Statutory Waiver of Municipal Immunity upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis

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# STATUTORY WAIVER OF MUNICIPAL IMMUNITY UPON PURCHASE OF LIABILITY INSURANCE IN NORTH CAROLINA AND THE MUNICIPAL LIABILITY CRISIS

**Patti Owen Harper**

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I. INTRODUCTION

A recent episode in the continuing academic perils of Peppermint Patti finds her delivering a report on “Hans Brinker and the Silver Skates.” After describing the boy’s noble act which saved his city from flood, Peppermint Patti raises some twentieth century questions that in all probability never occurred to either the hero or the originators of the folk tale centuries ago in Holland. “What if the boy lost the use of his finger? Could the doctor have been sued for improper diagnosis? And what if the boy’s family brought a personal injury action against the city for failing to properly maintain the dike?” Her queries are cut short by an apparently uninterested and unimpressed teacher, who rates the report as “another D minus,” and Patti ends her piercing probe of the Brinker case with a sigh.

This cartoon is unfortunately an all too accurate reflection of the increasingly litigious nature of American society today. People seem less interested in making peace with their fellows than in

2. Actually, Peppermint Patti had her Dutch fairy tales confused. “Hans Brinker and the Silver Skates” was a nineteenth century story written by Mary Mapes Dodge. The story about the little boy and the dike is evidently a product of legend and folklore, and it is not accredited to any particular author. See Childcraft, Vol. 14 at 178, Chicago Field Enterprises Education Corporation (1966 ed.). No wonder Peppermint made a D minus on her report!
making their fellows pay. The shootout has merely moved from the
corral to the courtroom as our legal system groans from the weight
of thousands of actions filed per year. "Sue the bums" is fast be-
coming the battlecry of the land; for every wrong, real or imagined,
there seem to be two dozen lawsuits. Depite her D minus, Pepper-
mint Patti was on the right (or at least the most modern) track.
Yet true rights and fair remedies are oftentimes elusive and inade-
quate. Both plaintiffs and defendants may be left battered,
bruised, a lot older and not much richer at the eventual resolution
of their dispute. Nonetheless, the beat goes on—and municipalities
are finding themselves involved in more and more lawsuits as vari-
ous cases and statutes make actions against governmental units an
increasingly viable route to pursue in plaintiffs' search for relief.

Peppermint Patti's first question opens Pandora's box of med-
ical malpractice actions, a topic whose treatment is left to other
authors and other articles. This article will focus on the problem
illustrated by her second question concerning a suit against the
city—or what has been termed "the liability crisis" in local gov-
ernment. More particularly, this article examines the doctrine of
municipal sovereign immunity in North Carolina, the statutory
waiver of that immunity upon purchase of liability insurance, the
emergence of the municipal liability crisis and the existence of at
least partial solutions to the crisis through a proposed statute and
competent risk management. 7
II. HISTORICAL DEVELOPMENT OF MUNICIPAL IMMUNITY

A. Roman and English Law

Sovereign (or governmental) immunity is an ancient legal doctrine that may have originated in Roman law. One commentator cites the Roman-Byzantine holding, "princeps legibus solutus est" as the equivalent if not the origin of the doctrine. Black's Law Dictionary translates the phrase as follows: "the emperor is released from the laws; is not bound by the laws." Such a rule may have been related to the Scriptural association of earthly kings with the heavenly Father. Numerous Biblical verses reflect an attitude toward government recognized in medieval England as the divine right of kings. As a corollary to the concept of the divine right, the belief developed that the king could do no wrong, and certainly a king who could do no wrong had no business being hauled into his own courts to answer to subjects over whom his

ties which protect certain classes of public officials. For example, judges, legislators and prosecutors historically have enjoyed extensive freedom from liability for tortious acts performed in the course of their official functions. See W. PROSSER, LAW OF TORTS § 131 at 987 (4th ed. 1971).

8. Id. § 131 at 970.


11. In the Old Testament when the Israelites asked for a king, the Lord directed the judge Samuel to anoint Saul "to be prince over my people Israel." The king came to be called "the Lord's appointed" or "the appointed one," and the title was also applied to the ideal future king (Hebrew "Messiah" and Greek "Christos"). I Samuel 8:5, 9:16 (The New Oxford Annotated Bible, Revised Standard Version 1973). In the New Testament, the apostle Paul wrote the Christians in Rome between A.D. 54 and 58 and instructed them as follows: "Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God." Romans 13:1-2. Just a few years later, Peter's first letter was written from Rome to encourage Christians suffering in northern Asia Minor: Biblical scholars speculate that I Peter may have been written after the outbreak of Nero's persecution in A.D. 64. Against that background of persecution, Peter wrote these words: "Be subject for the Lord's sake to every human institution, whether it be to the emperor as supreme, or to governors as sent by him . . . Fear God. Honor the emperor." I Peter 3:13-14, 17.

12. Shakespeare's Richard II expressed the notion most eloquently when he asserted that "not all the water in the rough rude sea can wash the balm off an anointed king; the breath of wordly men cannot depose the deputy elected by the Lord." THE COMPLETE WORKS OF SHAKESPEARE, 660, Richard II Act III, Sc. 1, 1. 54-7 (Craig and Bevington ed. 1973).
rule was supreme. According to a judgment of the King's court made in 1234, "our Lord the King can not be summoned or receive a command from any one." Blackstone wrote in 1765 that "the King can do no wrong . . . . The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness." Thus the interaction of these ideas gradually gave rise to the development of sovereign immunity in England. Yet Dean Prosser explains that it was not until the sixteenth century, "in the days of quite absolute monarchs," that the doctrine became firmly established as law.

In 1788 the immunity of the sovereign was applied for the first time to an English municipality in the case of Russell v. Men of Devon, which held that an unincorporated town could not be liable for damages caused by a defective bridge (Hans Brinker and Peppermint Patti, take notice). Prosser offers several explanations for the Russell result. First, he points out that at the time of the decision, the concept of the municipal corporation was in a nebulous state; thus, the lawsuit was actually against the population of the entire county. "In addition to the lack of precedent and the fear of an infinity of actions, the decision was based on the fact that there were no corporate funds out of which satisfaction could be obtained." He then enumerates a number of explanations for the doctrine of municipal immunity that developed in later cases: 1) the municipality derives no profit from the governmental functions exercised solely for the public benefit; 2) in performing governmental duties, public officers are agents of the state rather than the corporation, making the doctrine of respondeat superior inapplicable; 3) cities cannot carry on as governments if tax money is used to compensate persons injured by the tortious acts of city employees; and 4) it is unreasonable to hold a municipal corporation liable for negligently performing a duty imposed upon it by the legislature.
B. Early American and North Carolina Law

1. North Carolina's Initial Rejection of Sovereign Immunity.

Despite the American colonists' contempt for King George III that propelled them into the Revolution, and the subsequent replacement of monarchial rule with a democratic form of government, the doctrine of sovereign immunity found its way into the early annals of our law. Yet as noted by Justice Moore in a 1971 decision of the North Carolina Supreme Court, the doctrine was not a part of the English common law adopted by the State in North Carolina General Statute § 4-1, inasmuch as that statute only adopted the common law of England as of the date of the Declaration of Independence (1776). (N.C. General Statutes hereinafter referred to as G.S.). The Declaration was signed twelve years before the Russell opinion discussed above, and thus municipal sovereign immunity did not become a rule of English common law until some time after North Carolina declared the common law to be in force. While the United States Supreme Court decreed in 1821 that no suit could be brought against the United States without its consent, two North Carolina cases decided afterwards rejected the doctrine of sovereign immunity.

Meares v. Commissioners of the Town of Wilmington, decided in 1845, involved damages allegedly suffered when plaintiff's brick wall caved in after the town graded a street. The town argued that no action would lie against a municipal or public corporation because it was merely exercising its power as vested by the sovereign authority for the public's benefit and convenience. The town's argument was based on the distinction between acts done by private corporations such as railroads and canal companies for

21. N.C. GEN. STAT. § 4-1 (Repl. 1969) reads as follows:
Common law declared to be in force.—All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby to be in full force within this State.
23. 31 N.C. (9 Ired.) 73 (1848).
their own pecuniary benefit, as opposed to acts done by the town for the benefit of the general public. The Court said that while this distinction "appears at the first suggestion to be plausible, [it] will not bear examination, and is more fanciful than real." Reasoning that the town's power to do the grading was conditioned upon the work being done in a proper manner, the Court concluded:

A corporation, whether private or municipal, whether the act is done with a view to the receipt of money directly or only for indirect or collateral advantages, and whether the land belongs to the corporation or is only to be used and kept up as streets, in any and all these cases is liable for any damage resulting from a want of ordinary skill and caution in doing the work; although it is not liable when the work is properly done and in strict pursuance of the power vested in it, for any damage which necessarily results from the work, and does not depend upon the manner in which it is done.

Street improvements in Wilmington were again the subject of litigation in 1885 when plaintiffs complained that five years after the city graded its streets, heavy rains flooded their grain mill because the street gutters were inadequate to carry off the water. In Wright v. City of Wilmington, the Court reiterated its ruling in Meares, stating that "the test of corporate liability in such cases is the manner in which the work is done, and it is not incurred when the work is done with ordinary skill and caution." The Court held that the city could only be expected to maintain street gutters which would drain the surface water that could reasonably be expected to fall—"the corporation is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen and provided against."

2. North Carolina's Adoption of the Governmental/Proprietary Functions Distinction

Four years after the Wright case, the North Carolina Supreme Court decided Moffit v. City of Asheville, and adopted the distinction between acts done for the public good and those done

24. Id. at 80.
25. Id. at 86.
26. 92 N.C. 156 (1885).
27. Id. at 160.
28. Id. at 161.
29. 103 N.C. 191 (237), 9 S.E. 695 (1889).
merely for the benefit of the corporation, a distinction it had expressly rejected in *Meares* as "fanciful." In *Moffitt*, a prisoner sued the city for physical illness he claimed to have suffered because of a lack of heat and blankets in his cell on a cold January night. Initially, the Court described the dual nature of a municipality: a town exercises governmental duties in its capacity as an "*Impe-rium in imperio*" (government within a government), and its acts as a private corporation when exercising certain powers and privileges for its own benefit. Based on this duality, the court articulated two rules whereby municipalities would enjoy sovereign immunity from suit for torts occurring in the performance of "governmental" functions, but would be subject to legal actions rising out of the tortious performance of "proprietary" functions. The first rule it expressed as follows:

[W]here a city or town [exercises] the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence.

The second rule was stated in the following terms:

When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality.

Thus, the North Carolina Supreme Court adopted a distinction first enunciated by a New York court in 1842. According to Dean Prosser, this distinction was eventually followed by every American jurisdiction except South Carolina and Florida.

From *Moffitt* to the present time, North Carolina courts have continued to extend sovereign immunity to governmental functions.

30. *Id.* at 254, 9 S.E. at 697.
31. *Id.* at 255, 9 S.E. at 697.
32. *Id.* at 254, 9 S.E. at 697.
34. W. PROSSER, supra note 7, at 979.
and to deny it to proprietary functions.\textsuperscript{35} Examples of governmental functions include the granting of a public utility franchise,\textsuperscript{36} the maintenance and operation of a fire department,\textsuperscript{37} the enactment and enforcement of zoning regulations,\textsuperscript{38} the collection, removal and disposition of garbage,\textsuperscript{39} the construction and maintenance of public streets and bridges,\textsuperscript{40} the operation of a public street lighting system\textsuperscript{41} the construction of a sewage system,\textsuperscript{42} and the operation of a public library.\textsuperscript{43} Examples of proprietary functions include the operation of a waterworks system for sale of water for private consumption,\textsuperscript{44} the operation of an airport,\textsuperscript{45} and the operation of an arena for the holding of exhibitions and athletic events.\textsuperscript{46}

\textbf{C. Attempts to Defeat the Defense of Municipal Immunity}

1. \textit{Argument for Judicial Abolition of the Doctrine.}

While the recognition of municipal sovereign immunity for governmental functions and the denial of such immunity for proprietary functions remains a viable tenet of North Carolina law, plaintiffs have occasionally urged the North Carolina courts to abolish the doctrine. The Courts steadfastly refuse on the ground that any modification or repeal of sovereign immunity should come from the General Assembly and not the judiciary. For example, in \textit{Steelman v. City of New Bern},\textsuperscript{47} a young boy was electrocuted upon touching a guy wire maintained by the city as a part of its street lighting system. His estate sued the city, lost on summary judgment and conceded in its appellate brief that prior North Carolina cases had held street lighting to be a governmental function

\begin{footnotesize}
\begin{enumerate}
\item[35.] See generally 9 N.C. STRONG'S INDEX 3d, Municipal Corporations § 5 (1977).
\item[38.] Orange Co. v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).
\item[39.] Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972).
\item[40.] Robertson v. City of Kinston, 261 N.C. 135, 134 S.E.2d 193 (1964).
\item[41.] Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971).
\item[46.] Aaser v. City of Charlotte, 265 N.C. 494, 144 S.E.2d 610 (1965).
\item[47.] 279 N.C. 589 at 592, 184 S.E.2d 239 at 241 (1971).
\end{enumerate}
\end{footnotesize}
and thus, municipalities were immune from liability for negligence associated therewith. However, plaintiff asked the North Carolina Supreme Court to abolish the immunity, contending that its origin was questionable, "its application results in gross inequities, and that the very definite trend in modern decisions is to abolish the doctrine." The Court acknowledged that since 1957, sixteen states had overruled or greatly modified municipal immunization from tort liability. Moreover, the Court indicated that the reasons for the rule may have lost strength over the years; yet it concluded that despite its sympathy for the plaintiff, any change in the doctrine should come from the legislature rather than the courts.

2. Argument that N.C.R.C.P. 65 Abrogates the Doctrine.

Unable to convince the North Carolina courts to abolish sovereign immunity, parties opposing municipalities in certain situations have argued that the enactment of N.C. Rules of Civil Procedure 65(c) abrogated the doctrine. Rule 65 sets forth the procedure to be used in obtaining injunctions, and is substantially the same as Federal Rules of Civil Procedure 65. Rule 65(c) requires that applicants for restraining orders or preliminary injunctions give security. However, the rule states that "no such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule."

In Town of Hillsborough v. Smith, the town obtained a temporary restraining order to prevent defendant's proposed use of property which the town thought violated its zoning ordinances. Eventually, the Supreme Court of North Carolina determined that the town was not entitled to restrain the proposed use; the defendants then asked for damages from the town and its surety on the $20,000.00 bond the town had posted to obtain issuance of the temporary restraining order. The North Carolina Court of Appeals first noted that the enactment and enforcement of zoning regula-

48. Id. at 593, 184 S.E.2d at 242.
49. Id.
50. Id. at 595, 184 S.E.2d at 243.
51. N.C. GEN. STAT. § 1A, Rule 65(c) (Repl. 1969).
tions is a governmental function, and thus municipal immunity applies. The Court rejected defendants' argument that the posting of bond as required by Rule 65(c) worked a waiver of the town's immunity. The Court repeated the general rule that "a municipal corporation may not waive or contract away its governmental immunity in the absence of legislative authority for such action," and concluded that the town's act of posting bond "was an unauthorized attempt to waive its governmental immunity, and, as such, was ultra vires. Because the act was ultra vires, it follows that immunity was not waived." Curiously, however, the Court concluded that the surety on the bond could be held liable, because sureties for idiots, infants and corporations (both private and municipal) acting ultra vires may be liable, even though the principal is not liable to either the obligee or to the surety.

Two years later the North Carolina Supreme Court considered the argument that Rule 65(c) constituted a waiver of sovereign immunity in the case of Orange County v. Heath. Under facts similar to those in Town of Hillsborough v. Smith, defendants were unable to obtain damages from the county. The Court analyzed the reference in rule 65(c) to damages which may be awarded "against such party" in light of the language of Rule 65(e), which states that "an order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties . . . ," and stated that "it is arguable that the provision includes only parties who are required to give the sureties," (emphasis added—municipalities are not so required). The Court concluded that the legislature had not abolished governmental immunity in adopting Rule 65. Its rationale for this conclusion was four-fold: First, the North Carolina Constitution, Art. IV, sec. 13(2) states in part that "no rule of procedure or practice shall abridge substantive rights . . . ." Secondly, the

53. 10 N.C. App. at 73, 178 S.E.2d at 20.
54. Id., 178 S.E.2d at 21. (Municipalities are statutorily authorized by N.C. GEN. STAT. § 160-179 to bring suit to restrain zoning ordinance violations, but the statute neither authorizes nor requires the municipality to waive its governmental immunity in the process, nor is that immunity waived by the mere act of instituting a civil action.)
55. Id. at 73-4, 178 S.E.2d at 21.
56. Id. at 74, 178 S.E.2d at 21.
58. Id. at 295, 192 S.E.2d at 310.
59. Id.
Court relied heavily on comments of Professor Sizemore, a Wake Forest University School of Law faculty member and a member of the committee which drafted Rule 65, who compared the rule with North Carolina procedures for obtaining injunctions prior to the adoption of the N.C. Rules of Civil Procedure, and concluded that "the changes in injunction procedure are minute." 60 Said the Court, "clearly a minute change in a procedural rule would not embrace so fundamental a change as to abolish governmental immunity." 61 Thirdly, the Court quoted with approval the following words of the South Carolina Supreme Court:

As we understand the rule relating to the immunities attaching to sovereignty, such attributes are never to be considered as waived or surrendered by any inference or implication. The surrender of an attribute of sovereignty being so much at variance with the commonly accepted tenets of government, so much at variance with sound public policy and public welfare, the Courts will never say that it has been abrogated, abridged, or surrendered, except in deference to plain, positive legislative declarations to that effect. 62

Finally, the Court quoted G.S. § 160-191.1, a statute adopted in 1951 which expressly authorized waiver of sovereign immunity upon a city or town’s purchase of liability insurance, and concluded that “the precise manner in which the Legislature spelled out the waiver” in this statute was a “clear indication [that] the General Assembly did not abandon, abrogate, or abolish the rule of governmental immunity . . . in Procedural Rule 65.” 63 (It is perplexing that the Court relied upon a statute that by its terms applies only to cities and towns in a case involving the County of Orange; the statute is discussed in more detail below).


Unsuccessful in persuading the courts to abolish sovereign immunity, and equally unsuccessful in convincing the courts that N.C.R.C.P. 65 worked such a waiver, plaintiffs have argued that a municipality’s purchase of liability insurance constituted a waiver of the doctrine. Such an approach was taken in Stephenson v. City

60. Id. at 296, 192 S.E.2d at 310.
61. Id.
62. Id. 192 S.E.2d at 310-11.
63. Id. at 296-7, 192 S.E.2d at 311.
of Raleigh," where plaintiff’s decedent had died from injuries sustained in a rear-end collision with a city truck used to collect prunings from shrubbery and trees along city streets. Similar to city garbage collection services, these actions were classified as governmental, and thus the city’s performance of such functions was immunized from tort liability. Nonetheless, the city had purchased liability insurance covering its motor vehicles, and the truck involved in decedent’s accident was listed on a schedule of covered vehicles attached to the city’s liability insurance policy. The policy included a “Municipality Endorsement” which read as follows:

It is hereby agreed the Companies will not, in case of loss or damage arising under this policy during the term thereof, claim exemption from liability to the named insured because of any statute, ordinance or other legal restrictions, whereby the named assured shall, by reason of its being a municipal corporation, be legally exempt from liability for damage, and that in all cases of loss or damage, settlement shall be made as herein provided the same as though the named assured were a private corporation.

Based on that provision, plaintiff argued that the city had contractually agreed not to plead its immunity—in other words, the immunity had been waived by the purchase of liability insurance. The Court disagreed, and stated that the clause “clearly reveals that the policy is one of indemnity against loss, and protects only the insured, the City of Raleigh, and does not purport to create liability to anyone who may suffer tortious injury as result of acts of officials, agents or employees of the city in the performance of governmental duties.”

The Court cited G.S. § 160-1 for the proposition that a municipal corporation has only those powers “‘prescribed by statute, and those necessarily implied by law, and no other.’” Because at that time no statute existed that empowered a municipality to waive its tort liability immunity, directly or indirectly, the municipality has no power to do so.
III. STATUTORY WAIVER OF MUNICIPAL IMMUNITY UPON PURCHASE OF LIABILITY INSURANCE IN NORTH CAROLINA

A. Cities or Towns

One year after the *Stephenson* decision, the North Carolina General Assembly adopted G.S. § 160-191.1, enacted April 14, 1951 and effective July 1, 1951, which provided as follows:

*Municipality empowered to waive governmental immunity*—The governing body of any incorporated city or town, by securing liability insurance as hereinafter provided, is hereby authorized and empowered, *but not required*, to waive its government immunity from liability for any damage by reason of death, or injury to person or property, proximately caused by the negligent operation of any motor vehicle by an officer, agent or employee of such city or town when acting within the scope of his authority or within the course of his employment. Such immunity is waived only to the extent of the amount of the insurance so obtained. Such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body. (emphasis added).

Five important features of the statute are worthy of note. First, by its terms the statute applies only to incorporated cities or towns. Secondly it *allows*, but does not *require*, such governmental units to waive their sovereign immunity upon obtaining liability insurance. Thirdly, the waiver is only effective with regard to torts arising from the negligent operation of the municipal motor vehi-
cles. Fourthly, the waiver is limited to the amount of the insurance policy itself. Finally, a municipality that fails to take affirmative action concerning the waiver (i.e., pass an ordinance expressly denying waiver) is deemed to have so waived.

This statute was repealed and re-enacted verbatim in 1971 as G.S. § 160A-485. Both the 1951 and 1971 versions of the statute provided only for waiver of immunity from liability for the negligent operation of motor vehicles. In 1975, the statute was rewritten in much broader terms and amended to read, as it does at present, as follows:

§ 160A-485. Waiver of immunity through insurance purchase.—(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

(b) An insurance contract purchased pursuant to this section may cover such torts and such officials, employees, and agents of the city as the governing board may determine. The city may purchase one or more insurance contracts, each covering different torts or different officials, employees, or agents of the city. An insurer who issues a contract of insurance to a city pursuant to this section thereby waives any defense based upon the governmental immunity of the city, and any defense based upon lack of authority for the city to enter into the contract. Each city is authorized to pay the lawful premiums for insurance purchased pursuant to this section.

(c) Any plaintiff may maintain a tort claim against a city insured under this section in any court of competent jurisdiction. As to any such claim, to the extent that the city is insured against such claim pursuant to this section, governmental immunity shall be no defense. Except as expressly provided herein, nothing in this section shall be construed to deprive any defense to any tort claim lodged against it, or to restrict, limit, or otherwise affect any defense that the city may have at common law or by virtue of any statute. Nothing in this section shall relieve a plaintiff from any duty to give notice of his claim to the city, or to commence his action within the applicable period of time limited by statute. No judgment may be entered against a city in excess of its insur-

ance policy limits on any tort claim for which it would have been immune but for the purchase of liability insurance pursuant to this section. No judgment may be entered against a city on any tort claim for which it would have been immune but for the purchase of liability insurance pursuant to this section except a claim arising at a time when the city is insured under an insurance contract purchased and issued pursuant to this section. If, in the trial of any tort claim against a city for which it would have been immune but for the purchase of liability insurance pursuant to this section, a verdict is returned awarding damages to the plaintiff in excess of the insurance limits, the presiding judge shall reduce the award to the maximum policy limits before entering judgment.

(d) Except as otherwise provided in this section, tort claims against a city shall be governed by the North Carolina Rules of Civil Procedure. No document or exhibit which relates to or alleges facts as to the city's insurance against liability shall be read, exhibited, or mentioned in the presence of the trial jury in the trial of any claim brought pursuant to this section, nor shall the plaintiff, his counsel, or anyone testifying in his behalf directly or indirectly convey to the jury any inference that the city's potential liability is covered by insurance. No judgment may be entered against the city unless the plaintiff waives his right to jury trial on all issues of law or fact relating to insurance coverage. All issues relating to insurance coverage shall be heard and determined by the judge without resort to a jury. The jury shall be absent during all motions, arguments, testimony, or announcement of findings of fact or conclusions of law with respect to insurance coverage. The city may waive its right to have issues concerning insurance coverage determined by the judge without a jury, and may request a jury trial on these issues.

(e) Nothing in this section shall apply to any claim in tort against a city for which the city is not immune from liability under the statutes or common law of this State. 73

This article will analyze the major cases interpreting both the old statute (G.S. 160-191.1) and the new statute (G.S. 160A-485).


Moore v. Town of Plymouth 74 involved the town's operation of

a fogging machine mounted on a truck and used to spray a combination of Diesel oil and the insecticide DDT in an attempt to control mosquitoes. The white fog was disbursed in such a way as to completely obscure the truck from the view of motorists approaching from the rear. Plaintiff was a passenger in a vehicle hit by another vehicle whose driver's vision was obscured by the fog; the town truck on which the fogging machine was mounted was not hit. In fact, the truck driver did not even hear the wreck over the operating noises of the fogging machine. The trial court nonsuited plaintiff's action but the North Carolina Supreme Court reversed, holding that there was sufficient evidence for a jury to infer that the town's negligence was a concurrent cause of the accident. Although the Court did not delve into the ramifications of G.S. § 160-191.1, it did quote the statute, and mentioned *Stephenson v. Raleigh,* which held that the mere purchase of liability insurance for motor vehicles did not constitute a waiver of immunity, was decided prior to the enactment of this statute.

*Clark v. Scheld,* decided two years after *Moore,* concerned another city fogging machine; ten vehicles were involved in rear-end collisions that occurred when the insecticide spray obscured drivers' vision. The Court reviewed the *Moore* decision and stated, "[i]nferentially, then, this Court has held that governmental immunity applies . . . in the instant case unless waived by the municipality under the provision of . . . G.S. 160-191.1 et seq." The Court concluded that no such statutory waiver of immunity had occurred in the case at bar because plaintiff failed to prove the statutory waiver; presumably, plaintiff had produced no evidence of the city having purchased liability insurance. The Court explained its conclusion as follows:

We think, in the enactment of the legislation above referred to permitting the procurement of insurance and waiver of governmental immunity, the General Assembly recognized the immunity of municipalities from tort liability in the operation of motor vehicles in performance of governmental functions, and intended by the enactment to provide a limited exception to the general doctrine. This limited exception does not apply in this case. There is no proof that the City of Lenoir had waived immunity.

76. 249 N.C. at 431, 106 S.E.2d at 701.
78. *Id.* at 736, 117 S.E.2d at 842.
79. *Id.* at 737, 117 S.E.2d at 842.
The Court’s attention was turned temporarily from fogging machines to municipal libraries in *Seibold v. City of Kinston*.

Plaintiff caught the heel of her shoe in a crack in the library steps, and sued the city (and county) for injuries sustained in a resulting fall. The Court had previously determined that the operation of public libraries was a governmental function, and thus, governmental immunity applied unless statutorily waived. Inasmuch as N.C. Gen. Stat. § 160-191.1 only authorized the city to waive immunity from liability arising from the negligent operation of motor vehicles, not libraries, the city was allowed to plead its immunity in bar of plaintiff’s action.

The following year the Court again faced the problems associated with those infamous fogging machines, and for once, the plaintiff prevailed! In *White v. Motes*, as in *Moore and Clark*, insecticide from the fogging machine obscured motorists’ vision. The city had purchased automobile liability insurance covering a “garbage truck” identified in the policy by make, year, model and identification number, all of which matched the truck plaintiff hit from the rear. The policy was in full force and effect at the time of the accident. In affirming the lower court’s judgment in favor of the plaintiff, the Court rejected the city’s three main arguments. First, the city contended that it had not waived its immunity, but the plain language of G.S. § 160-191.1 stated that “such immunity shall be deemed to have been waived in the absence of affirmative action by such governing body.” The Court said because this law was in effect at the time the insurance policy was issued, it became

80. 268 N.C. 615, 151 S.E.2d 654 (1966). (Because the city of Kinston and the County of Lenoir had set up a public library jointly, the Court had occasion to consider not only N.C. GEN. STAT. 160-191.1 pertaining to city liability, but also N.C. GEN. STAT. 153-9(44) pertaining to county liability.)

81. Seibold v. Kinston-Lenoir Co. Public Library and Trustees, 264 N.C. 360, 141 S.E.2d 519 (1965)—the same plaintiff had been unsuccessful in her earlier attempt to hold the library trustees liable for her injuries, since they were performing a protected governmental function.

See also Rich v. City of Goldsboro, 15 N.C. App. 534, 190 S.E.2d 229, cert. allowed, 281 N.C. 758, 191 S.E.2d 362, rev’d., 282 N.C. 383, 192 S.E.2d 824 (1972), which considered the 1971 version of the statute (§ 160-191.1, re-codified in 1971 as 160A-485). The Court in that case held that a $1,200.00 donation from the Kiwanis Club to the city which helped fund the operation of a city park was incidental income totally insufficient to support a conclusion that the city operated the park as a proprietary or business venture; the statute was held inapplicable to the maintenance of playground equipment.

82. 270 N.C. 544, 155 S.E.2d 75 (1967).
a part of the insurance contract. The town had taken no affirmative action relative to tort liability other than to purchase insurance; thus, its immunity was waived.

Secondly, the city argued that the policy referred to an individual rather than to a municipality. This rather technical point was based on language in the Insuring Agreement of the policy. The Court observed that the wording clearly contemplated insurance on entities other than individuals; furthermore, the policy was issued to the Town of Siler City, a municipal corporation. Obviously the intent of the parties (the insurer and the town) was that the municipality be insured against tort liability within the limits of the policy. The Court quoted an earlier North Carolina case for the proposition that "[a]n insurance policy is only a contract and the intention of the parties is the controlling guide in its interpretation."

Finally, the town claimed that because the policy described the insured vehicle as a "garbage truck," it should not be liable for injuries occurring when the truck was being used for purposes other than garbage collection. The Court flatly refused to adopt the town's reasoning on this point, since the vehicle on which the fogging machine was mounted matched the vehicle described in the policy as to make, year, model and identification number. According to the Court, if the insurer had intended to escape liability because of the description or use of a named vehicle, "the excluded description or use could have and should have been written into the policy."

Thus the saga of city fogging machines ended on a happy note for at least one plaintiff. Lest plaintiffs' bar become too encouraged and municipal attorneys too dismayed, however, Gallican v. Town of Chapel Hill illustrates that a town can take successful affirmative action to preclude the automatic statutory waiver of its immu-

83. Id. at 555, 155 S.E.2d at 82.
84. Id. The Insuring Agreement read as follows:
III. Definition of Insured: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual . . .
86. Id. at 556, 155 S.E.2d at 83.
nity. As noted above, G.S. § 160-191.1 was enacted on April 14, 1951 and became effective on July 1, 1951. On June 25, 1951, the Board of Aldermen of the Town of Chapel Hill unanimously passed the following resolution:

WHEREAS, Chapter 1015 of the Session Laws of 1951 provides a method whereby municipalities may waive their governmental immunity; and WHEREAS, one provision of said law seems to require positive action on the part of this Governing Body with respect to whether or not it desires to waive such governmental immunity; and WHEREAS, it is the opinion of this Governing Body that the waiving of such immunity is not to the best interest of this municipality: NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, N.C. [that the town] does not under any circumstances or in any respect as suggested by Chapter 1015 of the Session Laws of 1951 or in any other manner waive its governmental immunity for damages to property or injury to persons as a result of its activities.88

Fourteen years later, plaintiff was injured in a collision with a Chapel Hill police car, and sued the town for damages. The town had obtained a liability insurance policy on its motor vehicles sometime prior to 1951, and had renewed it annually. Yet the Board of Aldermen had never passed another resolution similar to the one adopted in 1951, although that resolution contained no time limit, and had never been amended, repealed or rescinded. The trial court allowed the town to plead its governmental immunity in bar of plaintiff’s action, reasoning that the town had not waived its immunity inasmuch as it took affirmative action to expressly refute such a waiver via resolution. The North Carolina Supreme Court ultimately upheld the trial court’s dismissal of the action. Concluding that the 1951 resolution of the Board of Aldermen was an affirmative action that preserved the town’s immunity, the Court stated that “[t]o require a town to adopt a new resolution each time it renews a liability insurance policy or acquires a new liability policy would place an unnecessary and useless burden upon the town and impose a condition not provided for in the statute [G.S. § 160-191.1] or contemplated by the General Assembly.”89

88. 276 N.C. at 175-6, 171 S.E.2d at 429.
89. Id. at 177, 171 S.E.2d at 430.

Because the old statute (in both the 1951 and 1971 versions) pertaining to a city or town's waiver of immunity upon purchase of liability insurance was limited to policies covering municipal motor vehicles, the 1975 amendment to G.S. § 160A-485 significantly enlarged the scope of statutory waiver of governmental immunity. (The statute as amended is set out in its entirety above). Prior to analyzing several cases which interpret the statute, it is necessary to note certain aspects of the amendment itself.

Initially it is important to determine those units of local government to which the amended statute applies. It speaks in terms of "any city," and the word "city" is defined in G.S. § 160A-1(1) as "a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages. The term 'city' does not include counties or municipal corporations organized for a special purpose." The definition also states expressly that the word "city" is interchangeable with the terms "town" and "village."

Secondly, and of major impact, the language of the old statute stating that the municipality was "authorized and empowered, but not required" to waive its governmental immunity has been deleted (emphasis added). The new law authorizes any city to waive its immunity but does not permit the municipality to take affirmative action to refute waiver, as did the Town of Chapel Hill in Gallician. Rather, the new statute states that "[i]mmunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability" (emphasis added).

A third and striking change in the law is the elimination of the statute's limited applicability to municipal motor vehicle insurance alone. Instead, "an insurance contract purchased pursuant to this section may cover such torts and such officials, employees, and agents of the city as the governing board may determine."

Fourthly, and of special import to insurance companies, is the statute's explicit mandate that: "[a]n insurer who issues a contract of insurance to a city pursuant to this section thereby waives any

defense based upon the governmental immunity of the city, and any defense based upon lack of authority for the city to enter into the contract." This clear expression of the legislature's intent that the insurer be prohibited from raising the insured's immunity as a defense will save the courts from the convoluted reasoning that was employed in Town of Hillsborough v. Smith to hold the town's surety liable on its bond.

A fifth feature of the new statute is that plaintiff's recovery is expressly limited to the policy amount, as it was under the old law. The new statute goes a step further, however, and states that in the event "a verdict is returned awarding damages to the plaintiff in excess of the insurance limits, the presiding judge shall reduce the award to the maximum policy limits before entering judgment" (emphasis added).

Finally, the new statute preserves the rule of old G.S. § 160-191.5, which prohibited any mention of the municipality's insurance to the jury. The statute also states that "[n]othing in this section applies to any tort claim against a city for which the city is not immune from liability under the statutes or common law of this state," (emphasis added), presumably a reference to torts arising in the performance of proprietary functions.

Case law interpreting G.S. § 160-485 since its 1975 amendment is scant; two recent North Carolina Court of Appeals decisions mentioned the statute as amended, but neither case constituted a landmark decision. In Roach v. City of Lenoir, plaintiffs sued for damages suffered when a city sewer system backed up into their home. The trial court dismissed the action upon the city's 12(b)(6) motion, but the Court of Appeals remanded for amplification of the record. The Court acknowledged that prior North Carolina cases had held that "[t]he establishment and construction of a sewer system by a municipality are governmental functions entitling it to immunity from negligence," and therefore the city could not be liable "for any damage arising out of the governmental activity unless it expressly waives its immunity held pursuant to G.S.

94. Id.
96. N.C. GEN. STAT. § 160A-485(c) (Repl. 1976).
§ 160A-485.” However, the record on appeal was insufficient to enable the Court to review the trial court’s determination, as a matter of law, that the city had not waived its immunity pursuant to the statute, and the case was remanded.

In the second case, *Yates v. City of Raleigh*, the city had supposedly abated a nuisance by removing plaintiff’s tools and equipment from the premises he rented for his concrete contracting business. He sued for wrongful taking, trespass and conversion and lost on a 12(b)(6) motion in the trial court because the city had not bought insurance per G.S. § 160A-485 to cover these types of tortious activities, and thus its immunity had been preserved. Commenting on the “deplorable deficiencies of the record,” the Court decided that a 12(b)(6) dismissal was improper and remanded with the admonition that a municipality’s right to remove private property to abate a nuisance does not extend the police power “so as to allow a municipality to unlawfully take or destroy private property under the guise of exercising a governmental function, and thereafter to hide behind the shield of sovereign immunity.”

**B. Counties**

In 1955, the General Assembly enacted G.S. § 153-9(44), which provided as follows:

The board of county commissioners of any county, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive the county’s governmental immunity from liability for damage by reason of death, or injury to person or property, caused by the negligence or tort of the county or by the negligence or tort of any official or employee of such county when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that the county is indemnified by insurance from such negligence or tort.

Two features of the statute are noteworthy. First, statutory waiver of governmental immunity is not limited to the purchase of motor vehicle insurance, as it was under G.S. § 160-191.1, which dealt

100. *Id.* at 610, 261 S.E.2d at 300.
101. 46 N.C. App. 221, 264 S.E.2d 798 (1980).
102. *Id.* at 227, 264 S.E.2d at 801.
with cities or towns. Secondly, it does not contain an affirmative action provision to preclude waiver, as did the city statute. In all other respects, it is quite similar to the city statute.


In Walker v. The County of Randolph,104 the first case to cite this statute, plaintiff sued for injuries sustained when she fell down the county courthouse stairs while reading legal notices on a bulletin board that extended nineteen inches over the stairway. Because the county stipulated to the existence of a liability insurance policy secured by its commissioners pursuant to G.S. § 153-9(44), and further stipulated that its governmental immunity from liability for damages resulting from injury to persons or property caused by the county’s negligence or tort “was thereby and is now waived in this action,”105 the Court focused its attention on tort principles and ultimately affirmed a judgment for the plaintiff.

In Seibold v. Kinston,106 a 1966 case discussed earlier with regard to a city’s waiver of immunity, plaintiff also brought suit against the county, inasmuch as the public library where she fell was operated jointly by the city and county. The Court quoted the provisions of G.S. § 153-9(44) concerning a county’s statutory waiver of immunity, and emphasized that the immunity is waived “only to the extent that the county is indemnified by insurance from such negligence or tort.”107 At a hearing on defendants’ motion to dismiss, the county had introduced a liability insurance policy that protected certain county personnel and employees and covered certain listed premises owned and operated by the county. The policy did not cover either the library premises or its employees, and plaintiff admitted the same in her appellate brief.108 Plaintiff claimed, however, that another policy existed which did cover the library, the premiums for said policy allegedly being paid jointly by the city and county. Plaintiff further claimed that the defendants had prevented her from procuring a copy of the second policy but she intended to “take such means as are necessary to compel the production of this second policy at the trial of this ac-

104. 251 N.C. 805, 112 S.E.2d 551 (1960).
105. Id. at 806, 112 S.E.2d at 552.
107. Id. at 622, 151 S.E.2d at 658.
108. Id. at 623, 151 S.E.2d at 659.
tion.'\(^{109}\) (The case had not yet gone to trial, the judge having granted defendant municipalities’ motions to dismiss). Nonetheless, the North Carolina Supreme Court decided that plaintiff had had her day in court to compel production of the second policy, and having failed to do so, she had not proved that the county had any insurance protecting it from liability under the facts of her case. As a result, the county was allowed to plead its immunity in bar of plaintiff’s cause of action.

Slip-and-fall cases at the courthouse seem to plague North Carolina counties as much as faulty fogging machines troubled our cities. In \textit{Cook v. County of Burke},\(^{110}\) plaintiff sued for injuries suffered when she slipped on a wet sidewalk in the courthouse square. Her case, however, was complicated by the presence of “an accumulation of pigeon droppings which had become slick and slippery due to the rain.”\(^{111}\) The Court rather quaintly mentioned that:

\begin{quote}
[f]or many years pigeons have been flocking to the courthouse and roosting upon its ledges and under its eaves . . . . The commissioners had been aware of the problem . . . . and had tried various ways to keep the pigeons off of the building, but had not succeeded. They had instructed the custodian to keep the building as clean as possible and the chairman of the board felt that the custodian did as thorough a job of removing the pigeon droppings as he could.\(^{112}\)
\end{quote}

In fact, just before the plaintiff’s unfortunate mishap, the custodian was instructed to clean the sidewalk regularly, and he did so—sometimes more than once a day. But, as the Court noted rather despairingly, “[t]he pigeons fly in and out all through the day.”\(^{113}\) Suffice it to say that the Court evidently felt the county had done all it could do; a judgment nonsuiting plaintiff’s action was affirmed.\(^{114}\)

Of greater significance with regard to the county statute is the

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109. & \textit{Id.} \\
110. & 272 N.C. 94, 157 S.E.2d 611 (1967). \\
111. & \textit{Id.} at 95, 157 S.E.2d at 612. \\
112. & \textit{Id.} at 96, 157 S.E.2d at 613. \\
113. & \textit{Id.} \\
114. & \textit{Id.} The Court mentioned that since the county had stipulated to holding liability insurance at the time of plaintiff’s fall, the issue of governmental immunity did not arise concerning the validity of a judgment of nonsuit, and cited N.C. GEN. STAT. § 153-9(44) as its authority.
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case of Wilkie v. Henderson County.\textsuperscript{116} The widow of a county jail prisoner brought a wrongful death action in her capacity as administratrix of her husband's estate, alleging that her husband died from beatings and a bullet wound inflicted by county jailers. She claimed that the county owned an insurance policy which indemnified it "for damages resulting from bodily injury and death of persons on county property proximately caused by the negligence or wrongful act of county officials and county employees while acting within the scope of their authority within the course of their employment."\textsuperscript{116} The lower court granted the county's motion to strike all references in the complaint to the county's insurance and its waiver of immunity; plaintiff appealed. The Supreme Court of North Carolina dealt specifically with a portion of G.S. § 153-9(44) which read as follows: "No part of the pleadings which relates to or alleges facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this subdivision . . . ,"\textsuperscript{117} and concluded that the complaint's references to insurance were improperly stricken. Those allegations were necessary to enable the complaint to withstand a demurrer grounded on sovereign immunity. Moreover, the statute afforded sufficient protection from prejudice in preventing such references to be mentioned to the jury.

In 1973, the General Assembly repealed Chapter 153 of the General Statutes entitled "Counties and County Commissioners," and replaced it with a new Chapter 153A entitled "Counties."\textsuperscript{118} As a result, G.S. § 153-9(44) became G.S. § 153A-435, which reads as follows:

\textit{Liability insurance; damage suits against a county involving governmental functions.}—(a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.

\textsuperscript{115} 1 N.C. App. 155, 160 S.E.2d 505 (1968).
\textsuperscript{116} Id. at 156, 160 S.E.2d at 506.
\textsuperscript{117} Id. at 157, 160 S.E.2d at 507.
\textsuperscript{118} 1973 N.C. Sess. Laws, Ch. 822.
Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

(b) If a county has waived its governmental immunity pursuant to subsection (a) of this section, any person, or if he dies, his personal representative, sustaining damages as a result of an act or omission of the county or any of its officers, agents, or employees, occurring in the exercise of a governmental function, may sue the county for recovery of damages. To the extent of the coverage of insurance purchased, pursuant to subsection (a) of this section, governmental immunity may not be a defense to the action. Otherwise, however, the county has all defenses available to private litigants in any action brought pursuant to this section without restriction, limitation, or other effect, whether the defense arises from common law or by virtue of a statute.

Despite the purchase of insurance as authorized by subsection (a) of this section, the liability of a county for acts or omissions occurring in the exercise of governmental functions does not attach unless the plaintiff waives the right to have all issues of law or fact relating to insurance in the action determined by a jury. The judge shall hear and determine these issues without resort to a jury, and the jury shall be absent during any motion, argument, testimony, or announcement of findings of fact, or conclusions of law relating to these issues unless the defendant requests a jury trial on them.

Whereas old § 153-9(44) spoke in terms of liability insurance for negligence or tort, the new law spells out the fact that counties may insure themselves from liability resulting from "negligent or intentional damage to person or property or against absolute liability for damage to person or property," (emphasis added). Like the new statute pertaining to cities, this statute authorizes the county governing boards to determine which liabilities and which officers, agents and employees shall be covered by the insurance purchased. And, like the city statute, G.S. § 153A-435(a) specifically states that "purchase of insurance pursuant to this subsection waives the county's governmental immunity to the extent of insurance coverage." However, this statute does not order the trial judge to reduce judgments for plaintiffs in excess of the policy limits to the maximum amount available under the terms of the policy. Perhaps trial judges will take it upon themselves to do so, inasmuch as the statute does expressly limit the waiver of immunity to the ex-
tent of the insurance coverage.

Of special concern to insurance companies is the statute’s express statement that “[b]y entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.” Similar language appears in the city statute.


The North Carolina Supreme Court has mentioned this statute only once. In Sides v. Cabarrus Memorial Hospital, Inc.,119 the Court considered a question of first impression in North Carolina: whether the construction, maintenance and operation of a county hospital was a governmental or proprietary function. The Court concluded that such activity was a proprietary function, and having so held, it did not need to discuss G.S. § 153A-435, since that statute concerns only those county functions classified as governmental.

Three North Carolina Court of Appeals cases have mentioned this statute, and in each case either the county had not purchased any liability insurance, thereby preserving its immunity, or the plaintiff failed to allege a waiver of immunity. In Vaughan v. County of Durham,120 plaintiff was unable to hold either the county or its department of social services liable for the placement of a foster child in her home who carried an infectious disease and allegedly communicated it to plaintiff, necessitating an abortion on the part of the plaintiff. The Court held that placement of foster children was a governmental function performed pursuant to constitutional and statutory mandate and for the common good. Furthermore, as a governmental function it triggered governmental immunity unless such immunity had been waived by the purchase of liability insurance. Because the county proved it had made no such purchase, and because the Court of Appeals could not abrogate the doctrine of sovereign immunity (being bound by the decisions of the North Carolina Supreme Court, which uniformly left the abolition of the doctrine to the General Assembly), plaintiff’s action against the county and its department of social services was properly dismissed.

In Robinson v. Nash Co.,121 a women fell to her death on a

120. 34 N.C. App. 416, 240 S.E.2d 455 (1977).
stairway in the county register of deeds office. Because the county had not bought liability insurance pursuant to G.S. § 153A-435, and because the operation of a register of deeds office was held to be a governmental function, decedent’s estate could not hold the county liable.

Finally, in *Carey v. Wake Co.*, a sixteen year-old girl who obtained an intrauterine device from a county health department was prohibited from holding the county liable from complications allegedly associated with the device, inasmuch as the provision of public health care was determined to be governmental function, and plaintiff made no allegation of the county’s waiver of its immunity via a purchase of insurance.

C. Miscellaneous

It should be noted that North Carolina has two other statutes involving the waiver of immunity upon purchase of liability insurance. G.S. § 115-53 authorizes any county or city board of education to secure liability insurance and thereby waive its governmental immunity from liability for damage “by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment.” A similar statute pertaining to the boards of trustees of community colleges and technical institutes is found in G.S. § 115D-53.

A recent decision of the United States Supreme Court discussed below (*Owen v. City of Independence*) reviewed the doctrine of sovereign immunity in great detail. Justice Powell’s dissent contained a survey of the status of the doctrine in various states,

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122. 45 N.C. App. 522, 263 S.E.2d 360 (1980).
124. N.C. GEN. STAT. § 115D-53 (Repl. 1978), (formerly N.C. GEN. STAT. § 115A-17). No cases could be found interpreting or applying this statute. It was mentioned in Steelman v. City of New Bern, 299 N.C. 589, 184 S.E.2d 239 (1971).
which indicated that North Carolina is one of four states where immunity is statutorily waived upon purchase of liability insurance;\textsuperscript{126} the other states were Colorado, Missouri and Vermont.\textsuperscript{127}

\textsuperscript{126} 100 S. Ct. at 1431 n. 26.

\textsuperscript{127} \textbf{COLO. REV. STAT.} § 24-10-104, 24-10-106:

\textbf{24-10-104. Availability of insurance - effect.} (1) Notwithstanding any provision of law or of this article to the contrary, if a public entity provides insurance coverage provided by an insurance company authorized to do business in this state to insure itself against liability for any injury or to insure any of its employees against his liability for any injury resulting from an act or omission by such employee acting within the scope of his employment, then such public entity shall be deemed to have waived the defense of sovereign immunity in any action for damages for any such injury insured against, subject to the provision of subsection (2) of this section.

(2) If the defense of sovereign immunity would be available to a public entity except for the provisions of subsection (1) of this section, then damages for injury shall not be recoverable in excess of the amount of the insurance coverage and shall be recovered from the insurer only. The insurer shall not be named as a party defendant.

\textbf{24-10-106. Immunity and partial waiver.} (1) A public entity shall be immune from liability in all claims for injury which are actionable in tort except as provided otherwise in this section. Sovereign immunity, whether previously available as a defense or not, shall not be asserted by a public entity as a defense in an action for damages for injuries resulting from:

(a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of his employment, except emergency vehicles operating within the provisions of section 42-4-106 (2) and (3), C.R.S. 1973;

(b) The operation of any public hospital, penitentiary, reformatory, or jail by such public entity or a dangerous condition existing therein;

(c) A dangerous condition of any public building;

(d) A dangerous condition which interferes with the movement of traffic on the traveled portion and shoulders or curbs of any public highway, road, street, or sidewalk within the corporate limits of any municipality, or of any highway which is a part of the federal interstate highway system or the federal primary highway system, or of any paved highway which is a part of the federal secondary highway system, or of any paved highway which is a part of the state highway system on that portion of such highway, road, street, or sidewalk which was designed and intended for public travel or parking thereon;

(e) A dangerous condition of any public facility, except roads and highways located in parks or recreation areas, public parking facilities, and public transportation facilities maintained by such public entity. Nothing in this paragraph (e) or in paragraph (d) of this subsection (1) shall be construed to prevent a public entity from asserting the defense of sovereign immunity to an injury caused by the natural condition of
iv. Emergence of the Municipal Liability Crisis, and Possible Solutions to the Crisis

At this point, it may be helpful to offer a brief review. We have traced the development of municipal sovereign immunity in North

any unimproved property, whether or not such property is located in a park or recreation area or a highway, road, or street right-of-way.

(f) The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by such public entity or a dangerous condition existing therein.

(2) Nothing in this section shall be construed to constitute a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability.

Mo. Ann. Stat. § 71.185 (Vernon):

71:185. Tort liability for governmental acts, insurance trial

1. Any municipality engaged in the exercise of governmental functions may carry liability insurance and pay the premiums therefor to insure such municipality and their employees against claims or causes of action for property damage or personal injuries, including death, caused while in the exercise of the governmental functions, and shall be liable as in other cases of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the exercise of the governmental functions to the extent of the insurance so carried.

2. In all suits brought against the municipality for tort damages suffered by anyone while the municipality is engaged in the exercise of governmental functions, it shall be unlawful for the amount of insurance so carried to be shown in evidence, but the court shall be informed thereof and shall reduce any verdict rendered by a jury for an amount in excess of such insurance to the amount of the insurance coverage for the claim.

VT. Stat. Ann. tit. 29, §§ 1403, 1404:

§ 1043. Waiver of immunity by state, municipal corporations and counties.

When the state or department or board purchases a policy of liability insurance under the provisions of section 1401 of this title, and when a municipal corporation purchases a policy of liability insurance under section 1092 of Title 24, and when a county purchases a policy of liability insurance under the provisions of section 131 of Title 24, it waives its sovereign immunity from liability to the extent of the coverage of the policy and consents to be sued.—Added 1959, No. 328 (Adj. Sess.), § 14.

§ 1404. Judgments, maximum liability.

Upon trial of any action in which sovereign immunity has been waived, as provided in section 1403 of this title, a judgment shall not be rendered against the state of Vermont, a department or board thereof or a municipal corporation or county for more than the maximum amount of liability insurance carried by it and applicable to the subject matter of the action. - Added 1959, No. 328 (Adj. Sess.), § 14.
Carolina, examined several statutes whereby municipal immunity is waived upon the purchase of liability insurance, and analyzed a number of cases interpreting those statutes. One may wonder why a municipality in North Carolina would ever buy insurance, if the consequence is a waiver of immunity from suit. There are at least three answers to that question. First of all, as explained above, municipalities have never been protected from liability for the tortious performance of proprietary functions in this State. Insurance offers protection in those situations where immunity has never existed. Secondly, municipalities buy insurance to indemnify their employees, officials and agents who may be subject to legal action for faulty performance of their official duties. Although public employees, officials and agents have historically enjoyed immunities of their own, separate and apart from the immunity afforded the governmental unit, their immunities are not absolute.\(^\text{128}\) While municipalities in North Carolina are not required to indemnify their employees, officials and agents, many if not all units of local government seek to do so, in order to create a secure working environment wherein employees do not feel paralyzed in the performance of their duties for fear of being sued.\(^\text{128}\) The promotion of good will between the local government employer and its employees is not only a virtue but a necessity in our increasingly litigious society. Thirdly, municipalities may purchase insurance which covers their performance of governmental functions despite the resulting waiver of immunity simply in an attempt to protect the public from harm.

In light of the modern trend to abolish sovereign immunity altogether, insurance for municipalities is becoming increasingly important. The birth and growth of the class action, coupled with the enlarged scope of civil rights actions, may have municipalities feeling as though the law has come full circle—it seems we have evolved from the days of "the King can do no wrong" to the belief that "the King can do no right!"

\(^{128}\) See generally W. Prosser, supra note 7, at 987. See also Lawder, Annotation: Governmental Immunities for Governmental Officials, 11 Urban Lawyer 172 (Winter 1979).

\(^{129}\) See Annot., 71 A.L.R.3d 6 (1976) and Annot., 71 A.L.R.3d 90 (1976) for discussions of the validity and constitutionality of statutes authorizing or requiring governmental units to indemnify public officers or employees for liability arising out of the performance of their public duties.
A. 42 U.S.C. § 1983

The biggest contributor to the current crisis in local government is undoubtedly that piece of federal legislation known variously as the “Ku Klux Klan Act” or the Civil Rights Act of 1871, and now codified as 42 U.S.C. § 1983 (hereinafter referred to as “Sec. 1983”), which reads as follows:

§ 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.130

One commentator describes § 1983 as “by far the most significant source of federally imposed personal liability for state and local officials, and one of the most heavily litigated sections of the United States Code.”131 He illustrates the potent effect of § 1983 upon local governments with a real-life example: the elected officials of a small Kansas town, “[u]pon learning that they could be held personally liable for violations of the constitutional rights of individual citizens, . . . sought protection through personal liability insurance. When they did, they found that the quoted insurance premium exceeded the total town budget. With true heartland aplomb, they voted to disban the town.”132 In order to appreciate the breadth of the problem now facing municipalities, it is necessary to review three landmark decisions of the United States Supreme Court.

130. 42 U.S.C. § 1983. Section 1983 was amended on Dec. 29, 1979, by Pub. L. 96-170, § 1, 93 Stat. 1284 to add the words “or the District of Columbia” following “Territory,” and to include the statement that for purposes of Sec. 1983, “Acts of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”


132. Id. at 1.
B. Monroe, Monell and Owen—A Liability Trilogy.

In 1961, Monroe v. Pape\textsuperscript{133} considered the complaint of a black man whose home had been entered by thirteen Chicago policemen. Plaintiff and his family were pulled from bed, searched and made to stand naked in one room while the officers searched the house. The father was taken to a police station and questioned for sixteen hours before being released; none of the officers had either a search warrant or an arrest warrant. Plaintiff sued both the city of Chicago and the individual officers under § 1983. Although the Court held that the complaint did state a cause of action against the officers,\textsuperscript{134} the Court held that municipalities were not liable for damages under § 1983 (emphasis added).\textsuperscript{135}

Freedom from liability for municipalities in § 1983 actions was shortlived, however. Seventeen years later the Monroe holding that municipalities could not be sued under § 1983 was overruled in Monell v. Department of Social Services.\textsuperscript{136} In considering the claims for back pay of pregnant employees of the New York City Department of Social Services and Education who were compelled to take unpaid medical leaves of absence four months before their expected date of delivery, the Court re-examined the legislative history of § 1983 and concluded that the 42nd Congress (which adopted the forerunner of § 1983) did intend for local governmental units to be treated as "persons" for purposes of § 1983 actions.\textsuperscript{137} As one author put it:

\begin{quote}
With the Supreme Court's decision in Monell v. Department of Social Services, local governments have entered the 'Wonderland' of Section 1983 litigation. Probably no other recent decision of the Supreme Court has such vast and disturbing implications for municipalities. Now that they are 'persons' subject to damages in a civil suit under Section 1983 for the violation of an individual's rights, the doors to the municipal coffers are open.\textsuperscript{138}
\end{quote}

Monell did not hold that a municipality could or would be held automatically liable simply on the theory of respondeat superior.

\begin{itemize}
\item \textsuperscript{133} 365 U.S. 167 (1961).
\item \textsuperscript{134} Id. at 187.
\item \textsuperscript{135} Id. at 191.
\item \textsuperscript{136} 436 U.S. 658 (1978).
\item \textsuperscript{137} Id. at 669.
\end{itemize}
Rather, the Court enunciated the following rule for determining when a municipality incurred § 1983 liability:

A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Monell reserved the question of whether local governments, although not entitled to absolute immunity, should be afforded some form of official immunity in § 1983 actions. That question was answered negatively two years later in the case of Owen v. City of Independence.

In Owen, a former police chief brought suit under § 1983 against the city, city manager and members of the city council, claiming that he had been discharged from his position as police chief in violation of substantive and procedural due process. The city claimed immunity from liability based on the good faith of the city officials involved. In a 5-4 decision, the Supreme Court held that a municipality enjoys no immunity from liability for constitutional violations under § 1983, and that it may not assert the good faith of its officers as a defense to such liability. In support of their holding, the majority noted that by its terms, § 1983 “creates a species of tort liability that on its face admits of no immunities.” The majority then reviewed the legislative history of the statute in conjunction with the common law in existence at the time the section was adopted, and concluded that “there is no tradition of immunity for municipal corporations.” Justice Powell dissented, rejecting this conclusion as incompatible with the 1788 English decision of Russell v. Men of Devon and its American progeny.

The majority did acknowledge that there were two common law doctrines that afforded municipal corporations some measure of protection from tort liability, the first being the government-

139. 436 U.S. at 694.
142. Id. 100 S. Ct. at 1398.
143. Id. at 1407, quoting Imbler v. Pachtman, 424 U.S. 409 (1976).
144. Id. at 1409.
145. See generally Id. at 1419-1432 for J. Powell’s dissent.
proprietary distinction as used in North Carolina, and the second being a somewhat similar doctrine that protected municipalities' discretionary decisions. The Court decided, however, that "whatever vestige of the State's sovereign immunity the municipality possessed" was abolished by the sovereign's enactment of a statute making it amenable to suit—and § 1983 "was just such a statute." 146

Finally, the majority justified its decision on the basis of "the principle of equitable loss-spreading" which it explained as follows:

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy (citations omitted)." 147

C. What Lies Ahead

After Monell and Owen, municipalities are justified in wondering what lies ahead in terms of their tort liability. Certainly local governments are faced with an increase in their potential liability which could have drastic fiscal consequences. Whether this increase in potential liability results from a statutory waiver of immunity upon purchase of liability insurance, a judicial or legislative abolition of the doctrine of sovereign immunity or the expanding sweep of § 1983, municipalities must protect themselves from risks that could result in financial ruin. Two possible solutions will be discussed briefly below:

146. Id. at 1414.
147. Id. at 1419.

Under consideration in the 1981 Session of the North Carolina General Assembly was Senate Bill 220 and its Committee Substitute. Senate Bill 220, entitled "An Act to Require Counties and Municipalities To Contract for Liability Insurance"

The General Assembly of North Carolina enacts:

Section 1. G.S. 153A-435(a) is amended by adding a new sentence to the end to read:

"A county shall contract for liability insurance covering all county owned or operated motor vehicles providing a coverage limit of no less than one hundred thousand dollars ($100,000) for bodily injury to or death of one person in any one accident and no less than three hundred thousand dollars ($300,000) for bodily injury to or death of two or more persons in any one accident."

Sec. 2. G.S. 160A-485(a) is amended by adding a new sentence immediately after the first sentence to read:

"A city shall contract for liability insurance covering all city owned or operated motor vehicles providing a coverage limit of no less than one hundred thousand dollars ($100,000) for bodily injury to or death of one person in any one accident and no less than three hundred thousand dollars ($300,000) for bodily injury to or death of two or more persons in any one accident."

Sec. 3. This act shall become effective October 1, 1981.

S.B. 220, 1981 Sess., Committee Substitute:

March 9, 1981

A Bill to be Entitled

An Act To Waive The Governmental Immunity of Local Governments in Tort and to Require Them to Respond in Damages up to One Hundred Thousand Dollars.

The General Assembly of North Carolina enacts:

Section 1. G.S. 160A-485 is repealed.

Section 2. Article 21 of General Statutes Chapter 160A is amended by adding a new section to read:

"§ 160A-485.1 Governmental immunity waived: liability limited; insurance and self-insurance.—(a) The governmental immunity of cities is hereby waived to the extent of one hundred thousand dollars ($100,000) for wrongful death, bodily injury, or property damage to any one person proximately caused by any negligent act or omission of any of its officers, agents, or employees occurring in the exercise of a governmental function while within the scope of their authority and in the course of their employment by the city.

(b) Cities shall also be liable for damages for wrongful death, bodily
injury, or property damage up to a maximum of one hundred thousand dollars ($100,000) to any one person proximately caused by any negligent act or omission of any of its officers, agents, or employees occurring in the exercise of a proprietary function, in which the city is lawfully engaged, while within the scope of their authority and in the course of their employment by the city.

(c) Any city is authorized to assume liability beyond one hundred thousand dollars ($100,000) by the act of purchasing liability insurance. Liability beyond one hundred thousand dollars ($100,000) shall be assumed only to the extent that the city is indemnified by the insurance contract. No formal action other than the purchase of liability insurance shall be required to assume liability beyond one hundred thousand dollars ($100,000).

(d) A city must appropriate funds to pay its liabilities under subsections (a) and (b) of this section. It may elect to purchase insurance, create a self-insurance fund, or utilize a combination of insurance and self-insurance. A city may appropriate funds to provide coverage for its assumed liability under subsection (c) of this section."

Sec. 3. G.S. 160A-209(c) is amended by adding a new subdivision to read:

"(35) Claims. To provide funds for self-insurance, the payment of insurance premiums, and claims against the city pursuant to G.S. 160A-485.1."

Sec. 4. G.S. 153A-435 is repealed.

Sec. 5. Article 23 of General Statutes Chapter 153A is amended by adding a new section to read:

"§ 153A-435.1 Governmental immunity waived; liability limited; insurance and self-insurance.—(a) The governmental immunity of counties is hereby waived to the extent of one hundred thousand dollars ($100,000) for wrongful death, bodily injury, or property damage to any one person proximately caused by any negligent act or omission of any of its officers, agents, or employees occurring in the exercise of a governmental function while within the scope of their authority and in the course of their employment by the county.

(b) Counties shall also be liable for damages for wrongful death, bodily injury, or property damage up to a maximum of one hundred thousand dollars ($100,000) to any one person proximately caused by any negligent act or omission of any of its officers, agents, or employees occurring in the exercise of a proprietary function, in which the county is lawfully engaged, while within the scope of their authority and in the course of their employment by the county.

(c) Any county is authorized to assume liability beyond one hundred thousand dollars ($100,000) by the act of purchasing liability insurance. Liability beyond one hundred thousand dollars ($100,000) shall be assumed only to the extent that the county is indemnified by the insurance contract. No formal action other than the purchase of liability insurance shall be required to assume liability beyond one hundred thousand dol-
amend G.S. § 153A-435 (the statute whereby a county waives immunity upon purchase of liability insurance) and G.S. 160A-485 (corresponding statute dealing with cities) to make the procurement of liability insurance for county and city motor vehicles mandatory. The Committee Substitute to Senate Bill 220 takes a broader approach to the problem and would statutorily waive all governmental immunity of cities and counties to the extent of $100,000.00. Beyond that amount, municipalities would be authorized to assume liability by purchasing liability insurance. In order to satisfy the base amount of $100,000.00 liability and any amounts above and beyond that base sum, municipalities would be able "to elect to purchase insurance, create a self-insurance fund, or utilize a combination of insurance and self-insurance to pay its liabilities." (Senate Bill 220 was referred to the Committee on Highway Safety on May 12, 1981, and did not emerge prior to adjournment of the 1981 session.)

2. Risk Management Programs.

A second and much more comprehensive solution to the liability crisis in local government involves the development of competent risk management programs for municipalities. The concept of risk management encompasses more than a sound insurance program, although insurance is definitely an important aspect of risk management. Actually, because of the increased potential for municipal liability, many insurers have either raised their rates drastically or simply ceased to insure units of local government. For example, one survey revealed that municipal liability premiums in
California went up an average of ninety-eight percent from 1974 to 1976.\textsuperscript{150} According to Martin J. Jaron, Jr., Assistant to the County Executive of Fairfax County, Virginia,

[A] number of reasons have been advanced for the insurance industry's withdrawal from the government market for both governmental and personal liability coverage: the fear of increased liability claims and, therefore, high liability risks, making public insurance unprofitable; uncertain tort liability standards in the law, making it difficult to predict liability; almost a complete absence of organized actuarial information upon which to base rates; manipulation by the insurance industry as a scare tactic, similar to medical malpractice; and statutory limitations on the amount of liability insurance that can be written by a carrier.

Like most other institutions, insurance companies do not like unpredictable situations. Making a profit in the financial risk protection business depends on the long range certainty of income exceeding payments by a large enough margin to cover expenses and turn over a sizeable annual profit. It has been noted that the public sector is particularly prone to be discarded as a client because insurance companies do not understand state and local government. Few, if any, insurance firms treat government as a specialty; instead, they have been add-ons to other lines designed for the private sector. Thus, lack of insurer knowledge about the state and city operations has probably accelerated the increase in rates and abandonment of the market. Whether the commercial companies will re-enter the municipal and state official liability markets in the next few years with stabilized but higher rates remains to be seen.\textsuperscript{151}

Jaron indicates that in light of these developments in the insurance industry, municipalities are using alternatives such as self-insurance (the retention of a fund out of which claims can be satisfied) to protect themselves. He recommends an increased overall awareness throughout the local government unit of all potential risks and the use of risk management as possible means of alleviating the liability crisis.\textsuperscript{152} He defines risk management as follows:

Risk management is a conscious systematic effort by a public agency to identify potential exposures to loss and to reduce or control the possibility that the loss will occur through a number of identified approaches and techniques, such as training pro-

\textsuperscript{150} Jaron, \textit{supra} note 131, at 19 n. 122.
\textsuperscript{151} \textit{Id.} at 20.
\textsuperscript{152} \textit{Id.} at 22.
grams designed to improve the performance of public officials.  

Lafayette, Louisiana has applied the concept of risk management with apparent success. J. M. Wooderson, special counsel for that city, and Donald Hoffpauir, the city's risk manager, offer the following definition of risk management:

Risk management as we know it today is the process of identifying, evaluating, and selecting the appropriate risk treatment device; implementing the decision; and finally evaluating and continually reviewing the situation.

The North Carolina city of Charlotte and its county of Mecklenburg have also developed an extensive risk management program administered by an "Insurance and Risk Management Committee" that involves twenty-five separate governmental entities with over 17,000 employees.

V. CONCLUSION

In light of recent developments in the law discussed above, local governmental units and their legal counsel may feel that the sovereign crown has crumbled; they may see themselves as kindred spirits with Richard II as Bolingbroke's takeover of his throne appeared inevitable: "God save the king!" cried Richard. "Will no man say amen? Am I both priest and clerk? Well then, amen." And, despite Peppermint Patti's D minus, she may yet go on to law school and one day succeed in obtaining a hefty judgment against the Dutch city for negligent maintenance of its dike.

Ironically, the word "sovereign" in English law referred not only to the king; it also represented a gold coin of Great Britain, "of the value of a pound sterling." Presumably, opponents of

153. Id. at 21.
sovereign immunity feel that allowing plaintiffs to sue municipalities freely will give the injured party access to the "deep pocket." Yet the municipality's pocket is only as deep as those of the taxpayers. Perhaps the solution to the liability crisis in local government lies, in part, in statutes such as the Committee Substitute for Senate Bill 220, and in the implementation of competent risk management programs that incorporate a combination of self-insurance with policies issued by insurance companies. While it may be inevitable that as the risks increase, so must the rates, it also seems reasonable to assume that insurers will find a way to help municipalities protect themselves from risks. As my insurance professor has said so often, "if there's an insurable interest, somebody will write a policy for it." The hurdle for insurers to overcome, of course, is that of prohibitively high premiums.

Finally, the answer may lie in part in an increased emphasis by municipalities on preventing tortious injury, together with an increased sensitivity to the constitutional rights of persons whose lives are affected in a myriad of ways by units of local governments. Coupled with the municipality's efforts to promote safety and to discourage the violation of individual's rights, this country could stand a change in attitudes on the part of people whose first inclination is to "sue the bums." Alternatives to legal action include out-of-court settlements (an area in which insurers should be particularly skilled), arbitration and mediation. Various private groups now offer alternatives to the traditional forum of the courtroom. Perhaps through a balancing of the social equities, truly injured persons will receive just compensation from a more caring, responsive and accountable government without bankrupting small-town U.S.A. in the process. Perhaps then the sovereign and its subjects will enjoy a degree of compatibility that benefits both

159. Professor Lee A. Holley, Campbell University School of Law, Insurance Law Class, Fall, 1980. At least one commentator, however, feels that the role of insurance in civil rights litigation should be limited, in order to preserve Sec. 1983's deterrent effect upon unconstitutional behavior. See Lenz, Limiting the Role of Insurance in Civil Rights Litigation: A Case for Re-Establishing 42 U.S.C. § 1983 as an Enforcement Mechanism," 5 J. OF CORP. LAW 305 (Winter 1980).
the government and those governed, and ultimately enhances the common good.