THE COURT OF CLAIMS ACT IN ILLINOIS

Illinois needs a Court of Claims Act which will provide recovery for tort claimants. This fact is indicated by an examination of the actual accountability of state agencies in Illinois for injuries inflicted by officials and employees. There are, of course, existent acts which deal with different aspects of liability. However, a practical study cannot ignore the erratic functioning of the "court of claims," nor the unsatisfactory working of the present law of state and municipal liability. As a consequence, existing legislation is inadequate in its modification of the common law of state responsibility.

A comparison of "state tort" responsibility in Illinois and New York not only reveals the confused situation in Illinois resulting from domination of the rule of state immunity, but emphasizes the advantages of New York's policy of state accountability. State immunity to suit is axiomatic in the common law. One consequence of the rule of immunity is the inapplicability of the doctrine of respondeat superior when an officer or an employee of the state commits a tort in the performance of his duties. The only redress available to the injured

1 In legal language the term "tort" is usually applied only to invasions of personality and property by individuals and private corporations. The application of this term in the law of state responsibility must be made with caution.

2 Freund, Responsibility of the State in Internal (Municipal) Law, 9 Tulane L. Rev. 1 (1934).
party is an appeal to the legislature for a special appropriation,\(^3\) or a personal suit against the tortfeasor. Financial inability of public employees and officials frequently results in an undue hardship to the victim of the tort.\(^4\) Redress by legislative appeal suggests the baneful consequences of political influences and pressures, the failure to develop well-defined and consistent rules with regard to the making of appropriations, and the overburdening of the legislature with a multitude of claims the determination of which really requires judicial facilities. This state of the law has resulted in a barrage of vigorous criticism, in which commentators have emphasized strong practical justifications as well as the consonance of state responsibility with modern social, legal and political theories.\(^5\)

This constantly increasing criticism has resulted in some increase of state tort responsibility by legislative action in the federal government\(^6\) and in some of the states,\(^7\) especially New York.\(^8\) The advance, however, has been greatly impeded by the courts and other tribunals entrusted with the enforcement of such statutes. Apparent legislative desire for state accountability has been frustrated by strict construction.\(^9\) Thus in New York it was not until 1929, after a period of strict interpretation, that legislative action resulted in effective state responsibility. Illinois is still laboring under a restrictive application of a statute apparently designed to bring about state accountability.

With the legislative creation of the Board of Canal Appraisers in 1870, New York began its development toward judicial determination of tort claims against

\(^3\) In Illinois today, as a practical matter, even this type of redress is unavailable.


\(^7\) Borchard, Government Liability in Tort, 34 Yale L. J. 1, 12 (1924); 1 State Law Index 53, 57 (1925–26), 2 ibid. 79–80, 555 (1927–28), 3 ibid. 85, 86, 573 (1929–30), 4 ibid. 82, 550–51 (1931–32); 44 Harv. L. Rev. 433, 433–34 (1931); Borchard, Recent Statutory Developments in Municipal Liability in Tort, 2 Legal Notes on Local Gov't 89, 92–99 (1936). It is noteworthy that occasional reactions have occurred in the legislative extension of tort liability. Id. at 97.

\(^8\) New York Court of Claims Act, N.Y.L. 1929, c. 467, § 12a.

\(^9\) Borchard, op. cit. supra note 7, at 9–13; 42 A.L.R. 1464 (1926); Reddock v. State, 68 Wash. 329, 133 Pac. 450 (1922); Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920); Thompson v. State, 4 Ct. Cl. (Ill.) 27 (1918).
the state.10 This was followed by the creation of a Board of Audit whose jurisdiction was more general.11 In 1883, both of these bodies were replaced by a Board of Claims.12 The Court of Claims succeeded the board in 1897 with no change in jurisdiction.13 In 190814 the jurisdiction of the court was re-defined and thereafter remained unchanged until 1929.15

In 1908, the court asserted that "the principles governing the determination of controversies in the court of claims are the same as those between individuals or corporations in the ordinary courts of justice."16 This view was again asserted by the court in 190917 and 191718 and was adopted by the appellate division of the supreme court in 1914.19 With no change in the statute defining the jurisdiction of the court, the court of appeals impinged upon this broad concession of liability in 1917.20 A period of strict construction21 was introduced by a declaration that the state was immune as to governmental functions. This qualification was adopted by the court of claims in 1919.22 In 1920 the court of appeals traveled the entire road of immunity and strict construction by declaring that the state had merely waived its immunity from suit but had not extended its liability in tort.23 Reversion to the way of immunity and the hopeless consequences of legislative relief were the results of this defeat of the legislative intent.24

10 N.Y.L. 1870, c. 321. 11 N.Y.L. 1883, c. 205. 12 N.Y.L. 1908, c. 519.
13 N.Y.L. 1876, c. 444. 14 N.Y.L. 1897, c. 36.
15 The court "... has jurisdiction to hear and determine a private claim against the state, including a claim of the executor or the administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused ... and the state hereby consents, in all such claims, to have its liability determined." Code of Civil Procedure § 264, now § 12 of the Court of Claims Act, N.Y.L. 1920, c. 922.
21 It is to be noted that except for this period of strict construction, New York has always been liberal in the passage of special enabling acts permitting claims to be filed in the court of claims. Likewise, since 1915 the state has been liable as an ordinary defendant for tortious injuries in connection with its canals. N.Y.L. 1915, c. 494; amended in 1930, Cahill's Cons. L. 1930, c. 6, § 47.
24 Since the constitution of New York prohibits the legislature from auditing and determining private claims, the legislature used the device of special enabling acts in which the court of claims was authorized to audit and allow tort claims against the state. N.Y. Const. art. 3, § 19. See Williamsburgh Savings Bank v. State, 243 N.Y. 231, 153 N.E. 58 (1926); Brown v. State, 206 App. Div. 634, 198 N.Y.S. 773 (1923); Mann v. State, 130 Misc. 559, 224 N.Y.S. 355 (1927).
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In 1929, with the passage of § 12a\(^2\) of the Court of Claims Act, a new era of state accountability in New York was initiated.\(^2\) While the court's awards were only recommendatory,\(^7\) regular appropriations were in fact made by the legislature to satisfy these awards. Recent statistical studies and statements by the legal department of the state indicate that the act has operated efficiently and economically.\(^8\) However, there have been too few decisions since 1929 to indicate the limits of state responsibility.\(^9\) In those cases which have arisen,\(^3\) responsibility of the state seems to be treated like that of an ordinary private wrongdoer.\(^3\) The confines of the traditional categories of liability, for the most part, seem to outline the limits of state responsibility,\(^3\) and the same defenses

\(^2\) "The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law and equity as apply to an action in the supreme court against an individual or a corporation and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury while acting as such officer and employee. . . . ." N.Y.L. 1929, c. 467, § 12a.

\(^2\) It should be noted that since the New York constitution does not prohibit suit against the state in a regular court, the decisions of the Court of Claims may be appealed to the highest court. Freund, op. cit. supra note 2, at 14. See MacDonald, op. cit. supra note 5, at 238.

\(^7\) With respect to the "binding" effect of an award made by the court, see 17 Corn. L. Q. 254 (1932).

\(^8\) See Borchard, Recent Statutory Developments in Municipal Liability in Tort, 2 Legal Notes on Local Gov't 89, 98-99 (1936). The statistics analyzed by Professor Borchard indicate that between September 1, 1929 and January 20, 1935, aside from the claims filed under special enabling acts and under the canal acts, there were about 15 awards made per year with an average annual total of $82,000.

\(^9\) Professor Freund in 1932 said that although the terms of the statute seem to indicate a legislative intent to impose liability in both governmental and corporate functions and not to adopt the "analogy of municipal tort liability," yet it would be "extreme to say that the state intended to make itself liable for the consequences of errors committed in the administration of justice." Freund, op. cit. supra note 2, at 15.

\(^2\) It should be noted that the court has granted awards in some cases under special enabling acts and not under § 12a. Curley v. State, 148 Misc. 336, 265 N.Y.S. 762 (1933); Wilcove v. State, 146 Misc. 87, 261 N.Y.S. 685 (1933); Jacobson, Inc. v. State, 140 Misc. 306, 250 N.Y.S. 562 (1931). In these cases it appears that the claimant went to the legislature first to make certain that an award would be granted. This was the practice from 1920 until the passage of § 12a. The facts in these cases, however, seem to indicate that an award would have been granted under § 12a. See Paige v. State, 269 N.Y. 352, 199 N.E. 617 (1936).

\(^3\) "By section 12a, liability when proved by the rules of law applicable to individuals, has been affirmatively assumed, and jurisdiction to determine whether such a liability has been proved is conferred upon the court of claims . . . no longer will the state use the mantle of sovereignty to protect itself from such consequences as follow the negligent acts of individuals." Jackson v. State, 262 N.Y. 134, 136, 184 N.E. 735, 736 (1933).

are available to the state as to any ordinary defendant in tort cases. Because of a separate statute, however, an important limitation is presented by the highway cases.

For a claimant to recover under § 12a, it is clear that the tortfeasor must be an "officer or employee" of the state and the injury must occur while "he is acting as such officer or employee." When an individual is such an "officer or employee" is sometimes difficult to ascertain. In a recent case, the court of appeals held that the employees of a privately owned reformatory subject to state visitation were "employees" of the state within § 12a. This holding seems to imply that the employees of quasi-corporations and corporations both public and private entrusted by the state with the performance of governmental functions are "officers and employees" within § 12a. Since such subordinate agencies, in the performance of governmental functions, are immune from liability, such a construction leads to the result that liability attaches to the state but not to such agencies.

A survey of state accountability in Illinois presents a strange contrast. The present Court of Claims was created by the legislature in 1917. Its predecessors were the Commission of Claims created in 1877 and the Court of Claims

33 Miller v. State, 148 Misc. 184, 265 N.Y.S. 455 (1933) (contributory negligence); Countryman v. State, 159 Misc. 846, 288 N.Y.S. 613 (1936) (proximate cause); Consiglio v. State, 286 N.Y.S. 32 (1936) (sixty day limitation for filing claims). After the enactment of § 12a, the special enabling act was used to waive this last defense. Wilcove v. State, 146 Misc. 87, 261 N.Y.S. 685 (1933). This device has also been used to grant a convict the right to present his claim. Green v. State, 290 N.Y.S. 36 (1936).

34 Highway Law § 58; N.Y. Cons. L. 1930, c. 25, § 58. This provides for state immunity from May 1 until November 15 where the injury results from a defect in a state or county highway.

35 Several decisions have held that § 12a does not supersede this highway law. Miller v. State, 137 Misc. 768, 244 N.Y.S. 547 (1930), aff'd, 231 App. Div. 363, 247 N.Y.S. 399 (1931) (semble); Hinds v. State, 144 Misc. 464, 258 N.Y.S. 748 (1932). This construction has led the courts to draw a rather tenuous distinction between injuries caused by a "defect in the highway" and a "condition existing by reason of misfeasance or negligence." See Hinds v. State, 144 Misc. 464, 258 N.Y.S. 748 (1932).


37 Paige v. State, 269 N.Y. 352, 199 N.E. 617 (1936). This decision seems to indicate a tendency to construe § 12a liberally.

38 See the strong dissent of Lehman, J., 269 N.Y. 352, 357-58, 199 N.E. 617, 619-20.


40 Ill. State Bar Stats. 1935, c. 37, §§ 462-75.

41 Ill. L. 1877, p. 71. For the early history of claims against the state in Illinois see Constitutional Convention Bull. no. 10, 864-68 (1920).
established in 1903. While these predecessors were empowered to "hear and determine" claims against the state "according to the principles of equity and justice," the present court was authorized "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay."

Each of these enactments raised the problem of whether it provided for judicial determination of tort claims against the state. The New York courts prior to 1917 and after 1929 liberally construed similar statutes to provide for such judicial determination. Likewise, the Court of Claims of Illinois might well have construed these enactments to mean that the court was to determine in what situations it would be just and proper for the state to compensate victims of torts. This interpretation would have afforded not only a sufficient ground for tort responsibility on a broad basis, but would have made possible the development of a system of state responsibility based on well-defined though flexible rules. The court, instead, chose to prefer a strict construction similar to that of the New York Court of Appeals in 1920. Each of these enactments was followed by a pronouncement that the statute was procedural and that awards could be made only where there existed a claim against the state under recognized rules of law and equity. Since no state tort responsibility exists under such rules, this construction would seem to imply that no awards whatever could be made to a victim of a tort. This apparently was not the legislative intent, nor has the court consistently applied this construction. It has granted awards to tort claimants in quite a number of cases. At most, this interpretation must be taken to be a statement of a policy to confine state liability within narrow limits. A survey of the decisions of the court, however, discloses that it has not consistently followed such a policy.

The opinions of the predecessors of the present court manifest a strict adherence to the view that the legislature did not provide for state tort responsibility. The decisions of the present court since its creation in 1917 consider the merits of a claimant's demand on two grounds: (1) the "legal and equitable" liability of the state; (2) the liability of the state under the doctrine of "social

42 Ill. L. 1903, p. 140.

43 The commission of 1877 was to "... hear and determine all unadjusted claims of all persons, against the state..." In 1889 the jurisdiction of the commission was defined in greater detail. See Ill. L. 1889, p. 69.

44 Ill. State Bar Stats. 1935, c. 37, § 476(4).

45 Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920); 5 Corn. L.Q. 338 (1920).

46 Schmidt v. State, 1 Ct. Cl. (Ill.) 76, 80 (1890); Henke v. State, 2 Ct. Cl. (Ill.) 11, 14 (1906); Thompson v. State, 4 Ct.Cl. (Ill.) 26 (1928).

47 But see Crawford v. State, 1 Ct.Cl. (Ill.) 91 (1890), and comment by Maguire, op. cit. supra note 5, at 28.
justice and equity. 48 The court has almost uniformly denied liability on the "legal and equitable" basis. 49 This denial has taken the form of statements that the doctrine of respondeat superior is inapplicable to the state, 50 that the state is not liable for the torts of its agents, servants, and officers 51 and that the state is immune from tort liability in the exercise of governmental functions. 52 These latter pronouncements of the court make it doubtful whether the denial of "legal and equitable" liability is on the theory that the state is immune only in the exercise of governmental functions or on the common law theory that the state is immune in all situations. In one group of cases, the court announced that the maintenance of the Illinois-Michigan canal was a non-governmental function and that therefore the state was not immune. 53 Yet in a series of later cases, the court overruled its previous holding and argued that the state is not a corporation; therefore any activity exercised under its direct and sole control must be governmental. 54 In 1921 the court overruled its overruling by stating that the rule of respondeat superior applied to the conduct of the canal. 55 However, in no case of any kind since 1921 56 has the court found the state performing a non-governmental function. This differentiation on the basis of governmental and non-governmental functions represents an inroad upon the common law

48 This doctrine was "characterized, first as social justice, then as social justice and equity, and afterwards as equity and good conscience." Crabtree v. State, 7 Ct.Cl. (Ill.) 207, 218 (1933). It was also applied in cases where the claimant was an employee of the state. See Smith v. State, 4 Ct. Cl. (Ill.) 74 (1919).

49 In some of its opinions, the court divulges some of the reasons for the denial of liability. The burden on taxpayers is mentioned as a motivating influence in restricting the number of awards made. O'Brien v. State, 5 Ct. Cl. (Ill.) 20, 21 (1924); Carter v. State, 5 Ct. Cl. (Ill.) 102, 103 (1925); Crabtree v. State, 7 Ct. Cl. (Ill.) 207, 220 (1933). The court also cites United States v. Kirkpatrick (9 Wheat. (U.S.) 720, 723 (1824)), for the proposition that the state does not guarantee the fidelity of the agents and servants it employs "... since that would involve it, in all its operations, in endless embarrassments, and difficulties and losses which would be subversive to the public interests. ..." Alford v. State, 8 Ct. Cl. (Ill.) 16, 17 (1933).

50 Schwab v. State, 4 Ct. Cl. (Ill.) 77, 78 (1919); Carlson v. State, 8 Ct. Cl. (Ill.) 131, 132 (1934).

51 Braun v. State, 6 Ct. Cl. (Ill.) 104 (1928); Fenoglio v. State, 7 Ct. Cl. (Ill.) 4, 5 (1931).

52 Tuttle v. State, 5 Ct. Cl. (Ill.) 3 (1924); McDonald v. State, 8 Ct. Cl. (Ill.) 84 (1934).

53 Holmes v. State, 1 Ct. Cl. (Ill.) 324, 331 (1905); Phillips v. State, 1 Ct. Cl. (Ill.) 332, 333 (1905).

54 Morrissey v. State, 2 Ct. Cl. (Ill.) 254, 265-71 (1914); Ackerman v. State, 2 Ct. Cl. (Ill.) 272 (1914); Anderson v. State, 2 Ct. Cl. (Ill.) 273 (1914). See comment in Maguire, op. cit. supra note 5, at 31-32.

55 County of La Salle v. State, 4 Ct. Cl. (Ill.) 133 (1921).

56 In 1925, the court denied an award on "legal" grounds, but granted an award on "social justice and equity." Allen v. State, 5 Ct. Cl. (Ill.) 189 (1925); County of La Salle v. State, 5 Ct. Cl. (Ill.) 190 (1925); Illinois Traction, Inc. v. State, 5 Ct. Cl. 422 (1927). In 1935, the court denied both "legal" liability and also liability on "social justice and equity." Hanna v. State, 8 Ct. Cl. (Ill.) 349 (1935).
rule by a resort to the theory of responsibility of municipal corporations; a stage in the development of the civil law in its progress to state liability.\textsuperscript{57}

The first decade in the history of the present court reveals a rather liberal tendency to make awards on the ground of "social justice and equity." The period from 1927 until 1933 was one of transition. The tendency was from liberality to stringency in granting awards on this ground. Since 1933, the court has denied recovery on both the "legal" and "social justice" grounds and has proclaimed that the establishment of the court was to provide "a remedy" but not to create state tort liability. The liberality of the present court in the first period of its existence expressed itself in the granting of awards not only where at common law an ordinary defendant would be liable, but even in cases where an ordinary defendant would not be liable.\textsuperscript{58} The apparent presence of contributory negligence did not deter the court from granting an award on the basis of "social justice and equity."\textsuperscript{59} The period of transition was one in which the court became more and more stringent.\textsuperscript{60} In 1932 the court announced in \textit{Kayhs v. State} that the requirements for recovery on the ground of "social justice and equity" were a serious injury, "gross and wanton negligence," and the absence of contributory negligence.\textsuperscript{61} However, six months later the court granted an award where the injury was not serious.\textsuperscript{62} Subsequent decisions reveal situations where, although the enumerated elements seemed to be present, recovery was denied.\textsuperscript{63} Likewise, decisions prior to the \textit{Kayhs} case reveal clearly that awards were denied although the indicated requirements were present;\textsuperscript{64} while awards were granted where some of these elements were absent.\textsuperscript{65} In \textit{Crabtree v. State},\textsuperscript{66} the court noted that sympathy motivated it to stray from the strict and true view that the act of 1917 did not create state tort responsi-

\textsuperscript{57} Takayanagi, Liability Without Fault in the Modern Civil and Common Law, 16 Ill. L. Rev. 268, 292–94 (1921).

\textsuperscript{58} Award granted for tort by employee of state charitable institution. Schwab v. State, 4 Ct. Cl. (III.) 77 (1919); award granted to claimant although statute of limitations under the law creating the court had run. Kubler v. State, 4 Ct. Cl. (Ill.) 203 (1921).

\textsuperscript{59} Motter v. State, 4 Ct. Cl. (Ill.) 159 (1921); Stachowiak v. State, 5 Ct. Cl. (Ill.) 275 (1927). It is to be noted that the court, where it can, relies on various common law defenses in addition to the non-liability of the state. Smith v. State, 6 Ct. Cl. (Ill.) 133 (1929) (contributory negligence); Pelka, Admr'x. v. State, 6 Ct. Cl. (Ill.) 390 (1930) (charitable institution); Bailey v. State, 7 Ct. Cl. (Ill.) 171 (1933) (proximate cause); Dunning v. State, 5 Ct. Cl. 232, 233 (1926) (independent contractor).

\textsuperscript{60} Mercer v. State, 6 Ct. Cl. (Ill.) 20 (1927); Stoddard v. State, 6 Ct. Cl. (Ill.) 27 (1927); Perry v. State, 6 Ct. Cl. (Ill.) 81 (1928).

\textsuperscript{61} Kayhs v. State, 7 Ct. Cl. (Ill.) 93 (1932).

\textsuperscript{62} Sprague Dairy Co. v. State, 7 Ct. Cl. (Ill.) 227 (1933).

\textsuperscript{63} Palumbo v. State, 8 Ct. Cl. (Ill.) 196 (1934).

\textsuperscript{64} Edgar v. State, 4 Ct. Cl. (Ill.) 17 (1918).

\textsuperscript{65} McGee v. State, 4 Ct. Cl. (Ill.) 336 (1923) (neither gross negligence nor serious injury were present); Bean v. State, 5 Ct. Cl. (Ill.) 375 (1927) (serious injury absent).

\textsuperscript{66} 7 Ct. Cl. (Ill.) 207 (1933).
bility. The court made a firm resolution to check itself when the appeal to its
sympathies became strong. Thenceforth, a claimant would be required to show
that he was entitled to redress under recognized rules of law and equity. Yet
this resolution was short-lived; for a month later the court reverted to the
*Kayks*, or restricted "social justice," rule and then granted an award even where
the injury was not serious. In 1934 the court again observed that the *Crabtree*
case represented the proper rule. The awards made under the rule in the
*Kayks* case were improper. The decisions since 1933 clearly indicate that the
court will not grant redress for the tortious wrongs of the officers and employees
of the state. Under the present practice of the court and the statement of
policy by the present governor, the victim of a tort is limited to a personal
suit against the tortfeasor.

Since the constitution of Illinois prohibits the suit of the state in any of its
courts, it was not possible, as in New York, to organize the court of claims as
a regular part of the judicial system of the state. Not only are its awards
recommendatory, but its decisions may not be appealed to the regular courts.
Hence the court is in fact, though perhaps not in theory, a court of first and
last resort, similar to the administrative courts of European countries. An ex-
amination of the court's decisions from the point of view of similar factual
situations discloses flagrant inconsistencies. Some of these can be explained

67 Id. at 222. 68 Connole v. State, 7 Ct. Cl. (Ill.) 232 (1933).
69 Sprague Dairy Co. v. State, 7 Ct. Cl. (Ill.) 227 (1933).
70 Alford v. State, 8 Ct. Cl. (Ill.) 16 (1933); Kramer v. State, 8 Ct. Cl. (Ill.) 31 (1934).
72 Reid v. State, 8 Ct. Cl. (Ill.) 163, 164 (1935).
73 No awards have been granted in tort cases since 1933. The decisions made in 1936 are
not yet reported.
74 "Even if there is a liability on the part of the State for damages received in the manner
indicated by the appropriation bill, there has been no evidence presented or adjudication as
to the extent of the damages or that the damages were caused in the manner charged. The
determination of such issues is the proper function of the Court of Claims and the payment of
such claims should not be made until these issues have been determined and awards entered
by that court." Veto Messages of the Governor of Ill. on Bills Passed 58th, 59th General As-
semblies, pp. 90-91 (1933-35).
75 Sherman v. State, 6 Ct. Cl. (Ill.) 346 (1929).
76 The court has reached divergent views in the following situations: (1) Where inmates of
prisons sustain injuries because of the negligence of guards. Tiller v. State, 4 Ct. Cl. (Ill.) 243
(1922); cf. Thompson v. State, 5 Ct. Cl. (Ill.) 65 (1925). (2) Where inmates of institutions
by the fact that the cases came before the court in different periods in the decline of the doctrine of "social justice and equity." Yet some of the cases which are in apparent conflict arose within the same period of decline. Nor is it easy to discover factual differentiations upon which some of the contrary results can be based.

It is possible that the court feels that consistency is unimportant in view of its subjection to unlimited legislative and executive check. The act creating the present court provides that the jurisdiction of the court shall be exclusive and that no appropriation shall be made by the legislature for the payment of any claim over which the court has jurisdiction unless the court has granted an award on such claim. But this provision is merely a declaration of policy, since the court is a statutory body and cannot deprive the legislature of the power to make such appropriations. The legislature has made appropriations in situations over which the court had jurisdiction not only where the court has actually denied an


77 Tosi v. State, 4 Ct. Cl. (Ill.) 190 (1921), and Palumbo v. State, 8 Ct. Cl. (Ill.) 196 (1934); Braun v. State, 6 Ct. Cl. (Ill.) 104 (1928), and Brawner v. State, 5 Ct. Cl. (Ill.) 194 (1929).

78 Tiller v. State, 4 Ct. Cl. (Ill.) 243 (1922), and Thompson v. State, 5 Ct. Cl. (Ill.) 65 (1925); Edgar v. State, 4 Ct. Cl. (Ill.) 17 (1918), and Schwab v. State, 4 Ct. Cl. (Ill.) 77 (1919).

79 Some of the factors which seem to motivate the court in granting relief are interesting to note: The need of the claimant has been emphasized. Kubler v. State, 4 Ct. Cl. (Ill.) 203 (1921). The recommendation of a department head carries weight. Bean v. State, 5 Ct. Cl. (Ill.) 375 (1927); Tunnicliff v. State, 7 Ct. Cl. (Ill.) 15 (1931). Yet in one case an award was granted contrary to the recommendation of a department head. Channing v. State, 5 Ct. Cl. (Ill.) 450 (1927). A letter from the secretary of state was effectual in Crabb v. State, 5 Ct. Cl. (Ill.) 432 (1927). In other cases, the consent of the attorney general seemed to be a decisive factor. Hutson v. State, 6 Ct. Cl. (Ill.) 273 (1929). There is some suggestion in the cases that the court may at times be influenced by the financial condition of the state and by the fiscal and other policies of the administration.

80 Court of Claims Act § 13.

81 Fergus v. Russell, 277 Ill. 20, 115 N.E. 166 (1917) (dealing with similar provision in the 1913 act for exclusive jurisdiction of the court); Crabtree v. State, 7 Ct. Cl. (Ill.) 207, 221 (1933).

82 House Bill no. 76, Ill. L. 1919, p. 119; Senate Bill no. 117, Ill. L. 1919, p. 123; House Bill no. 181, Ill. L. 1919, p. 128; House Bill no. 278, Ill. L. 1925, p. 135. In the following cases, the legislature granted appropriations for claims merely pending before the court on which the court had not handed down a decision. Shumway v. State, 8 Ct. Cl. (Ill.) 43 (1934) (claim was later denied by the court); House Bill no. 1072 (1933); Baird v. State (not yet reported), Senate Bill no. 609, Ill. L. 1935, p. 63.
award. The governor in some instances has by veto frustrated some of these legislative attempts to grant appropriations when the claim had not been passed upon by the court and where the court had denied an award. It is also noteworthy that the governor has in certain cases overruled the court of claims by vetoing appropriations made by the legislature to cover awards made by this court.

In the light of the present practice of the court and the policy of the present governor the sharp contrast of Illinois practice with that of New York, where a system of broad state responsibility is being established, is obvious. The Illinois legislature in 1935 attempted to improve this situation by a bill apparently intended to create state tort responsibility like that of private individuals.

The bill passed both houses, but the governor vetoed the bill because...
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its provisions were "directly contradictory and impossible of interpretation." Its provisions were "directly contradictory and impossible of interpretation."88 While the governor's criticism of the bill was just,89 its passage indicates a legislative intent to remedy a state of affairs in need of reform.

It requires little examination, however, to show that any reform which is directed merely toward a revision of the policies of the court of claims can accomplish only a superficial and partial solution of the existing problems. Present confusion with respect to the liability of municipalities and other subdivisions of the state cannot be ignored. Here again, as in the case of the state proper, Illinois has adhered to the traditional rules of municipal tort accountability.90 The municipality is immune from liability for the torts of its agents or officers in the performance of governmental functions.91 In the conduct of its "corporate," or non-governmental functions, the tort liability of an ordinary defendant attaches.92 Both commentators,93 and courts94 have emphasized the difficulty, uncertainty, and inconsistency of the applications of this rule. Courts have disagreed not only on the classification of particular functions, but also on the justifications and criteria for such classifications.95 Courts96 and writers97 have urged the abolition of this attempt at differentiation between non-govern-

88 Veto Messages, loc. cit. supra note 73, at 104. Another ground for the veto was that one part of the bill, which related to damages in case of injury or death to members of the National Guard, was unconstitutional.


91 Roumbos v. City of Chicago, 332 Ill. 70, 80, 163 N.E. 361, 364 (1928). McQuillin, op. cit. supra note 90, at § 2793.


93 Roumbos v. City of Chicago, 332 Ill. 70, 74, 163 N.E. 361, 363 (1928); Johnston v. City of Chicago, 258 Ill. 494, 497, 101 N.E. 960, 961 (1913); Irvine v. Town of Greenwood, 89 S. C. 511, 72 S.E. 228 (1912).


96 Doddridge, op. cit. supra note 93; Harno, op. cit. supra note 93; 34 Harv. L. Rev. 66 (1920).
mental and governmental functions, and have suggested that reform take the direction of liability for all activities.98

The courts in Illinois have decided that the maintenance of sewers,99 streets,100 sidewalks,101 bridges,102 a public library,103 a water system for domestic and commercial use,104 garbage removal,105 the construction of part of a city hall,106 street cleaning,107 lighting of streets,108 and the operation of a fire tug109 are corporate functions. Yet the activities of firemen on land,110 the construction and operation of schools,111 the use of a water system by a fire department,112 the maintenance of a hospital113 and swimming pool,114 and the exercise of police powers which include activities pertaining to the "safety, health, welfare, and good order of the public,"115 are governmental functions. Thus where firemen were negligent on land the city was immune;116 but where firemen were negligent on water the city was liable.117 Educational activities in the form of the construction and maintenance of schools were governmental;118 but in the form of the maintenance of a public library they were non-governmental.119

98 Borchard, op. cit. supra note 95. For recent developments in county and municipal liability in other states, see Borchard, Recent Statutory Development in Municipal Liability in Tort, 2 Legal Notes on Local Gov't 89, 92–98 (1936).

99 City of Chicago v. Seben, 165 Ill. 371, 46 N.E. 244 (1897); Republic Co. v. City of Rockford, 251 Ill. App. 109 (1928).

100 Simon v. City of Chicago, 279 Ill. App. 80 (1935).


102 Gathman v. City of Chicago, 236 Ill. 9, 86 N.E. 152 (1908).


106 City of Chicago v. Dermody, 61 Ill. 431 (1871).

107 Roumbos v. City of Chicago, 332 Ill. 70, 163 N.E. 361 (1928).


110 Wilcox v. City of Chicago, 107 Ill. 334 (1883).

111 Kinnare v. City of Chicago, 171 Ill. 332, 337, 49 N.E. 536, 538 (1898) (dictum).


113 Tollefson v. City of Ottawa, 228 Ill. 134, 81 N.E. 823 (1907).


115 Roumbos v. City of Chicago, 332 Ill. 70, 82, 163 N.E. 361, 366 (1928); Culver v. City of Streator, 130 Ill. 238, 22 N.E. 819, 820 (1890); Craig v. City of Charleston, 180 Ill. 154, 54 N.E. 184 (1899); Evans v. City of Kankakee, 231 Ill. 223, 83 N.E. 223 (1907).

116 Wilcox v. City of Chicago, 107 Ill. 334 (1883).


118 Kinnare v. City of Chicago, 171 Ill. 332, 337, 49 N.E. 536, 538 (1898) (dictum).

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negligent use of a fire hydrant by an employee of the water department rendered the city liable; but such negligence by a fireman with respect to the same hydrant would have left the city immune.\textsuperscript{220}

To justify such classifications, the courts of Illinois and other courts have searched for various criteria.\textsuperscript{222} Activities voluntarily assumed by the municipality are non-governmental, but those thrust upon it by the legislature are governmental.\textsuperscript{222} Functions which are performed primarily for local benefit are non-governmental, but those performed for the people of the state as a whole are governmental.\textsuperscript{222} However, if a voluntarily assumed activity results in public benefit, it is governmental.\textsuperscript{224} Agents and servants engaged in governmental activities, though hired, paid, and controlled by the municipality are agents of the state; hence the doctrine of \textit{respondeat superior} has no application to these functions.\textsuperscript{225} Commentators have emphasized the inconsistencies and fallacies involved in these and other attempted distinctions.\textsuperscript{226}

The existing state of the law has led even the courts to conclude that:

no definition of the terms "corporate" and "governmental" has been declared which is of much practical value. . . .\textsuperscript{227}

The ordinary principles of the law pertaining to torts ought to apply to municipal corporations . . . . and the distinction between governmental and ministerial functions . . . . should be abandoned.\textsuperscript{228}

The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to one class or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.\textsuperscript{229}

Not only have the courts in Illinois adhered to a rule of municipal tort liability based on a differentiation of corporate and governmental activities, but they have established the rule that "public involuntary quasi corporations"
are immune from tort responsibility.\textsuperscript{130} Thus townships,\textsuperscript{132} counties,\textsuperscript{133} and school districts\textsuperscript{134} are not accountable for torts of their agents.\textsuperscript{135} These bodies have been declared to be mere agencies and subdivisions of the state.\textsuperscript{136} This distinction in the tort responsibility of municipalities and quasi-corporations has been supported by other justifications. While the municipality is created and assumes its duties "voluntarily," these quasi-corporations are created nolens volens and have their duties thrust upon them involuntarily.\textsuperscript{137} While the municipal corporation is created for the benefit of local inhabitants, the activities of the quasi-corporation are concerned with the welfare of the state as a whole.\textsuperscript{138} Likewise, the powers and purposes of such quasi-corporations are more limited and restricted than those of a municipality.\textsuperscript{139} Commentators have properly attacked both the differentiation in the tort liability of municipalities and these quasi-corporations and the alleged justifications.\textsuperscript{140}

To a certain extent the legislature has come to the aid of the courts. Thus in 1877\textsuperscript{141} and 1905\textsuperscript{142} the legislature enacted statutes providing for the liability of cities and counties for injuries to person and property as a result of mob violence. In 1931 the statute of 1905 was amended to impose such liability also upon park districts and to increase the maximum compensation for such in-


\textsuperscript{131} Cooney v. Town of Hartland, 95 Ill. 516 (1880).

\textsuperscript{132} White v. County of Bond, 58 Ill. 297 (1871); Hollenbeck v. County of Winnebago, 95 Ill. 148 (1880); Sevick v. County of Cook, 282 Ill. App. 451, 454 (1935).

\textsuperscript{133} City of Chicago v. City of Chicago, etc., 243 Ill. App. 327, 329 (1927) (board of education); see Roumbos v. City of Chicago, 332 Ill. 70, 75, 163 N.E. 361, 364 (1928).

\textsuperscript{134} Yet park districts have been declared first to be a "quasi-municipal corporation." Wilcox v. People, 90 Ill. 186, 193 (1878) and later a municipal corporation. Stein v. West Chicago Park Com'rs, 247 Ill. App. 479, 483 (1926). So drainage districts were first declared to be municipal corporations. See Com'rs v. Kelsey, 120 Ill. 482, 484, 11 N.E. 256, 256 (1887). Later such bodies were declared to be "quasi corporations." Elmore v. Drainage Com'rs, 135 Ill. 269, 277, 25 N.E. 1010, 1012 (1890). This classification was questioned later in Bradbury v. Vandalia Drainage Dist., 236 Ill. 36, 46, 86 N.E. 163, 166 (1908).

\textsuperscript{135} Sevick v. County of Cook, 282 Ill. App. 451, 455 (1935); Lindstrom v. City of Chicago, 331 Ill. 144, 147, 162 N.E. 128, 130 (1928).

\textsuperscript{136} Elmore v. Drainage Com'rs, 135 Ill. 269, 276, 25 N.E. 1010, 1011 (1890); City of Chicago v. City of Chicago, etc., 243 Ill. App. 327, 329 (1927); McQuillin, \textit{op. cit. supra} note 90, at § 2775.

\textsuperscript{137} Johnston v. City of Chicago, 258 Ill. 494, 499, 101 N.E. 960, 962 (1913); Roumbos v. City of Chicago, 332 Ill. 70, 77, 163 N.E. 361, 364 (1928); Kinnare v. City of Chicago, 171 Ill. 339, 337, 49 N.E. 536, 537 (1898).

\textsuperscript{138} County of Cook v. City of Chicago, 311 Ill. 234, 241, 142 N.E. 512, 514 (1924); Elmore v. Drainage Com'rs, 135 Ill. 269, 274, 25 N.E. 1010, 1011 (1890).


\textsuperscript{140} Ill. L. 1887, p. 237.

\textsuperscript{141} Ill. L. 1905, p. 190.
Likewise, in an effort to abolish the distinction between the terrestrial and aquatic activities of the fire department, the legislature has provided for municipal liability for the negligence of firemen in the operation of motor vehicles. Such minor extensions of liability merely serve to emphasize the need for a thorough reform.

The preceding survey of community responsibility in Illinois has revealed that the attempted extensions of state accountability through revision of the court of claims statutes have been ineffective, and that attempted extensions of the liability of municipalities and quasi-corporations have been trifling. The result has been that the unfortunate victim of a tort committed by an employee or officer of the state is left only with a dubious remedy against the wrongdoer. Since the court of claims under its present policy will not grant awards in tort cases and the governor has indicated that he will adhere to the policy of exclusive jurisdiction of the court of claims, the victim cannot appeal to the legislature. The public quasi-corporation is likewise immune from liability. Here, too, the only redress is a personal suit. Finally, the tort responsibility of municipalities depends upon inconsistent and artificial distinctions between governmental and non-governmental functions.

While the federal government and New York have made considerable advances in community responsibility, much remains to be done. It is obvious that while any proposed reform must indicate with some definiteness the limits of community responsibility, it must also provide sufficient flexibility to allow the administrators to benefit from experience. Whether reform should take the pattern of general provisions for responsibility as exemplified in § 12a of the New York Court of Claims Act, or more detailed and specific provisions as embodied in a draft statute proposed by Professor Edwin M. Borchard is problematical. While the former has the apparent advantage of flexibility and makes possible the development of rules of community liability in the light of cumulative experience, the latter has the advantages of certainty and definiteness and of having its provisions based on the studies of experts. Further, as previous experience in Illinois has indicated, broad and general provisions might enable the courts by the device of strict construction to defeat legislative attempts to extend responsibility.

The major problems in the reform of the present state of the law are:

1. They appear to be based on the view that such a horrible occurrence as a lynching or mob violence either implies fault in protective agencies or, on the theory of equitable distribution of risks, should be borne by the community. Borchard, op. cit. supra note 98, at 97.

142 Ill. L. 1931, p. 454; Ill. State Bar Stats. 1935, c. 38, §§ 540, 541, 543. “They appear to be based on the view that such a horrible occurrence as a lynching or mob violence either implies fault in protective agencies or, on the theory of equitable distribution of risks, should be borne by the community.” Borchard, op. cit. supra note 98, at 97.

143 Ill. State Bar Stats. 1935, c. 24, § 987 (i).


145 N. Y. L. 1929, c. 467, § 12a.


147 Among the other problems of reform, Professor Borchard lists: (1) Should existing statutes dealing with responsibility be left on the statute books or should a “comprehensive
(1) to determine the extent to which the principle of community responsibility is to be adopted in view of the experimental stage of reform and in view of the political and financial difficulties of securing legislative adoption; and (2) to decide upon specific administrative machinery to give practical effect to any reform which is finally adopted.\textsuperscript{48} While France has advanced to the stage in community responsibility in which liability without fault has been imposed in some cases,\textsuperscript{49} the objective of the English and American reform movement has been to achieve state accountability but limit it to the tortious invasions of employees and officers acting within the scope of their employment.\textsuperscript{50} Abolition of the distinction between governmental and non-governmental functions, accomplished by some European countries,\textsuperscript{52} should be achieved by any proposed reform.

The proposed draft statute provides that "the state, and every county, city, municipal corporation, school district, district established by law, and other political subdivision of the state shall be liable" for injuries to property up to $25,000\textsuperscript{52} and for personal injuries and death up to $7,500.\textsuperscript{153} Such injuries must be proximately caused by "the wrongful or negligent act or omission" of an employee or other agency of the state or its subdivisions.\textsuperscript{54} Claimants are defeated by contributory negligence, or when the damage or loss is proximately caused by intoxication or willful conduct of the claimant. The fact that the injury arose out of the conduct of a governmental function, however, is not made a defense.\textsuperscript{155} Because of political expediency and caution dictated by the experimental stage of community responsibility, the draftsman has not only restricted the amount of recovery, but has limited the situations in which a claim against the state can arise.\textsuperscript{156} Hence, injuries to prisoners and National Guardsmen do not give rise to claims. No claims are allowed for injuries arising

\textsuperscript{48} See Borchard, \textit{op. cit. supra} note 126, at 752.

\textsuperscript{49} Takayanagi, \textit{op. cit. supra} note 57, at 292–95; Borchard, Governmental Responsibility in Tort, 28 Col. L. Rev. 577, 604; 28 ibid., 734, 772–75 (1928).

\textsuperscript{50} Borchard, Government Liability in Tort, 34 Yale L. J. 229, 258 (1925).

\textsuperscript{52} See Borchard, \textit{op. cit. supra} note 149.

\textsuperscript{153} \textsection 3.

\textsuperscript{154} \textsection 6.

\textsuperscript{155} \textsection 11.
out of public medical or surgical treatment, assault, excessive force, false arrest, false imprisonment, malicious prosecution, abuse of process, slander, libel, battery, misrepresentation, interference with contractual rights, deceit, or any criminal act. Likewise claims arising from legislative acts or executive orders do not give rise to liability.

It may well be argued that these exceptions to liability are so broad that little substance is left to the proposed extension of responsibility. While such exceptions may be politically expedient, they should be limited as much as possible. Since injuries to National Guardsmen are at present compensated in Illinois,57 there would be no need for this limitation. Likewise the exception to liability with regard to criminal acts should be made more specific, since present statutes declare so many intentional and negligent activities to be criminal that the possible scope of the exception is too broad. In view of the apparent state of political opinion in Illinois, as reflected by the passage in 1935 of a bill intended to extend state responsibility, perhaps legislative approval could be obtained even though some of these exceptions were eliminated. It is to be noted, however, that the proposed statute extends municipal and quasi-corporate liability. Likewise, it must be emphasized that the present policy of the court of claims and the tenor of the governor's veto messages58 may indicate a need for even more exceptions than the draft statute provides.

The draftsman has indicated that a major political and financial difficulty is presented by the limited sources of revenue in the small subdivisions of the state.59 These subdivisions might well object to the imposition of tort liability and defeat the legislative adoption of the proposed statute. The suggested solution is a distribution of this burden of responsibility between the state and the local subdivisions.60 The subdivisions needing assistance would contribute 2 per cent of their gross tax receipts to the state; and the state would assume all liabilities under the act.61 Claims against those local subdivisions whose liability the state had not assumed would be paid out of their local funds.62

The suggested administrative implementation for the assertion and disposition of claims has as its objectives: (1) the maintenance of local autonomy as much as possible by not transferring "from local units to a centralized state board all tort claims, but to leave both the appointing power and some responsibility with the local units, while yet distributing the financial burden in

57 Gayles v. State, 8 Ct. Cl. (III.) 299 (1934); Hayes v. State, 8 Ct. Cl. (III.) 459 (1935).
58 Veto Messages, op. cit. supra note 73, at 31, 90.
59 Borchard, op. cit. supra note 146, at 751-52. The draftsman suggests that subdivisions with a gross tax revenue of less than $250,000 are within this class.
60 The justification for this distribution is that most claims arise in connection with highways, the greatest use of which is not local.
61 To encourage more efficient government, the draftsman suggests that unexpended portions of the contributions should be periodically returned to the subdivision. Borchard, op. cit. supra note 146, at 751-52.
62 § 2.
such a way that the local unit would not bear too great a burden"; and (2) the settlement of claims under $2,500 by administrative bodies and the disposition of claims above $2,500 by the court of claims only upon failure of an attempted settlement by administrative means. This is open to a possible objection. While the settlement of small claims by administrative bodies might be desirable after definite rules of responsibility have been developed, before such rules have been developed such administrative disposition might be erratic.

The draft statute provides for a state administrative board in addition to the court of claims. This board is to supervise and attempt to make uniform the administration of the act. The board is also to hear and adjust all claims of less than $2,500 against the state and against those subdivisions which have not established "a board, council, body, or officer authorized to settle private claims." Claims of less than $2,500 against local subdivisions are to be heard and adjusted by local boards and councils. Where a claimant objects to the adjustment made by a local board, he may, if his claim amounts to more than $2,500, submit it to the court of claims. During the litigation in the court of claims, the state board may settle the claim for less than $2,500.

While the draft statute provides for an appeal to the supreme court of the state, it is clear that under the present constitution of Illinois no such provision for appeal would be constitutional. How to obtain a court of claims, a state board, and local boards which will be independent of political influences presents a more difficult problem than securing a capable judiciary. This problem would be intensified in Illinois by the absence of an appeal to the supreme court. Perhaps the publicizing of the dispositions of claims by the state and local boards would supply at least a partial solution to this problem.

Again to insure political success to the proposed reform, it is suggested that the legislature should establish a "general fund" out of which awards under $1,000 which have been made by the court of claims and the state board shall be automatically paid. The legislature, however, must approve all awards in excess of $1,000. This latter provision for a legislative and executive check on the court of claims and the state board may be politically expedient to facilitate the adoption of the draft statute. Yet the policy of the present governor in Illinois to review the individual awards made by the court of claims might

163 Borchard, op. cit. supra note 146, at 751.
164 § 2.
165 However, awards made by the small units, whose liability the state has assumed, may be reviewed and revised by the state board. § 10 of the draft statute. The draftsman's proposal to have the awards made by all of the local subdivisions subject to the approval of the state board will aid in obtaining uniformity in substantive rules. Likewise, local political influences may thereby be checked.
166 § 9.
167 § 9.
168 See note 74 supra.
169 Awards made by the board or council of the subdivisions whose liability the state has assumed are subject to the same provisions.
170 § 2. This would avoid executive and legislative check on small awards.
171 § 9.
seriously hinder the proper and efficient administration of the act and prevent the development of the desired system of state accountability.

Various supplemental provisions deny the subrogation of insurance companies to the claimants' rights, and provide that a deduction shall be made from the claimant's claim equal to the amount which he has received from insurance companies. Juries are eliminated. Excessive attorneys' fees are discouraged by criminal sanctions. Redress for claims in excess of $25,000 is still to be obtained by legislative appeal. Assignments of claims are prohibited. The state is to pay only its proportionate share of the damage caused by its agent and a joint tortfeasor. Short periods of limitation are established. The exaggeration of a claim or the presentation of false evidence "with intent to defraud" bars the claim. To encourage more efficient public service and yet not to impose too heavy a burden on public employees, the proposed statute provides for governmental redress from employees or officers, but only for "wilful" tortious invasions. While this provision departs from the view taken by the common law, it is in accord with modern justifications for vicarious liability of the private employer.

MANUFACTURERS' LIABILITY—McPHERSON v. BUICK

Cutting across the general problem of protecting the pocketbook of the consumer is the problem of protecting the person of any member of the public, whether consumer, user, or bystander from injuries due to defects in chattels. There have been two distinct judicial approaches to this latter problem: the

173 § 16. 175 § 18. 177 § 7. 179 §§ 5, 8, 14.
181 § 17. It is suggested that employees should not be free from ultimate liability in cases where there is "gross" negligence amounting to reckless conduct.
182 At common law, the agent was liable for negligence in performing his undertaking. See Mechem, Agency §§ 1274-80 (2d ed. 1914).
1 Soule, Consumer Protection, 4 Encyc. Soc. Sci. 282 (1931); Hamilton, Caveat Emptor, 3 Encyc. Soc. Sci. 280 (1930). Organizations such as Consumer's Research and Consumer's Union send informative periodical bulletins to members. In addition, significant attempts are being made to utilize the mass buying power of the consuming public through consumers' cooperatives. Such non-legal means as these go far toward solving this problem.
2 No less than eighty cases in tort alone have appeared in the appellate reports since 1928; in New York alone there have been sixteen cases in this interval. When the cases tried on warranty theory and the high percentage of all such cases that are tried in lower courts or settled out of court are also considered, the practical importance of the problem is clear.