ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating").

5. FLA. CONST. art. X, § 13.

6. 1973 Fla. Laws ch. 73-313, § 1 (current version codified at FLA. STAT. § 768.28(5) (1981)). The statute took effect in 1974 for the state's executive departments, and in 1975 for all other agencies and subdivisions. FLA. STAT. § 768.30 (1981).

7. FLA. STAT. § 768.28(5) (1981).

8. 342 So. 2d 1047 (Fla. 3d DCA 1977), *rev'd*, 371 So. 2d 1010 (Fla. 1979).

9. 353 So. 2d 623 (Fla. 3d DCA 1977), *rev'd sub nom. Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).

10. *Commercial Carrier* involved a vehicular collision at an unmarked intersection. The plaintiffs alleged that there had previously been a stop sign and pavement markings at the intersection. 371 So. 2d at 1013. In *Cheney* the plaintiff-accident victim contended that Dade County had negligently maintained a traffic light. *Id.*

11. Each motion to dismiss included the allegation that the defendants (third-party plaintiffs) failed to comply with the notice requirement of FLA. STAT. § 768.28(6) (1981), which provides in part:

An action shall not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the

of Appeal, Third District, affirmed, holding that no cause of action existed for the counties' allegedly negligent acts in either case. The Supreme Court of Florida consolidated the two cases for review under the name *Commercial Carrier v. Indian River County*.<sup>12</sup> In reinstating the two third-party complaints, the court criticized the Third District for narrowly construing the statutory waiver of sovereign immunity, and expressly disapproved of the trial court's decisions in the cases below.<sup>13</sup> The court labeled as "circuitous" the district court's reasoning that negligence by the state or its political subdivisions does not create a cause of action when the state breaches a duty supposedly owed to the general public rather than individuals. That logic, the supreme court observed, has been characterized by "less kind commentators" as a theory "which results in a duty to none where there is a duty to all."<sup>14</sup>

The Supreme Court of Florida had previously espoused this "general duty"—"special duty" dichotomy in *Modlin v. City of Miami Beach*,<sup>15</sup> a case decided before the enactment of section 768.28 of the Florida Statutes.<sup>16</sup> *Modlin* arose from a claim that a city building inspector had negligently examined a retail shop's storage mezzanine, which later collapsed and crushed a patron. The supreme court dismissed the claim, holding that the city was not vicariously liable because it did not owe the injured plaintiff a duty different from the duty owed to the public at large.<sup>17</sup>

In *Cheney*, the Third District followed *Modlin's* rationale, concluding that section 768.28 of the Florida Statutes

does not create a liability in the State where the act complained of does not give rise to liability in the agent committing the act,

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appropriate agency, and also, except as to any claim against a municipality, presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing.

12. The supreme court's jurisdiction over the two actions rested on different grounds. The district court's disposition of *Commercial Carrier Corp. v. Indian River County*, 342 So. 2d 1047 (Fla. 3d DCA 1977), allegedly conflicted with *Gordon v. City of West Palm Beach*, 321 So. 2d 78 (Fla. 4th DCA 1975). The Third District certified *Cheney v. Dade County*, 353 So. 2d 623 (Fla. 3d DCA 1977) as raising a question of great public interest. Supreme court jurisdiction vested pursuant to FLA. CONST. art. V, § 3(b)(3) (amended 1980) (current version at FLA. CONST. art. V, § 3(b)(4)).

13. 371 So. 2d at 1015.

14. *Id.*

15. 201 So. 2d 70 (Fla. 1967).

16. 371 So. 2d at 1016.

17. 201 So. 2d at 76.

because the duty claimed to be violated is a duty owed to the citizens of the state in general and is not a duty owed to a particular person or persons.<sup>18</sup>

In *Commercial Carrier*, the Supreme Court of Florida firmly rejected this language and the *Modlin* doctrine, declaring that a "plain reading" of the statute denies any construction that the legislature intended to codify the existing judicial rules of municipal sovereign immunity.<sup>19</sup>

The supreme court then examined the scope of the waiver of immunity envisioned by section 768.28. Analogizing the Florida statute to the interpretation of the Supreme Court of the United States of the "almost identical" language in the relevant sections of the Federal Tort Claims Act,<sup>20</sup> the Supreme Court of Florida concluded that the statutory waiver of municipal immunity extends to the performance of governmental functions not performed by private individuals.<sup>21</sup> The court in *Commercial Carrier* recognized, however, that certain governmental activities still fall outside the scope of the statute and are thus immune from liability.<sup>22</sup>

18. *Cheney v. Dade County*, 353 So. 2d at 626. The *Cheney* court cited *Spangler v. State Turnpike Auth.*, 106 So. 2d 421 (Fla. 1958), as direct authority for the statement: "The Supreme Court of Florida has held that statutes purporting to waive sovereign immunity are to be strictly construed and that such waiver should not be implied." 353 So. 2d at 626. The Third District's reliance on this case, which preceded section 768.28 by 17 years, may partially explain *Cheney's* reversal.

19. 371 So. 2d at 1016.

20. 28 U.S.C. §§ 1346(b), 2674 (1976), noted in 371 So. 2d at 1016 & n.9 (citing *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (federal government held liable for damage caused by Coast Guard's negligent maintenance of a lighthouse)). The *Commercial Carrier* court quoted extensively from *Indian Towing* in describing the government's interpretation of the language of the federal waiver of immunity:

"But the Government contends that the language of § 2674 . . . imposing liability 'in the same manner and to the same extent as a private individual under like circumstances . . . ' must be read as excluding liability in the performance of activities which private persons do not perform. Thus there would be no liability for negligent performance of 'uniquely governmental functions.' The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual 'under the same circumstances.' But the statutory language is 'under like circumstances,' and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner.

371 So. 2d at 1016 (quoting 350 U.S. at 64-65).

21. Thus, the language of section 768.28(5) of the Florida Statutes imposing liability "in the same manner and to the same extent as a private individual under like circumstances" does not limit state and municipal liability to activities that only private persons perform. 371 So. 2d at 1016-17.

22. See 371 So. 2d at 1017-22. The existence and nature of an exception to the statu-

In considering what municipal acts may be outside the scope of section 768.28, the court examined the case law of several states that exempt certain areas of governmental conduct from scrutiny by judge or jury.<sup>23</sup> Perhaps the most significant of these cases was *Evangelical United Brethren Church v. State*,<sup>24</sup> which involved an action by property owners against the State of Washington for damages caused by a fire set by an escapee from a state reformatory. Predicating their action on a Washington statute<sup>25</sup> similar to section 768.28 (1) of the Florida Statutes,<sup>26</sup> the plaintiffs alleged that the state negligently permitted the escape when it knew or should have known that the escapee was a pyromaniac.<sup>27</sup> The state argued, however, that because its acts involved the exercise of administrative judgment and discretion, it could still invoke sovereign immunity as a defense.<sup>28</sup> The Supreme Court of Washington concluded that the state legislature clearly intended to abolish the doctrine of sovereign immunity, but with certain exceptions more limited than those embodied in the Federal Tort Claims Act.<sup>29</sup> The Washington statute "does not render the state liable for every harm that may flow from governmental action," the court explained, nor does it make the state "a surety for every governmental enterprise involving an element of risk."<sup>30</sup>

The *Evangelical* court first considered where in the realm of governmental activity "orthodox tort liability stops and the act of governing begins."<sup>31</sup> It noted that "it is not a tort for government to govern."<sup>32</sup> In the words of *Commercial Carrier, Evangelical*

tory waiver was a matter for judicial determination because, unlike the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976), § 768.28 does not contain an express exception for discretionary acts.

23. 371 So. 2d at 1017-20.

24. 67 Wash. 2d 246, 407 P.2d 440 (1965).

25. WASH. REV. CODE § 4.92.090 (1961) (amended 1963), provided in part: "The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

The 1963 amendment replaced the phrase, "hereby consents to the maintaining of a suit or action against it for damages" with "shall be liable for damages." 1963 Wash. Laws, ch. 159, § 2.

26. FLA. STAT. § 768.28(1) (1981), provides a general waiver of sovereign immunity for the state, its agencies, and its subdivisions.

27. 67 Wash. 2d at 248, 407 P.2d at 441.

28. *Id.* at 252, 407 P.2d at 443.

29. *Id.*

30. *Id.* at 253, 407 P.2d at 444, quoted in 371 So. 2d at 1019.

31. *Id.*

32. *Id.* (quoting *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).

“recognized that the legislative, judicial and purely executive processes of government, including discretionary acts and decisions within the framework of such processes, cannot and should not be characterized as tortious.”<sup>33</sup> In attempting to fashion a line of demarcation that would preserve sovereign immunity for “truly discretionary” but not merely ministerial functions, the *Evangelical* court proposed a four-part test that was quoted at length in *Commercial Carrier*:

(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? (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? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary government process and nontortious, regardless of its un wisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.<sup>34</sup>

After finding *Evangelical's* four-part test persuasive in *Commercial Carrier*, the Supreme Court of Florida discussed one of its earlier decisions, *Wong v. City of Miami*.<sup>35</sup> In *Wong*, merchants whose business premises were damaged when a rally culminated in civil disorder sued the City of Miami and Dade County for negligent failure to contain the rally. While impliedly conceding the defendants' negligence, the supreme court held that it was not actionable because of sovereign immunity.<sup>36</sup> The court declared, “The sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.”<sup>37</sup>

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33. 371 So. 2d at 1018-19.

34. 67 Wash. 2d at 255, 407 P.2d at 445, quoted in 371 So. 2d at 1019.

35. 237 So. 2d 132 (Fla. 1970).

36. See 371 So. 2d at 1020 (explanation of *Wong*).

37. 371 So. 2d at 1020 (emphasis omitted) (quoting *Wong*, 237 So. 2d at 134).

Relying on *Evangelical* and *Wong*, the *Commercial Carrier* court emphasized the "distinct principle of law . . . which makes not actionable in tort certain judgmental decisions of governmental authorities which are inherent in the act of governing."<sup>38</sup> It then developed a test for identifying such "discretionary" governmental functions, ultimately adopting the "planning"—"operational" dichotomy that had been developed by the federal and California courts.<sup>39</sup>

Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which government[al] liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.<sup>40</sup>

The court expressly adopted the above planning-operational analysis as a judicial aid in isolating the discretionary functions of government that should be immune from tort liability despite broad statutory waiver, and, at the same time, "commended" *Evangelical's* four-pronged preliminary test.<sup>41</sup>

The other issues treated by *Commercial Carrier* were primarily procedural, involving the notice requirements for filing claims under section 768.28 of the Florida Statutes,<sup>42</sup> and the question whether the statute pertains to either contribution or indemnity. On the latter issue, the supreme court stated: "Actions for contribution or indemnity grounded on the tortious conduct of the state

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38. 371 So. 2d at 1020 (citing Judge Fuld's opinion in *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960) (pedestrian unable to recover against city for injuries allegedly caused by inadequate traffic signal "clearance interval" on grounds that discretionary decision by governmental official not actionable in tort)).

39. The *Commercial Carrier* court traced the development of the planning-operational analysis of sovereign immunity to the opinion of the Supreme Court of the United States in *Dalehite v. United States*, 346 U.S. 15 (1953), in which the Supreme Court construed the Federal Tort Claims Act. 371 So. 2d at 1021. The Supreme Court of California articulated a planning-operational test first in *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961), and later in *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968). See 371 So. 2d at 1021.

40. 371 So. 2d at 1021 (quoting *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99).

41. 371 So. 2d at 1022. For an explication of the *Evangelical* test, see text accompanying notes 32-34 *supra*.

42. 371 So. 2d at 1022. The court held that compliance with FLA. STAT. § 768.28(6) is a condition precedent to maintaining an action against the state. 371 So. 2d at 1022.



or its agencies and subdivisions are no less tort claims for purposes of section 768.28 than direct actions."<sup>43</sup>

Florida courts have adhered to the tests developed in *Commercial Carrier* for determining municipal liability. At first, there was some doubt about the efficacy of the tests. For example, in *Wallace v. Nationwide Mutual Fire Insurance Co.*,<sup>44</sup> the District Court of Appeal, Fourth District, observed that the now-extinct *Modlin* rule was "at least easy to discern and apply."<sup>45</sup> By contrast, the court found that the *Evangelical-Commercial Carrier* test was "complex" and might be construed "either to exempt each and every governmental action, or alternatively, exclude none of them."<sup>46</sup> Additionally, the *Wallace* court speculated with concern on the "specter of governmental authorities being found negligent and liable for the routine acts and inspections by their building and plumbing officials . . . [and on] what might come forth out of the State's requirement that automobiles be routinely inspected."<sup>47</sup>

Nonetheless, the Fourth District easily interpreted the *Commercial Carrier* test in *Relyea v. State*,<sup>48</sup> which involved two students who had been attacked and killed on a state college campus.<sup>49</sup> The plaintiffs alleged that the state had failed to provide adequate security on the campus. Relying on the *Commercial Carrier* test, the court held that "the allegations of negligence fall within the definition of discretionary function. Whether to provide security guards, parking attendants, [and] security gates . . . are clearly discretionary decisions, partially based upon budgetary limitations controlled by the legislature."<sup>50</sup>

Other lower courts in Florida have applied *Commercial Carrier's* analysis to a great variety of situations, illustrating the case's inevitable impact. For example, in *Weston v. State*,<sup>51</sup> the District Court of Appeal, First District, affirmed the trial court's dismissal

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43. *Id.*

44. 376 So. 2d 39 (Fla. 4th DCA 1979).

45. *Id.* at 40.

46. *Id.*

47. *Id.* The *Wallace* court concluded that "the possible permutations resulting in the Government bearing the financial responsibility for the misdeeds of the private sector, simply because it is trying to safeguard the general public by regulatory action, is staggering." *Id.*

48. 385 So. 2d 1378 (Fla. 4th DCA 1980).

49. *Id.* at 1380.

50. *Id.* at 1382. The complaint in *Relyea* had alleged that the state university had a mandatory, nondiscretionary duty to provide reasonable security for all persons lawfully on the campus, particularly students. *Id.* at 1380.

51. 373 So. 2d 701 (Fla. 1st DCA 1979).

of a complaint alleging that a state attorney had maliciously prosecuted and caused the false imprisonment of the plaintiff. The state attorney had advised a grand jury during its pre-indictment investigation of the plaintiff, who was a county official. The criminal trial court subsequently dismissed the criminal action, finding that the statute on which the indictment was based did not apply to the official.<sup>52</sup> In concluding that the exonerated official did not have an actionable claim, the First District held that, under *Commercial Carrier*, "[t]he state attorney's action in this case, as advisor to the grand jury, qualifies as a 'certain "discretionary" governmental function' the performance of which is not affected by the statute waiving sovereign immunity."<sup>53</sup>

The District Court of Appeal, Second District, has applied the holding of *Commercial Carrier* to cases involving allegations of faulty highway construction and inadequate warnings of impending riots. In *Neilson v. Department of Transportation*,<sup>54</sup> the plaintiffs brought a negligence action against a state agency and a county for damages incurred in a traffic accident. The complaint alleged that the defendants' negligent design and construction of a public road, combined with their failure to provide adequate warning devices and signals at the accident site, resulted in personal injuries and property damage.<sup>55</sup> The District Court of Appeal, Second District, reversed the trial court's dismissal of the case, stating that although most, if not all, of the allegations appeared to involve discretionary actions under *Commercial Carrier*, the trial court should gather additional evidence before making a final determination.<sup>56</sup>

Six weeks later in *Ellmer v. City of St. Petersburg*,<sup>57</sup> the Second District again relied on *Commercial Carrier*. In *Ellmer*, the City of St. Petersburg allegedly failed to warn its residents of an impending riot. The court held that any negligence attributable to the city fell within the scope of its discretionary planning function.

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52. *Id.* at 702.

53. *Id.* (quoting *Commercial Carrier*, 371 So. 2d at 1022). The policy considerations relating to the needs of the judicial system greatly influenced the court. It reasoned that a state attorney must be able to enforce the law free from any apprehension that he might be subject to liability for acts performed in exercising his discretionary duties. The court feared that curbing the exercise of the state attorney's judgment in prosecuting crimes would cripple law enforcement and related judicial activities. *Id.* at 703.

54. 376 So. 2d 296 (Fla. 2d DCA 1979).

55. *Id.*

56. *Id.*

57. 378 So. 2d 825 (Fla. 2d DCA 1979).

The court observed that the exigencies of the circumstances required that the city be free to exercise its discretion in meeting its larger responsibility to provide police protection during the riot. Accordingly, the court rejected "the idea that any planning level function must occur back at headquarters and that any decision made on the scene necessarily be operational. Sometimes, only persons in the field can make effective plans."<sup>58</sup>

The District Court of Appeal, Third District, examined the character of governmental functions in the area of highway safety in *A. L. Lewis Elementary School v. Metropolitan Dade County*.<sup>59</sup> In *Lewis*, an automobile struck a student in an intersection adjacent to school grounds. The court concluded that designating traffic zones and installing traffic signals and pedestrian control devices are discretionary policy matters that involve planning and judgment and therefore are not subject to traditional tort liability.<sup>60</sup> Sovereign immunity, however, would not apply if there was "a statutory imposition of a duty on such governmental agencies to establish and maintain such traffic regulation facilities."<sup>61</sup> The court found that in this case a statutory duty did exist,<sup>62</sup> and thus reversed the trial court's order dismissing the complaint.<sup>63</sup>

Another case decided by the Third District concerning the scope of sovereign immunity was *Weissberg v. City of Miami Beach*.<sup>64</sup> In *Weissberg*, the plaintiff was injured in a traffic accident at an intersection where equipment being used by a public utility had obscured visibility. The utility company had hired a uniformed, off-duty city policeman to direct traffic at the site. The policeman was allegedly negligent in performing his duties. The Third District reversed the trial court's summary judgment in favor of the city,<sup>65</sup> using the tests developed in *Commercial Carrier* to reject the city's argument that placing the policeman at the site involved a planning function.<sup>66</sup> The court discerned no difference

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58. *Id.* at 827.

59. 376 So. 2d 32 (Fla. 3d DCA 1979).

60. *Id.* at 34.

61. *Id.*

62. The court referred to FLA. STAT. § 316.1895 (1975), which directed the Florida Department of Transportation to adopt a system for installing traffic control devices in areas surrounding public and private schools.

63. 376 So. 2d at 35. *See also* *Universal Dry Wall, Inc. v. Dade County*, 375 So. 2d 573 (Fla. 3d DCA 1979).

64. 383 So. 2d 1158 (Fla. 3d DCA 1980).

65. *Id.* at 1159. The trial court rendered its summary judgment prior to the supreme court's decision in *Commercial Carrier*.

66. *Id.* at 1158-59.

between municipal liability for malfunctioning traffic devices, the subject matter of *Commercial Carrier*, and for an inattentive policeman directing traffic—in both cases, the state entity was engaged in a purely operational procedure.<sup>67</sup>

In *Daniele v. Board of County Commissioners*,<sup>68</sup> the District Court of Appeal, Fourth District, found that under *Commercial Carrier*'s interpretation of section 768.28 of the Florida Statutes, a county was liable for its negligent failure to maintain public property. There, the plaintiff was injured when his bicycle hit a pothole in a county park.<sup>69</sup> On facts somewhat similar to those of *Daniele*, the District Court of Appeal, Fifth District, in *Wojtan v. Hernando County*,<sup>70</sup> held that a county is not immune from a suit for negligent maintenance of county roadway shoulders. In *Wojtan*, poorly maintained highway shoulders caused injuries to a plaintiff who had been operating a motor vehicle along the road.<sup>71</sup> *Commercial Carrier*, then, has been used to justify imposing liability on government entities for all types of negligent behavior affecting public property.<sup>72</sup>

Overall, *Commercial Carrier* and its progeny suggest that the state cannot be held liable for a discretionary decision within the ambit of its authority; the execution of that decision is ministerial and, therefore, subject to judicial review.

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67. *Id.* at 1159.

68. 375 So. 2d 1 (Fla. 4th DCA 1979).

69. *Id.*

70. 379 So. 2d 198 (Fla. 5th DCA 1980).

71. *Id.* at 199. The court reversed the trial court's judgment on the pleadings based upon *Commercial Carrier*, which was decided while the case was on appeal. For another roadway maintenance case, see *State Dep't of Transp. v. Eades*, 383 So. 2d 973 (Fla. 3d DCA 1980) (state liable for injuries sustained by police officer who fell through drainage grating on shoulder of public highway). See also *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981) (city found liable for injuries caused by dangerous condition of road shoulder although the limit on damages imposed by FLA. STAT. § 768.28 (1981) constitutionally reduced recovery).

72. The District Court of Appeal, Second District, recently used the tests developed in *Commercial Carrier* to defeat liability in a case in which the plaintiffs did not allege any negligent behavior. In *Rumbough v. City of Tampa*, 403 So. 2d 1139 (Fla. 2d DCA 1981), property owners appealed the trial court's grant of a motion for summary judgment in an action in which they had alleged that the City of Tampa's non-negligent operation of a sanitary landfill caused damage to their home. In affirming the trial court's decision, the Second District concluded that in the absence of any allegation of negligence on the part of the city, its operation of the landfill was a discretionary function that could not create liability. *Id.* at 1141-42.

### III. STATUTORY DEVELOPMENTS

In section 768.28(1) of the Florida Statutes, Florida waived sovereign tort immunity for the state, its agencies, and its subdivisions, with the caveat that the waiver is effective "only to the extent specified" in the statute.<sup>73</sup> The remaining thirteen subsections of section 768.28 limit and define the scope of this general waiver.<sup>74</sup> The following discussion will review the 1979 and 1980 cases that have further shaped and defined the application of section 768.28,<sup>75</sup> and will examine several significant legislative amendments.<sup>76</sup>

The District Court of Appeal, First District, construed the general waiver of section 768.28 in *Hollis v. School Board*.<sup>77</sup> In *Hollis*, the estate of a deceased five-year-old child sued a county school superintendent claiming that the alleged negligence of a school bus driver caused the child's death. The trial court granted the superintendent's motion for summary judgment, absolving him from liability, and the estate appealed. Because section 768.28(1) limits the state's liability to that of a private person in similar circumstances, the court first considered whether, in the private sector, the superintendent would be liable for the bus driver's negligence under the doctrine of respondeat superior.<sup>78</sup> To resolve this issue, the court had to determine whether the bus driver was an

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73. FLA. STAT. § 768.28(1) (1981) provides in part:

Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act of omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

74. FLA. STAT. §§ 768.28(2)-(14) (1981).

75. See, e.g., *Beard v. Hambrick*, 396 So. 2d 708 (Fla. 1981) (construing FLA. STAT. § 768.28(1), (2), (6), (12) (Supp. 1974) (subsection (1) amended 1981)); *District School Bd. v. Talmadge*, 381 So. 2d 698 (Fla. 1980) (construing FLA. STAT. § 768.28(9)(1975) (amended 1979, 1980, 1981)); *Department of Transp. v. Knowles*, 388 So. 2d 1045 (Fla. 2d DCA 1980) (construing FLA. STAT. § 768.28(5) (1977) (amended 1981)); *Hollis v. School Bd.*, 384 So. 2d 661 (Fla. 1st DCA 1980) (construing FLA. STAT. § 768.28(1)-(2) (1977) (subsection (1) amended 1981)); *West v. Wainright*, 380 So. 2d 1338 (Fla. 1st DCA 1980) (construing FLA. STAT. § 768.28(6) (1979)); *State v. Yant*, 360 So. 2d 99 (Fla. 1st DCA 1978) (construing FLA. STAT. § 768.28(5) (1975) (amended 1977, 1981)).

76. See, e.g., 1981 Fla. Laws ch. 81-317 § 1 (amending FLA. STAT. § 768.28(9) (1979)); 1979 Fla. Laws ch. 79-253, § 1 (amending FLA. STAT. § 768.28(13) (1977)).

77. 384 So. 2d 661 (Fla. 1st DCA 1980).

78. *Id.* at 662-63.

employee of the superintendent as well as of the school board.<sup>79</sup> The First District concluded that the superintendent was an employer of the bus driver and thus could be held vicariously liable for the driver's negligent acts.<sup>80</sup>

The *Hollis* court then considered whether the employer of a negligent employee is a state entity under section 768.28(2), which lists the organizations included within the terms "state agencies or subdivisions."<sup>81</sup> The court noted that cases addressing the issue under the Federal Tort Claims Act<sup>82</sup> look to whether the employee is an integral part of the government. Because the superintendent's activities as both the administrator and chief executive officer of the school board were essential to the effective functioning of the board, the court concluded that the "superintendent . . . is an integral part of the government and must be considered an agency as that term is defined in Section 768.28(2)."<sup>83</sup>

Section 768.28(5) of the Florida Statutes<sup>84</sup> limits the state's liability for tort claims to \$100,000 for any individual's claim, and to a total of \$200,000 for claims arising from any single incident or occurrence. If a judgment exceeds these limits, the claimant may report the excess to the legislature, "but may be paid in part or in whole only by further act of the legislature."<sup>85</sup> Subsection (5) also preserves the state's immunity from claims for "punitive damages

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79. *Id.* at 662.

80. *Id.* at 663-64.

81. FLA. STAT. § 768.28(2) (1981) provides that "'state agencies or subdivisions' include the executive departments, the Legislature, the judicial branch, and . . . [the] counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities."

82. The *Hollis* court noted that 28 U.S.C. § 2671 (1976) defines "federal agency" to include the executive and military departments, the independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States. 384 So. 2d at 664 n.6.

83. 384 So. 2d at 664. *But see* 1978 Op. Att'y Gen. Fla. 078-145 (Dec. 21, 1978), which summarized this issue as follows:

Under the provisions of the general law waiving sovereign immunity in tort for state agencies or subdivisions, as defined in Section 768.28(2), F.S., actions may be brought against a mosquito control *district* for the negligent acts or omissions of its officers or employees committed within the scope of their authority. The officers or employees of the district may be held individually or personally liable, however, for those acts or omissions committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property. Florida appellate court decisions are in conflict as to whether the officers or employees of a governmental entity are immune from suit for negligent acts or omissions committed within the scope of their authority.

84. FLA. STAT. § 768.28(5) (1981).

85. *Id.*

or interest for the period prior to judgment."<sup>86</sup> The Florida cases construing section 768.28(5) literally interpret its plain language. The courts have consistently held, for example, that the limitation on individual claims, which is now \$100,000, "does not apply to separate claims by different individuals in the same lawsuit."<sup>87</sup>

It remains unclear whether courts may order the state to pay costs and interest in excess of the statutory limit. The First and Second District Courts of Appeal have held that a trial court may tax costs above the limitation of section 768.28(5) "to the same extent and in the same manner" that it taxes costs against private individuals.<sup>88</sup> In contrast, the Third District has held that the payment "of post-judgment interest and costs are recoverable, but only to the extent that the total of the judgment for damages and the post-judgment interest and costs [do] not exceed" the statutory limit.<sup>89</sup>

Section 768.28(6) of the Florida Statutes conditions the state's broad waiver of sovereign immunity by prohibiting an action "unless the claimant presents the claim in writing to the appropriate agency, and also . . . presents such claim in writing to the Department of Insurance within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing."<sup>90</sup> In *Hutchins v. Mills*,<sup>91</sup> a pre-*Commercial Carrier* case, the trial court had decided that it lacked subject matter jurisdiction of an action because the plaintiff did not comply with

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86. *Id.*; see *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981) (statutory ceiling on amount of money damages recoverable against municipality is constitutional); *Berek v. Metropolitan Dade County*, 396 So. 2d 756, 759 (Fla. 3d DCA 1981).

87. *Department of Transp. v. Knowles*, 388 So. 2d 1045, 1047 (Fla. 2d DCA 1980); *e.g.*, *State v. Yant*, 360 So. 2d 99 (Fla. 1st DCA 1978). When the First and Second Districts decided *Knowles* and *Yant*, the individual recovery limit under § 768.28(5) was \$50,000, and the occurrence recovery limit was \$100,000. The legislature amended subsection (5) in 1981 to raise the limits to \$100,000 and \$200,000 respectively. 1981 Fla. Laws, ch. 81-317, § 1.

In *Yant*, a minor child sustained serious injuries because of a state agency's alleged negligence. The trial court entered judgment in accordance with a jury verdict of \$125,000 for the injured child and \$26,000 for the medical bills paid by the mother. The First District reasoned that the claim of the injured minor child was separate and distinct from his parent's claim for resulting medical expenses. 360 So. 2d at 101.

88. *Department of Transp. v. Knowles*, 388 So. 2d 1045, 1047 (Fla. 2d DCA 1980); *State v. Yant*, 360 So. 2d 99 (Fla. 1st DCA 1978).

89. *Berek v. Metropolitan Dade County*, 396 So. 2d 756, 759 (Fla. 3d DCA 1981).

90. FLA. STAT. § 768.28(6) (1981). Subsection (6) also provides that "[t]he failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section."

91. 363 So. 2d 818 (Fla. 1st DCA 1978).

the notice requirement for filing a claim.<sup>92</sup> The District Court of Appeal, First District, disagreed with the trial court,<sup>93</sup> analogizing section 768.28(6) to an earlier statute that, as a prerequisite to suing a municipality, had required plaintiffs notify the municipality of potential claims within ninety days of the occurrence or discovery of an injury.<sup>94</sup> The court then noted that the Supreme Court of Florida had held "that a municipality may waive or be estopped to assert the benefit" of such notice statutes.<sup>95</sup> The First District reasoned that since a defendant may waive notice requirements, the plaintiff's failure to give notice does not deprive the court of subject matter jurisdiction.<sup>96</sup>

If the notice requirements of a local ordinance conflict with the terms of section 768.28(6), the latter will prevail. In *Scavella v. Fernandez*,<sup>97</sup> for example, the District Court of Appeal, Third District, examined a Dade County ordinance<sup>98</sup> that required claimants to file a claim with the county commission within sixty days of the alleged injury.<sup>99</sup> The court concluded that the ordinance conflicted with section 768.28(6), which allows claimants three years in which to file, and was therefore invalid: "What the legislature hath granted, the commission may not take away—even in part."<sup>100</sup>

The *Scavella* holding does not directly apply, however, if the plaintiff's injury occurred before the effective date of section 768.28(6). In *Cooper v. Dade County*,<sup>101</sup> the plaintiff alleged that the negligence of Dade County hospital employees caused her injuries. The trial court entered a directed verdict for the county because the plaintiff did not notify the county of her claim within sixty days, as required by the Dade County ordinance.<sup>102</sup> The

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92. *Id.* at 821.

93. The First District affirmed the trial court decision, however, on other grounds. The court held that since the plaintiff did not allege or present evidence of waiver or estoppel, the trial court properly dismissed the plaintiff's claim for failing to comply with notice requirement of § 768.28(6). 363 So. 2d at 821.

94. The court compared FLA. STAT. § 768.28(6) (1981) with FLA. STAT. § 95.241 (1973) (amended 1974).

95. 363 So. 2d at 821 (citing *Rabinowitz v. Town of Bay Harbor Island*, 178 So. 2d 9 (Fla. 1965)).

96. 363 So. 2d at 821.

97. 371 So. 2d 535 (Fla. 3d DCA 1979).

98. METRO. DADE CTY., FLA., CODE § 2-2 (1981).

99. The county had argued that there was no conflict because a claimant could comply with both the county ordinance and the statute by giving notice within sixty days. The *Scavella* court criticized this reasoning as "entirely unsound." 363 So. 2d at 536.

100. *Id.* at 537.

101. 384 So. 2d 221 (Fla. 3d DCA 1980).

102. METRO. DADE CTY., FLA., CODE § 2-2 (1981).



Third District concluded that its *Scavella* holding did not control the decision because section 768.28 of the Florida Statutes was not effective until fifteen days after the plaintiff's accident.<sup>103</sup> Nonetheless, the court applied *Scavella's* reasoning to the one-year notice requirement of another Florida statute<sup>104</sup> that conflicted with and thus overrode the county ordinance.<sup>105</sup>

In *West v. Wainwright*,<sup>106</sup> the District Court of Appeal, First District, articulated an exception to the notice requirement of section 768.28(6). A state prisoner had sued officers of the Florida Department of Corrections, both individually and as state officials, alleging that they negligently and maliciously denied him dietary and medical treatment while he was imprisoned.<sup>107</sup> The First District affirmed the trial court's dismissal of the complaint against the state because the plaintiff had not complied with the statutory notice requirements. But the court also partially reversed, because "insofar as appellant's complaint alleged deliberate mistreatment . . . the complaint stated a cause of action against the appellees individually, for which section 768.28(6) does not require a written claim upon the state or its agencies."<sup>108</sup>

Section 768.28(9) of the Florida Statutes<sup>109</sup> governs the personal tort liability of public employees. Over the past few years, this subsection has undergone significant legislative revision and judicial review. In *District School Board v. Talmadge*,<sup>110</sup> the Supreme Court of Florida interpreted an apparent inconsistency in the 1975 version of subsection (9)<sup>111</sup> to determine whether a plain-

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103. 384 So. 2d at 222.

104. FLA. STAT. § 95.08 (1965) (repealed 1975) (barring claims against a county unless presented to county's board of commissioners within one year from "due").

105. 384 So. 2d at 222.

106. 380 So. 2d 1338 (Fla. 1st DCA 1980).

107. *Id.* at 1339.

108. *Id.* Subsection (9) of § 768.28 implicitly permits state agents, officers, and employees to be sued individually if they act maliciously or in bad faith. *See also* County of Sarasota v. Wall, 403 So. 2d 500 (Fla. 2d DCA 1981) (county not entitled to new notice of claim prior to institution of another suit on same claim).

109. FLA. STAT. § 768.28(9)(a)-(b) (1981).

110. 381 So. 2d 698 (Fla. 1980).

111. FLA. STAT. § 768.28(9) (1975) (amended 1979, 1980 & 1981) provided:

(9) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Subject to the monetary limitations set forth in subsection (5), the state shall pay any monetary judgment which is rendered in a civil action personally against an officer, employee, or agent of the state which arises as

tiff could sue a public employee as a party-defendant for the employee's alleged negligence while acting within the scope of his employment. The plaintiff in *Talmadge*, a public school student, had sued the Lake County School Board, the Board's insurer, and a school coach for injuries incurred when the coach forced him to exercise on a trampoline.<sup>112</sup>

The version of section 768.28(9) before the court was facially ambiguous. The first sentence provided that public employees are not personally liable in tort for damages resulting from acts within the scope of their employment, unless they act maliciously or in bad faith.<sup>113</sup> The second sentence, however, directed the state to pay "any monetary judgment which is rendered in a civil action personally against an officer, employee, or agent of the state,"<sup>114</sup> subject, of course, to the recovery limitations of 768.28(5). The defendants moved for summary judgment, arguing that the first sentence immunized public employees from suit, and that only malicious or bad faith activity could trigger the second sentence and expose the employees to liability and the state to an indemnity obligation. The plaintiff, on the other hand, argued that the two sentences read together indemnified, but did not immunize, public employees.<sup>115</sup> The trial court granted the defendant's motion to dismiss. The District Court of Appeal, Second District, reversed, holding that the statute indemnified state employees from monetary judgments, but did not forbid suits against a state employee as a party-defendant.<sup>116</sup>

The supreme court affirmed on appeal. The court first acknowledged the legislature's ambiguous treatment in section 768.28(9) of the "coexistence" of employee and governmental liability.<sup>117</sup> Then, finding no relevant analogy in the Federal Tort Claims Act, the court looked for similar legislation in other jurisdictions.<sup>118</sup> Although it did not discover a comparable statute, the court found it significant that almost every jurisdiction permitted tort suits against both the government and its employees. This fact suggested to the court that "the absence of an explicit prohibition

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a result of any act, event, or omission of action within the scope of his employment or function.

112. 381 So. 2d at 699.

113. FLA. STAT. § 768.28(9) (1975).

114. *Id.*

115. 381 So. 2d at 700-01.

116. *Talmadge v. District School Bd.*, 355 So. 2d 502 (Fla. 2d DCA 1978).

117. 381 So. 2d at 700.

118. *Id.* at 701-02.

against suing public employees for their torts suggests that none was intended."<sup>119</sup> The court ultimately relied, however, on the maxim of statutory construction that "[w]here possible, it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act."<sup>120</sup> To give "content to each sentence" of subsection (9), the court construed the statute to allow plaintiffs to sue public employees as party defendants.<sup>121</sup> Subsection (9) does not immunize employees; rather, it "merely addresses the extent to which the state will be liable for their torts."<sup>122</sup> For example, if a plaintiff sues the state and a public employee jointly, the state must pay any judgments up to the monetary limitations set forth in subsection (5). The negligent employee will be "personally liable for that portion of a judgment rendered against him which exceeds the state's liability limits."<sup>123</sup>

In 1979, the legislature amended section 768.28(9) to remove the inconsistency that had troubled the *Talmadge* court.<sup>124</sup> The legislature deleted the entire second sentence, dealing with the state's responsibility to pay damages. The legislature also revised the first sentence to provide that a public employee shall not "be held personally liable in tort for a final judgment which has been rendered against him," and which resulted from acts committed within the scope of his employment, unless he had acted mali-

119. *Id.* at 702.

120. *Id.* at 702 (quoting *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14, 16 (Fla. 1977)).

121. 381 So. 2d at 702.

122. *Id.*

123. *Id.* at 703. The Florida Supreme Court distinguished its holding from that of the lower court in *Talmadge* because "subsection (9) goes beyond mere reimbursement and requires the state to pay judgments directly." *Id.* at 703 n.21. It then observed that "[j]udgments in excess of the limitations in subsection (5) can also 'be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.'" *Id.* at 703 n.22 (quoting FLA. STAT. § 768.28(5) (1975)).

124. 1979 Fla. Laws ch. 79-139, § 6 (amending FLA. STAT. § 768.28(9) (1975)). As amended, § 768.28(9) provides:

No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for a final judgment which has been rendered against him for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Subsection 9 was amended again in 1981 to provide that public employees shall be adverse witnesses in actions involving injuries caused by acts in the scope of their employment. 1981 Fla. Laws ch. 81-317, § 1.

ciously or in bad faith.<sup>125</sup> The following year, the legislature amended subsection (9) again, eliminating any ambiguity that may have remained.<sup>126</sup> The new amendment deleted the phrase in the first sentence that had been added in 1979. Now a public employee shall not "be held personally liable in tort or named as a party defendant in any action" for nonmalicious acts committed within the scope of his employment.<sup>127</sup> Another new provision expressly provides that a claimant's exclusive remedy for torts committed by public employees is an action against the appropriate governmental entity. The statute also specifies that the state is not liable for acts committed by employees maliciously or in bad faith, or outside the scope of their employment.<sup>128</sup>

#### IV. CONCLUSION

The important legislative changes and judicial interpretations of the last several years have significantly affected the doctrine of sovereign immunity in Florida. Although Florida's courts continue to explore new theories and establish new guidelines regarding the statutory waiver of immunity, unusual factual situations may require further amendment of the statute, or further interpretation by the courts. These statutory and judicial changes in the law of sovereign immunity, although retaining remnants of the ancient doctrine, reflect the shift from "the King can do no wrong"<sup>129</sup> to the modern rationale that now justifies sovereign immunity: "It is not a tort for government to govern."<sup>130</sup>

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125. 1979 Fla. Laws ch. 79-139, § 6 (underscored in original).

126. 1980 Fla. Laws ch. 80-271, § 1 (amending FLA. STAT. § 768.28(10) (1979)).

127. *Id.* (underscored in original).

128. *Id.* The 1980 amendment also expressly included volunteer firefighters within the term "employee." *Id.*

129. See Borchard, *supra* note 1.

130. *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 253, 407 P.2d 440, 444 (quoting *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).