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## Sovereign Immunity: A Framework for Applying Current Missouri Law

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# SOVEREIGN IMMUNITY: A FRAMEWORK FOR APPLYING CURRENT MISSOURI LAW

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## I. INTRODUCTION

The law of sovereign immunity in Missouri has its source in numerous statutes and cases. A cursory examination of these sources reveals a confusing pattern of rules and exceptions which have been the subject of repeated amendments and reinterpretations by both the legislature and the courts. This Comment attempts to present these rules and exceptions in a systematic manner. The objective is to provide a framework for applying current Missouri law of sovereign immunity in tort cases.<sup>1</sup>

## II. PRELIMINARY CONSIDERATIONS

The starting point in this analysis is Section 537.600 of the Missouri Revised Statutes.<sup>2</sup> This statute provides that “such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, . . . shall remain in full force and effect . . .” subject to certain exceptions.<sup>3</sup> Thus, sovereign immunity in Missouri is a statutory-common law

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1. The scope of this comment is limited to the immunity of state and local governmental entities from tort liability under Missouri law in Missouri courts. Questions of whether these entities enjoy sovereign immunity in actions brought under federal law, in federal court or in other state courts are beyond the scope of this comment.

2. MO. REV. STAT. § 537.600 (Supp. 1985).

3. *Id.*

hybrid: its existence is affirmed by statute, yet its definition must be gleaned from pronouncements of the courts. Therefore, in order to apply the doctrine of sovereign immunity in a particular case, one must look to both statutory and common law principles for direction.<sup>4</sup>

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4. MO. REV. STAT. § 537.600 (Supp. 1985) provides:

1. Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment;

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition. In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

2. The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.

This statute represents the legislative response to *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc). In *Jones*, the Missouri Supreme Court joined a growing number of state courts to reject the doctrine of sovereign immunity. See *id.* at 227 n.1 (list of 30 other jurisdictions which had abrogated the doctrine of sovereign immunity prior to *Jones*). The court refused to apply the doctrine in *Jones* and in three other cases decided the same day: *Prewitt v. Parkway School Dist.*, 557 S.W.2d 232 (Mo. 1977) (en banc); *Wheeler v. St. Clair County Hosp. Dist.*, 557 S.W.2d 233 (Mo. 1977) (en banc); and *State ex rel. Racer v. Richardson*, 557 S.W.2d 235 (Mo. 1977) (en banc). With the exception of these four cases, the court's ruling was made prospective in application from August 15, 1978. *Jones*, 557 S.W.2d at

Section 537.600 also indicates the general parameters of the doctrine of sovereign immunity. First, the doctrine applies only in suits against governmental *entities*.<sup>5</sup> As elementary as this may sound, it is a point sometimes missed by practioners, as demonstrated by cases brought against public *officials* in which sovereign immunity defenses are advanced.<sup>6</sup> If the defendant is a public official rather than a public entity, the suit may be barred by official immunity. However, this doctrine is distinct from sovereign immunity in both its application and rationale.<sup>7</sup>

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231. The court settled on this postponed prospective application of the holding “[i]n order that an orderly transition be made, that adequate financial planning take place, that governmental units have time to adjust their practices and that the legislature be afforded an opportunity to consider the subject in general . . . .” *Id.* In the 1978 legislative session, Missouri lawmakers approved Mo. REV. STAT. § 537.600 (1978). This prevented the application of the *Jones* ruling in any other case.

For an explanation of the sources of pre-1977 sovereign immunity law in Missouri, see *O’Dell v. School Dist. of Independence*, 521 S.W.2d 403 (Mo.) (en banc), *cert. denied*, 423 U.S. 865 (1975). Judge Finch’s dissenting opinion in *O’Dell* provided the blueprint for the majority opinion in *Jones*. *Jones*, 557 S.W.2d at 228.

5. See Mo. REV. STAT. § 537.600.1 (Supp. 1985) (referring to “immunity of the public entity”). The question of what constitutes a “public entity” is apparently well settled, as no recent cases discuss this issue. The early cases which considered this question took a broad view of public entities. See, e.g., *Reardon v. St. Louis County*, 36 Mo. 555, 562-63 (1865) (entities “created by the Legislature for the purposes of public policy” enjoy sovereign immunity). Thus, sovereign immunity has been extended to all types of public bodies including not only the state, counties, and municipalities, but also: drainage districts, school boards, county hospitals, state university boards of curators, special road districts, and state agencies. See, e.g., *Kanagawa v. State of Missouri*, 685 S.W.2d 831 (Mo. 1985) (en banc); *Todd v. Curators of Univ. of Mo.*, 347 Mo. 460, 147 S.W.2d 1063 (1941); *Cochran v. Wilson*, 287 Mo. 210, 222, 229 S.W. 1051, 1055 (1921); *Lamar v. Bolivar Special Road Dist.*, 201 S.W. 890 (Mo. 1918); *Murtaugh v. City of St. Louis*, 44 Mo. 479 (1869) (case involving city hospital); *Reardon v. St. Louis County*, 36 Mo. 555 (1865); *Gabbett v. Pike County Memorial Hosp.*, 675 S.W.2d 950 (Mo. Ct. App. 1984); *Arnold v. Worth County Drainage Dist.*, 209 Mo. App. 220, 222, 234 S.W. 349, 350 (1921) (as an arm of the state, a drainage district “is no more liable for negligence than would be the state”).

6. E.g., *Spearman v. University City Pub. School Dist.*, 617 S.W.2d 68, 69 (Mo. 1981) (defendant asserted sovereign immunity as a defense to claims made against public school instructors); *Newson v. City of Kansas City*, 606 S.W.2d 487, 490 (Mo. Ct. App. 1980) (error for trial court to dismiss action against firefighter on grounds of *sovereign* immunity).

7. *Jackson v. Wilson*, 581 S.W.2d 39, 42 (Mo. Ct. App. 1979); see also *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 294-95 (Mo. Ct. App. 1983) (distinguishing the two doctrines); *Newson v. City of Kansas City*, 606 S.W.2d 487, 490 (Mo. Ct. App. 1980) (“The doctrine of sovereign immunity, however, protects only the body politic—the government, itself—from suits in tort and not the conduct of the public official—employee.”).

In the recent case of *Gavan v. Madison Memorial Hosp.*, 700 S.W.2d 124, 127-28 (Mo. Ct. App. 1985), the court makes the following succinct statement of the law

Second, Section 537.600 indicates that sovereign immunity applies only in tort actions where the plaintiff is seeking money damages.<sup>8</sup> Suits for declaratory or injunctive relief are not barred by this doctrine.<sup>9</sup>

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of official immunity in Missouri:

Official immunity, the insulation of a public officer from tort liability depends upon whether the act is discretionary or ministerial; if discretionary, the official is immune, but if ministerial, he is subject to liability for negligent performance. Ministerial duties of public officials are those of a clerical nature performed in obedience to mandate without exercise of judgment and therefore are not immune to suit.

*Id.* (footnote and citation omitted) (citing *Smith v. Lewis*, 669 S.W.2d 558, 563 (Mo. Ct. App. 1983) and *State ex rel. Eli Lilly v. Gaertner*, 619 S.W.2d 761, 765 (Mo. Ct. App. 1981)).

8. As noted above, Mo. REV. STAT. § 537.600 (Supp. 1985) is the basis for sovereign immunity in Missouri, and it “relates only to tort immunity.” *Gavan v. Madison Memorial Hosp.*, 700 S.W.2d 124, 126 (Mo. Ct. App. 1985).

As in other tort actions, sovereign immunity bars actions against state and local governmental entities to recover for property damage allegedly caused by nuisance or negligence. *Page v. Metropolitan St. Louis Sewer Dist.*, 377 S.W.2d 348, 352 (Mo. 1964); *Mattingly v. St. Louis County*, 569 S.W.2d 251, 252 (Mo. Ct. App. 1978). However, if the plaintiff states his claim as an action to recover for an inverse condemnation, i.e. an unconstitutional taking of his property, it will not be barred by sovereign immunity. *Mattingly*, 569 S.W.2d at 252.

Sovereign immunity will not bar contract actions against governmental entities. *V.S. DiCarlo Constr. Co. v. State*, 485 S.W.2d 52, 54 (Mo. 1972) (“[W]hen the state enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by so contracting.”); *Crain v. Missouri State Empl. Retirement Sys.*, 613 S.W.2d 912, 917 (Mo. Ct. App. 1981) (“[W]hen a statute provides a benefit or awards a contract, the requisite waiver of immunity from suit to enforce the benefit or contract is inferred.”).

An additional consideration which should be noted is that statutory provisions granting a governmental entity the power to “sue and be sued” do not abrogate the entity’s immunity to tort liability. *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 186-87 (Mo. 1985) (en banc). Such language indicates that the entity may be sued, for example, by creditors. However, a statute will abrogate tort immunity only if it *explicitly* so states. *Id.*

9. *See, e.g., Regal-Tinneys Grove Special Road Dist. v. Fields*, 552 S.W.2d 719, 722 (Mo. 1977) (en banc) (“A declaratory judgment action provides an appropriate method of determining controversies concerning construction of statutes and powers and duties of governmental agencies thereunder . . .”); *Rowland v. City of St. Louis*, 327 S.W.2d 505 (Mo. Ct. App. 1959) (upholding the issuance of a declaratory judgment against the City of St. Louis and the city’s mayor and license collector).

There are special considerations which apply to the issuance of injunctions against a governmental entity or official. *See, e.g., Albright v. Fisher*, 164 Mo. 56, 64 S.W. 106 (1901) (discussing the issue of separation of powers and denying an injunction against a municipal legislative body); *May Dept. Stores v. County of St. Louis*, 607 S.W.2d 857, 870-71 (Mo. Ct. App. 1980) (examining issues to be considered in grant-

If a case falls within these general parameters, i.e. if it is a tort action for damages against a governmental entity, the defendant is presumed to be immune<sup>10</sup> from liability and from the inconvenience of defending itself in the suit.<sup>11</sup> It is then incumbent on the plaintiff to establish that one of the exceptions to sovereign immunity applies; otherwise a motion to dismiss by the defendant should be sustained.<sup>12</sup>

ing or denying injunctive relief against the County Council of St. Louis County). However, such cases are not subject to dismissal upon a general assertion of sovereign immunity by the defendant. *Cf. Carson v. Sullivan*, 284 Mo. 353, 361, 223 S.W. 571, 574 (1920) (en banc) (state officials are amenable to suits for injunctive relief in Missouri); *see also Fratcher, Sovereign Immunity in Probate Proceedings*, 31 Mo. L. Rev. 127, 131 (1966) (“[A]n injunction against a threatened unlawful seizure of property by state officers usually may be secured without the consent of the state to the maintenance of the suit.”).

10. In *Jones v. State Highway Comm’n*, 557 S.W.2d 225, 230 (Mo. 1977) (en banc), the court held that “henceforth, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity.” This abrogated the longstanding rule to the contrary. *Id.* When the legislature reinstated the doctrine of sovereign immunity, it did so by relying on the common law, as it existed prior to *Jones*. Thus, the rule under Mo. REV. STAT. § 537.600 is now immunity, and liability is the exception. *See Bartley v. Special School Dist.*, 649 S.W.2d 864, 868 (Mo. 1983) (en banc).

11. *State ex rel. Mo. Dept. of Agriculture v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985) (en banc). Because a defendant who is protected by immunity is immune from both liability and from suit, he may challenge the denial of his motion to dismiss immediately by seeking a writ of prohibition against the trial judge. *Id.* at 184.

12. *See State ex rel. Allen v. Barker*, 581 S.W.2d 818, 825 (Mo. 1979). It should be noted that the doctrine of sovereign immunity as established by Sections 537.600 is not the only protection from tort liability which the state enjoys. The Missouri courts also apply the “public duty” rule which protects the government and public officials from liability “for injuries or damages sustained by particular individuals resulting from breach by the officers of a duty owed the general public.” *Berger v. City of Univ. City*, 676 S.W.2d 39, 41 (Mo. Ct. App. 1984); *see also Sherrill v. Wilson*, 653 S.W.2d 661, 663-69 (Mo. 1983) (en banc); *Jamieron v. Dale*, 670 S.W.2d 195, 196-97 (Mo. Ct. App. 1984) (public duty rule applied in cases against public officials).

The public duty rule is conceptually distinct from the doctrine of sovereign immunity: the former prevents the plaintiff from establishing the requisite elements of a tort claim, while the latter doctrine acts as a bar to an otherwise sufficient cause of action. This is illustrated by *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969). In *Massengill*, the Arizona court allowed the defendant to successfully assert the public duty rule as a defense, although the court had previously *rejected* the doctrine of sovereign immunity. *Id.* at 520-21, 456 P.2d at 378-79. (Arizona later rejected the public duty rule. *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982)).

Since both theories shield the government from liability, some courts have concluded that the public duty rule is merely another form of sovereign immunity. *See Adams v. State*, 555 P.2d 235, 241 (Alaska 1976) (“[T]he duty to all, duty to no-one’ doctrine is in reality a form of sovereign immunity . . . .”); *Commerical Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1015 (Fla. 1979) (The “efficacy of [the public duty rule] is dependent on the continuing vitality of the doctrine of

## III. EXCEPTIONS TO SOVEREIGN IMMUNITY

A. *The Common Law Exception: The Governmental—  
Proprietary Distinction*

In the 1869 case of *Murtaugh v. City of St. Louis*,<sup>13</sup> the Missouri Supreme Court determined whether the St. Louis City Hospital could be held liable for the injuries of a non-paying patient who allegedly received negligent care. The court held that the action could not be maintained. The basis for its holding was a rule, adopted from cases in other jurisdictions,<sup>14</sup> which provides that where the

officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise for the public good, and not for private corporate advantage, then the corporation is not liable . . . .<sup>15</sup>

The acts which the *Murtaugh* court described as being for the "private benefit" of a municipal corporation are more commonly referred to as "proprietary" or "corporate" functions.<sup>16</sup> The latter type of municipal acts, those performed "for the public good," are generally called "governmental" func-

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sovereign immunity."'). However, under Missouri law the two doctrines remain distinct. Thus, although one of the exceptions to sovereign immunity discussed in this comment may apply in a particular case, the action may still be barred by the public duty rule.

For example, in *Christine H. v. Derby Liquor Store*, 703 S.W.2d 87 (Mo. Ct. App. 1985), the court upheld the dismissal of tort claims against a police officer and his employer, the City of Kirkwood, on the basis of the public duty rule. Both claims arose from the allegedly negligent omissions of the police officer. One of the appellant's arguments opposing the dismissal of her claim against the city was that since the city had purchased liability insurance, it had waived its sovereign immunity under Mo. REV. STAT. § 71.185 (1978) (this statute is discussed *infra* notes 102-11 and accompanying text). However, the court explained that "before a municipality may be held liable under § 71.185 there must be liability as in cases of other torts, and [because of the public duty rule] the facts pled by appellant do not support tort liability." 703 S.W.2d at 89.

13. 44 Mo. 479 (1869).

14. The court cited cases from New York, Virginia, California, Alabama, Louisiana and Kentucky which applied the rule. *Id.* at 480-81.

15. *Id.* at 480.

16. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 131 (5th ed. 1984); 18 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.23, .24 (3d. ed. 1984).

tions.<sup>17</sup> The distinction drawn by the Missouri Supreme Court in *Murtaugh* is still applied by the Missouri courts: a municipality is not shielded by sovereign immunity in cases arising from the exercise of a proprietary function, but actions involving torts arising from the performance of governmental functions by a municipality will be barred by sovereign immunity—provided none of the statutory exceptions to the doctrine apply.<sup>18</sup>

The exception to sovereign immunity for proprietary acts is thus easily articulated.<sup>19</sup> However, as the Missouri Supreme Court observed in *State ex rel. Allen v. Barker*,<sup>20</sup> “[c]haritably, it has been said that the line between the functions is not clearly defined.”<sup>21</sup> Indeed, the cases in which the distinction has been drawn provide very little guidance on why a particular act should be considered proprietary or governmental, and there is no readily apparent pattern to these decisions.<sup>22</sup> Therefore, as a practical matter, the only way for an attorney to determine with any degree of certainty whether an act is proprietary or governmental is to refer to Missouri cases which have classified the particular act in question.<sup>23</sup>

17. See *supra* note 16; see also *Dallas v. City of St. Louis*, 338 S.W.2d 39, 44 (Mo. 1960); *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 295 (Mo. Ct. App. 1983).

18. See, e.g., *Dallas v. City of St. Louis*, 338 S.W.2d 39, 44 (Mo. 1960); *Larabee v. City of Kansas City*, 697 S.W.2d 177, 179 (Mo. Ct. App. 1985); *Ashlock v. City of Herculaneum*, 670 S.W.2d 131, 132 (Mo. Ct. App. 1984); *Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 295 (Mo. Ct. App. 1983); *Davis v. City of St. Louis*, 612 S.W.2d 812, 814 (Mo. Ct. App. 1981).

19. See *Dallas v. City of St. Louis*, 338 S.W.2d 39, 41 (Mo. 1960) (“It is easy to state the general rule . . . . The great difficulty is in the application of the rule to particular facts.”).

20. 581 S.W.2d 818 (Mo. 1979).

21. *Id.* at 824.

22. In reinstating the pre-1977 common law version of sovereign immunity in Missouri, MO. REV. STAT. § 537.600 (Supp. 1985) probably prolonged the existence of this exception. The governmental-proprietary distinction has been assailed as “nebulous” in *Gabbett v. Pike County Memorial Hosp.*, 675 S.W.2d 950, 951 (Mo. Ct. App. 1984), and *Sanchez v. Missouri Div. of Youth Servs.*, 672 S.W.2d 164, 165 (Mo. Ct. App. 1984). It also has been criticized for causing “the anomolous situation that a plaintiff’s right of recovery for the same tortious conduct depended on whether the tortfeasor was a municipality or a political subdivision such as a county . . . .” *McConnell v. St. Louis County*, 655 S.W.2d 654, 656 (Mo. Ct. App. 1983). Given the judicial hostility toward this exception, it is likely that it would have quietly slipped into extinction had the legislature not, perhaps inadvertently, assured its continued viability by freezing the common law of sovereign immunity at its pre-*Jones* stage of development.

23. Determinations of what is proprietary and what is governmental vary from jurisdiction to jurisdiction. Thus, cases from other states do not necessarily indicate how the Missouri courts will categorize a particular act. For example, the Missouri Courts have held that the operation of a city hospital is a governmental act. *Murtaugh v. City of St. Louis*, 44 Mo. 479 (1869). However, the Kansas Supreme Court ruled that this act is proprietary in nature. See *Stolp v. City of Arkansas City*, 180 Kan.



Although some generalizations can be stated about the types of acts for which a municipality may be held liable, there are problems in applying these rules to the facts of a given case. For example, the Missouri courts have consistently held that municipalities are liable for injuries caused by the negligent construction, repair, and maintenance of their streets.<sup>24</sup> On the other hand, directing the flow of traffic, which includes determining where to place traffic signs, is considered a governmental function, and thus protected by sovereign immunity.<sup>25</sup> The overlap between these two rules is illustrated by two cases: *Watson v. Kansas City*<sup>26</sup> and *German v. Kansas City*.<sup>27</sup>

In *Watson*, the plaintiff was injured when she drove through an unmarked T intersection and down the steep, rocky embankment which lay beyond it.<sup>28</sup> The Missouri Supreme Court held that Kansas City was not liable for failing to place warning signs at the accident site.<sup>29</sup> The court remarked that "there can be no reasonable argument concerning the validity of the proposition that the placing (or failure to place) of a sign . . . to warn that the intersection in question was a T intersection is a form of traffic regulation, direction, or control, and hence a governmental function."<sup>30</sup>

In the *German* case, however, the supreme court ruled that the city was *not* protected by sovereign immunity in a case stemming from the failure to adequately mark a stretch of highway as two-way.<sup>31</sup> The roadway in *German* was under construction at the time of the accident, and on the basis of this fact, the court distinguished the case from *Watson*.<sup>32</sup>

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197, 203-04, 303 P.2d 123, 128 (1956). Conversely, the Kansas courts hold that the operation of city parks is a governmental function, while the Missouri courts classify this as a proprietary act. Compare *Harper v. City of Topeka*, 92 Kan. 11, 15, 139 P. 1018, 1020 (1914), with *Teaney v. City of St. Joseph*, 520 S.W.2d 705, 708 (Mo. Ct. App. 1975).

24. *Myers v. City of Palmyra*, 355 S.W.2d 17, 18-19 (Mo. 1962). As the *Meyers* court noted, some Missouri cases characterize this function as proprietary, others as a governmental function (which is an exception to the general rule that a municipality is immune for tortious performance of governmental acts), and still others use the term "ministerial" to describe this function and explain why a city has no immunity in cases concerning this duty. *Id.* Despite this confusion over terminology, it is clear that "to this activity the doctrine of immunity from liability for torts does not apply." *Id.* at 19.

25. *Watson v. Kansas City*, 499 S.W.2d 515 (Mo. 1973).

26. *Id.*

27. 512 S.W.2d 135 (Mo. 1974) (en banc).

28. *Watson*, 499 S.W.2d at 516.

29. *Id.* at 517.

30. *Id.* at 518.

31. *German*, 512 S.W.2d at 146.

32. *Id.* at 144. In his concurring opinion, Judge Seiler revealed that he was "unable to perceive any real distinction" between the *German* and *Watson* cases, but in his judgment, "the view adopted in the present case is the more enlightened and sensible one . . ." *Id.* at 148. Judge Holman, the author of the *Watson* opinion also failed to see a distinction between the two cases, and dissented. *Id.* at 149.

*Langhammer v. City of Mexico*<sup>33</sup> provides another illustration of the overlap between the duty to maintain streets and a governmental function. In this case, Mrs. Langhammer was injured when the road surface in the city dump gave way and "she was precipitated into the glowing embers beneath."<sup>34</sup> There is considerable authority that maintaining a dump is a governmental function, as the court noted.<sup>35</sup> However, the court held that

a jury could reasonably find that the 'circles,' 'loops' and leveled areas [through the dump] constituted a city maintained 'way' with consequent liability for their negligent maintenance even though they came into existence and were maintained as a part of the city's exercise of the governmental function of operating a city dump.<sup>36</sup>

The courts have also had difficulty drawing a distinction between a city's proprietary and governmental acts in cases involving street cleaning. Early cases held that "the keeping of streets clean and free from filth and noxious refuse is a governmental function."<sup>37</sup> However, in *Myers v. City of Palmyra*,<sup>38</sup> the supreme court concluded that the objective of removing snow and ice from the streets is to improve the flow of traffic—a proprietary function. On the basis of the *Myers* case, the Missouri Court of Appeals in *Davis v. City of St. Louis*<sup>39</sup> held that cleaning the streets to remove cinders is also a proprietary act, explaining that "[s]treet sweeping is primarily an act conducted by municipalities to maintain our thoroughfares open for the unrestricted flow of traffic."<sup>40</sup>

One area where the courts have generally avoided inconsistency is in cases concerning parks. As explained in *Taney v. City of St. Joseph*,<sup>41</sup> "[w]hile there is a division of authority among the states as to whether or not maintaining a park falls under the governmental or proprietary function

33. 327 S.W.2d 831 (Mo. 1959).

34. *Id.* at 834.

35. *Id.*

36. *Id.* at 836.

37. *Hayes v. City of Kansas City*, 362 Mo. 368, 371, 241 S.W.2d 888, 890 (1951) (citing *Cassidy v. City of St. Joseph*, 247 Mo. 197, 152 S.W. 306 (1912)); *Berhmann v. City of St. Louis*, 273 Mo. 578, 201 S.W. 547, 547 (1918).

38. 355 S.W.2d 17, 20-21 (Mo. 1962).

39. 612 S.W.2d 812 (Mo. Ct. App. 1981).

40. *Id.* at 815; *accord Ashlock v. City of Herculaneum*, 670 S.W.2d 131 (Mo. Ct. App. 1984). It can be argued that *Davis* and *Ashlock* conflict with Mo. REV. STAT. § 537.600 (Supp. 1985). The statute provides that the law of sovereign immunity is the law which "existed at common law in this state prior to September 12, 1977." In other words, the statute freezes the common law of sovereign immunity at its pre-*Jones* stage of development. However, the holdings of *Davis* and *Ashlock* are inconsistent with the pre-*Jones* common law. See *supra* note 37 and accompanying text.

41. 520 S.W.2d 705 (Mo. Ct. App. 1975).

of the city, Missouri has long held that it falls within the proprietary function."<sup>42</sup> However, in two cases involving violence by mobs and individuals in parks, sovereign immunity was successfully raised as a bar to the actions.<sup>43</sup> In these cases, the failure of the city to maintain order was held to be a governmental function, since the city's actions were an exercise of its police power.<sup>44</sup>

The Missouri courts are also consistent in categorizing the operation of city hospitals<sup>45</sup> and police departments<sup>46</sup> as governmental functions. The Missouri courts are equally consistent in categorizing actions arising from the construction, maintenance, and operation of sewers<sup>47</sup> and city owned utility companies<sup>48</sup> as proprietary acts.

In addition to the difficulty of determining which acts are governmental and which are proprietary, there is also confusion over what governmental entities are capable of performing both types of functions. Much of this confusion among the Missouri courts in recent years can be traced to the supreme court's opinion in *State ex rel. Allen v. Barker*.<sup>49</sup> In *Barker*, the court concluded that the governmental-proprietary distinction "is still viable and must be applied."<sup>50</sup> The court then noted that it knew of no decisions which categorized the particular function at issue in the case—the operation of a radio station by a school district.<sup>51</sup> The court held that the trial court's dismissal of the action against the school district on the basis of sovereign immunity was not an abuse of discretion. However, it added that the plaintiff should be allowed to amend the petition "to aver sufficient facts to bring the cause within the [proprietary function] exception to the general doctrine of immunity."<sup>52</sup>

The Missouri Courts of Appeals, not surprisingly, interpreted *Barker* as indicating that school districts were capable of performing proprietary func-

42. *Id.* at 708.

43. See *Wasserman v. Kansas City*, 471 S.W.2d 199 (Mo. 1971) (en banc); *Healy v. Kansas City*, 277 Mo. 619, 211 S.W. 59 (1919).

44. *Wasserman v. Kansas City*, 471 S.W.2d 199, 201-02 (Mo. 1971) (en banc); *Healy v. Kansas City*, 277 Mo. 619, 626-27, 211 S.W. 59, 61 (1919).

45. See *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 186 (Mo. 1985).

46. See *Ozark Silver Exchange v. City of Rolla*, 664 S.W.2d 50, 51 (Mo. Ct. App. 1984).

47. See *St. Joseph Light v. Kaw Valley Tunneling*, 589 S.W.2d 260, 266-67 (Mo. 1979) (en banc).

48. See *Lockhart v. Kansas City*, 351 Mo. 1218, 1221-22, 175 S.W.2d 814, 815-16 (Mo. 1944).

49. 581 S.W.2d 818 (Mo. 1979) (en banc).

50. *Id.* at 825.

51. *Id.*

52. *Id.*

tions.<sup>53</sup> This conclusion is clearly implied by the case, although the court did not discuss this point. Since earlier cases had rejected the application of the governmental-proprietary distinction in all cases except those against municipalities, *Barker's* apparent extension of the distinction was very significant.<sup>54</sup>

The courts of appeals have dutifully followed this interpretation of *Barker* and expanded the application of the governmental-proprietary distinction despite the difficulties involved.<sup>55</sup> It now appears, however, that the supreme court has discovered the full import of its opinion and has resolved to curtail its application. There are indications that, notwithstanding *Barker*, the court will continue to apply the governmental-proprietary distinction only in cases against municipalities. This retreat from *Barker* is evident in two recent supreme court cases: *State ex rel. New Liberty Hospital v. Pratt*<sup>56</sup> and *State ex rel. Missouri Dept. of Agriculture v. McHenry*.<sup>57</sup>

In *Pratt*, the court stated that "[t]he traditional rule . . . permits the application of the governmental-proprietary distinction (and the preclusion of immunity in the latter circumstance) only as to municipalities."<sup>58</sup> In a footnote, the court explained that it is cognizant of the interpretations of *Barker* arrived at by the courts of appeals. However, it refused to affirm either the "existence or the propriety of such a deviation from the traditional rule."<sup>59</sup> But in *McHenry*, which was handed down on the same day, the court stated unequivocally (although also in a footnote), "A school district enjoys sovereign immunity, and there is no need to invoke the proprietary-governmental analysis."<sup>60</sup>

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53. See *Allen v. Salina Broadcasting*, 630 S.W.2d 225, 228 (Mo. Ct. App. 1982); *Johnson v. Carthell*, 631 S.W.2d 923, 926 (Mo. Ct. App. 1982); *Fowler v. Board of Regents*, 637 S.W.2d 352, 353 (Mo. Ct. App. 1982); see also *Gabbett v. Pike County Memorial Hosp.*, 675 S.W.2d 950, 951 (Mo. Ct. App. 1984) (stating that the governmental-proprietary distinction applies to municipalities and school districts, but not citing *State ex rel. Allen v. Barker*, 581 S.W.2d 818 (Mo. 1979) (en banc)).

54. See *McConnell v. St. Louis County*, 655 S.W.2d 654, 655-56 (Mo. Ct. App. 1983). *McConnell* notes the Missouri Courts of Appeals interpretation of *Barker*, and criticizes the *Barker* case for ignoring the line of pre-*Jones* cases which held that the governmental-proprietary distinction was applicable only to municipalities. *Id.* at 656. The *McConnell* case also points out that Mo. REV. STAT. § 537.600 (1978) reinstated sovereign immunity as it existed prior to *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977). *McConnell*, 655 S.W.2d at 656. On this basis, the *McConnell* court rejected the suggestion that it extend the governmental-proprietary distinction to a situation not indicated by the pre-*Jones* cases. *Id.*

55. See *Allen v. Salina Broadcasting*, 630 S.W.2d 225, 227 (Mo. Ct. App. 1982) (describing the difficulty of applying this distinction).

56. 687 S.W.2d 184 (Mo. 1985) (en banc).

57. 687 S.W.2d 178 (Mo. 1985) (en banc).

58. *Pratt*, 687 S.W.2d at 186.

59. *Id.* at 186 n.1.

60. *McHenry*, 687 S.W.2d at 182 n.5.

Thus, *McHenry* and *Pratt* indicate that in the future the supreme court will not uphold the application of the governmental-proprietary distinction in cases against school districts. It should be noted, however, that the language from these cases which is cited above is clearly *dicta*.<sup>61</sup> Nevertheless, these comments are a good indication of the court's thinking on this topic.

This much can be said with certainty: the governmental-proprietary distinction is applicable to municipalities and, with the exception of school districts, it is clearly inapplicable to cases against other public entities. The remaining question which must be addressed in connection with this exception is: what constitutes a municipality?

As the Missouri Supreme Court recently stated in *State ex rel. St. Louis Housing Authority v. Gaertner*,<sup>62</sup> "the term 'municipality' may have different meanings in different contexts."<sup>63</sup> One approach in applying the governmental-proprietary distinction is to ask: What powers has the legislature given the entity? For example, in *St. Louis Housing Authority*, the court noted that "by statute the Housing Authority is granted only power to exercise 'public and essential governmental functions.'"<sup>64</sup> Thus, although the Housing Authority is a "municipality" for some purposes,<sup>65</sup> it is incapable of performing a proprietary function.

The governmental-proprietary distinction provides the basis for the only common law exception to the general rule of sovereign immunity. There are no equitable exceptions to the doctrine.<sup>66</sup> This rule has repeatedly been upheld, even in cases where it was conceded by the court that application of the doctrine would result in injustice to the plaintiff.<sup>67</sup>

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61. Neither case was against a school district defendant, and the discussion of this issue was not a factor in the outcome of either case. Moreover, both cases relegated their comments, for the most part, to footnotes, another indication that this topic was not central to the court's holdings.

62. 695 S.W.2d 461 (Mo. 1985).

63. *Id.* at 462.

64. *Id.*

65. In addition to applying the governmental-proprietary distinction, the court also evaluated the case under MO. REV. STAT. § 71.185 (1978). This statute, discussed *infra* at notes 104-10 and accompanying text, provides an exception to sovereign immunity in cases against municipalities which are covered by liability insurance. Like the common law exception, this statute applies only to municipalities. The court noted that the St. Louis Housing Authority, the defendant, was held to be a municipality for purposes of cooperation agreements in *St. Louis Housing Authority v. City of St. Louis*, 361 Mo. 1170, 239 S.W.2d 289 (1951) (en banc). *Gaertner*, 695 S.W.2d at 462. The court concluded that in sovereign immunity contexts "municipality" should be construed narrowly. *Gaertner*, 695 S.W.2d at 463. Thus, it found § 71.185 to be inapplicable to the defendant. 695 S.W.2d 460, 462-63.

66. *State ex rel. New Liberty v. Pratt*, 687 S.W.2d 184, 187 (Mo. 1985).

67. See *id.* As the court noted in *Pratt*, "in light of the legislature's reinstatement of sovereign immunity, the question of fairness has been definitively removed from legitimate consideration" in applying the doctrine. *Id.*

If a case for damages against a public entity is not removed from the general rule of immunity by the proprietary function exception, it may still meet the requirements of a statutory exception to the doctrine. The inter-relationship between the common law and statutory exceptions to sovereign immunity was explained in *Delmain v. Meramec Valley R-III School District*.<sup>68</sup> In *Delmain*, the court noted that if plaintiffs allege facts which bring the defendant within one of the statutory exceptions to sovereign immunity, it is not necessary to also allege facts to bring him within the common law proprietary function exception. In such a case, the court explained, the failure to allege that the defendant was acting in a proprietary capacity is not grounds for dismissal.<sup>69</sup>

### B. *Statutory Exceptions: Operations of Motor Vehicles and Dangerous Conditions of Public Property*

There are several statutory exceptions to sovereign immunity. Among these, Missouri Revised Statutes Section 537.600 has created the most confusing and perhaps most surprising amount of caselaw. Fortunately, the legislature's amendments to Section 537.600, which became effective September 28, 1985, overrule much of this caselaw.<sup>70</sup> The statute, as amended, provides two important exceptions to the doctrine of sovereign immunity: Subsection 1.(1) waives immunity in actions resulting from the negligent operation of motorized vehicles by public employees acting within the course of their employment and Subsection 1.(2) creates a limited exception for injuries caused by dangerous conditions of public property.<sup>71</sup>

Although Section 537.600 as originally adopted contained most of the language found in the current statute,<sup>72</sup> it lacked a provision now found in

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68. 671 S.W.2d 415 (Mo. Ct. App. 1984).

69. *Id.* at 417. In addition to establishing that an exception to sovereign immunity applies, a plaintiff in a tort case against a municipality may also have to comply with the statutory notice of claim requirements. These statutes apply in actions "on account of any injuries growing out of any defect or unsafe condition of or on any bridge, boulevard, street, sidewalk or thoroughfare, in said city." MO. REV. STAT. §§ 77.600 (3rd class cities), 79.480 (4th class cities), 81.060 (special charter cities and towns), 82.210 (constitutional charter cities) (1978). They provide that such an action may not be maintained unless the plaintiff notifies the mayor in writing, within ninety days of the injury, and describes the place, time, character and circumstances of the injury and states his intention to claim damages.

70. MO. REV. STAT. § 537.600 (Supp. 1985).

71. For the full text of this provision, see *supra* note 4.

72. The original version of these subsections provided an express waiver of sovereign immunity for:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course

Subsection 2. This amendment stipulates that the motor vehicle and dangerous condition of property exceptions are "absolute waivers of sovereign immunity in all cases within such situations . . . whether or not the public entity is covered by a liability insurance for tort."<sup>73</sup>

To anyone who is unfamiliar with the pre-1985 interpretations of Section 537.600, its amendment probably seems superfluous. Most of these observers would probably conclude that the statute in its original form created two exceptions that were absolute and unrelated to insurance coverage.<sup>74</sup>

However, in 1983, the Missouri Supreme Court concluded that the original version of Section 537.600 must be interpreted *in pari materia* with Section 537.610.<sup>75</sup> Through a somewhat bewildering reasoning process, the court determined, in the case of *Bartley v. Special School District*,<sup>76</sup> that the motor vehicle and dangerous condition of property exceptions applied only where the public entity had procured liability insurance.<sup>77</sup> Thus, under this interpretation, a public entity could avoid liability in these circumstances by simply failing to procure liability insurance.<sup>78</sup>

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of their employment;

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

MO. REV. STAT. § 537.600 (1978) (amended 1985). Note that the essential language defining the exceptions has remained unchanged.

73. *Id.* § 537.600.2. (Supp. 1985).

74. *See Bartley v. Special School Dist.*, 649 S.W.2d 864, 870-74 (Mo. 1983) (Wasserstrom, Special Judge, dissenting).

75. *Id.* at 867 (majority opinion).

76. *Id.*

77. *Id.* at 870. The courts of appeal were reluctant to apply this holding. *See, e.g., Brown v. Green County*, 677 S.W.2d 432, 434 (Mo. Ct. App. 1984) ("While it plainly appears that plaintiff's petition states a cause of action under § 537.600(2), because of the recent opinion in *Bartley* . . . we are constrained to conclude otherwise."); *Hohimer v. Missouri Highway and Transp. Comm'n*, 659 S.W.2d 521, 522 (Mo. Ct. App. 1983) ("This writer agrees with the analysis of legislative intent set forth in the dissent of Wasserstrom, Sp. J., in the *Bartley* case . . .").

78. For example, in *Sanchez v. Missouri Youth Servs.*, 672 S.W.2d 164, 165 (Mo. Ct. App. 1984), the plaintiff "did not, and apparently in good faith could not, allege defendant possessed liability insurance." Thus, she could not bring her case within *Bartley's* interpretation of the dangerous condition of property exception, even though she had been struck in the head by a sign which fell from the defendant's building. As a result, the plaintiff in this case, a sixteen month old child who suffered a fractured skull in the accident, was denied recovery because of the doctrine of sovereign immunity.

Although it can be argued that this somewhat incongruous result did not reflect the legislature's intention, it was not until 1985 that Missouri lawmakers took the opportunity to restate Section 537.600.<sup>79</sup> It should be noted however, that an earlier legislative pronouncement, in an amendment to Section 34.260,<sup>80</sup> may have also been intended to overrule *Bartley*.<sup>81</sup> This earlier amendment was passed in 1983.<sup>82</sup> Thus, it may be significant for persons bringing cases arising from alleged tortious acts which occurred between 1983 and the effective date of the 1985 amendment to Section 537.600.

To date, only one reported case has considered this possible interpretation of the amendments to Section 34.260. In this case, *State ex rel. Mis-*

79. MO. REV. STAT. § 537.600 (Supp. 1985).

80. *Id.* § 34.260 (Supp. 1984).

81. See Barvick, *Sovereign Immunity—A Corpse That Will Not Stay Down*, 41 J. MO. BAR 293 (1985) (Barvick concludes that Section 31.260 may have overruled *Bartley*). But see Venker, *Sovereign Immunity in Missouri: A Different Perspective on § 34.260*, 42 J. MO. BAR 81 (1986) (Venker concludes that such an interpretation would violate the Missouri Constitution).

82. The effective date of the amended statute was September 28, 1983. As amended it provides:

The commissioner of administration may procure on the basis of competitive bids under the provisions of this chapter, motor vehicle, aircraft, and marine liability insurance covering the operating of state-controlled motor vehicles, aircraft, and marine vessels by state employees, members of the Missouri national guard, or agents in the course of their employment, military duties, or the scope of their agency, or for dangerous conditions of property as defined in section 537.600, RSMo; provided, however that in lieu of procuring insurance to cover such risks, the commissioner may determine that the state shall self-insure against all or any portion of such risks. Each department and agency of state government coming within the provisions of sections 34.260 to 34.275 shall provide the commissioner with such information regarding the risks to be insured as he deems necessary. Sections 34.260 to 34.275 shall not apply to the departments and agencies which on September 28, 1973, provided motor vehicle liability insurance for their employees who operate state-controlled motor vehicles, aircraft, or marine vessels in the course of their employment, military duties, or scope of their agency. *The procurement of liability insurance or the adoption of a plan of self-insurance by the commissioner of administration shall not limit the express waiver of sovereign immunity in all cases within such situations specified therein whether or not the public entity was functioning in a governmental or proprietary capacity or whether or not the public entity is: (1) covered by liability insurance or a self-insurance plan or (2) uninsured. In the other situations specified in this section, and in such other situations of tort liability for which insurance or a self-insurance plan is obtained or provided, sovereign immunity is waived to the maximum amount of, and for the purposes covered by, such policy of insurance or self-insurance plan, provided that sovereign immunity in instances other than those specified in subdivisions (1) and (2) of section 537.600, RSMo, shall be retained in the event of [sic] the public entity elects not to procure insurance or to implement a self-insurance plan under the provisions of section 537.620 to 537.650 RSMo.*

Mo. REV. STAT. § 34.260 (Supp. 1984) (emphasis added).



*souri Highway and Transportation Commission v. Appelquist*,<sup>83</sup> the Missouri Court of Appeals, Southern District, agreed that it was possible to read the new Section 34.260 as “an unconditional waiver of sovereign immunity in the instances specified in subsections ‘(1)’ and ‘(2)’ of § 537.600 RSMo 1978.”<sup>84</sup> However, the court also pointed out that the “mysteriously worded and difficult to fathom”<sup>85</sup> language of the amendment conflicts with the clear statement in another statute<sup>86</sup> that Section 34.260 was not intended to waive or abrogate the state’s sovereign immunity.<sup>87</sup>

The court declined to resolve this conflict, although it suggested that the amendments to Section 34.260 may have repealed the earlier inconsistent statute by implication.<sup>88</sup> The court was able to avoid ruling on this issue since the auto collision which gave rise to the plaintiff’s cause of action occurred before the effective date of the amended statute. The court found that the statute does not operate retroactively, and thus was not applicable in the case at hand.<sup>89</sup>

Whatever the effect of Section 34.260 on torts committed between 1983 and 1985, it is now clear that, at least for torts committed after September 28, 1985, the dangerous condition of property and motor vehicle exceptions apply regardless of insurance coverage.<sup>90</sup> Aside from this issue, there has been little litigation over the parameters of the motor vehicle exception.<sup>91</sup> The dangerous condition of property exception, on the other hand, has spawned several appellate arguments over its exact meaning.<sup>92</sup>

83. 698 S.W.2d 883 (Mo. Ct. App. 1985).

84. *Id.* at 894.

85. *Id.*

86. *Id.* The court was referring to MO. REV. STAT. § 34.275 (Supp. 1978).

87. MO. REV. STAT. § 34.275 (Supp. 1978) provides: “Nothing in sections 34.260 to 34.275 is intended to nor shall it be construed as a waiver of sovereign immunity or the acknowledgement or creation of any liability on the part of the state for personal injury, death or property.”

88. 698 S.W.2d at 894.

89. *Id.* at 894-95.

90. *See* MO. REV. STAT. § 537.600 (Supp. 1985). It is unclear, however, whether the amount of liability under these exceptions is limited by Section 537.610. For a discussion of this issue, *see infra* notes 112-37 and accompanying text.

91. However, in one case against a school district and a school bus driver, the plaintiff argued that the actions of the driver (who allegedly participated in a fight between his passengers) fell within this exception. *Johnson v. Carthell*, 631 S.W.2d 923 (Mo. Ct. App. 1982). The court noted that there were no cases construing the phrase “operation of motor vehicles” as it is used in § 537.600(1). Nevertheless, after examining cases construing the similar language of MO. REV. STAT. § 304.010 (1978), the court concluded that the “operation of a motor vehicle includes nearly any activity that deals specifically with the motor vehicle.” 631 S.W.2d at 927. The connection between the defendant’s actions and the bus arose only because the fight occurred on the bus. Therefore, his actions “were not part of the ‘operation’ of a vehicle” and the case did not come within the exception to sovereign immunity. *Id.*

92. *E.g.*, *Kanagawa v. State*, 685 S.W.2d 831 (Mo. 1985); *Delmain v. Meramec*

Three cases which interpreted the dangerous condition of property exception concerned criminal acts by third parties.<sup>93</sup> Public property was involved in these cases, but only in a tangential way. For example, in *Kanagawa v. State*,<sup>94</sup> the plaintiff was injured by a convict who escaped from a state penal institution. The plaintiff contended that the circumstances at the facility which led to the prisoner's escape constituted a dangerous condition of public property under Section 537.610.<sup>95</sup> The court, however, rejected this argument explaining that the dangerous condition of property exception should be construed narrowly, and that it refers only to "a defect in the physical condition of public property."<sup>96</sup> The court concluded that the appellant's allegations were insufficient to fit within this narrow construction. The court added that "the facts alleged demonstrate beyond doubt that the escaped inmate, and not the condition of the state's property, caused appellant's injuries."<sup>97</sup>

Similarly, in *Twente v. Ellis Fischel State Cancer Hospital*,<sup>98</sup> the Missouri Court of Appeals rejected the plaintiff's contention that her case fell within the dangerous condition of property exception. In *Twente*, the plaintiff alleged that she had been sexually assaulted on the defendant's parking lot. She maintained that lack of supervision of the parking lot was the dangerous condition of the defendant's property which resulted in her injuries.<sup>99</sup> The court, however, denied the plaintiff recovery and stated that "dangerous condition" as used in Section 537.600 "refers exclusively to some physical condition upon the property and not other 'conditions.'"<sup>100</sup>

*Kanagawa* and *Twente* illustrate the Missouri courts' narrow reading of the dangerous condition of property exception. To come within this exception, the plaintiff's injuries must be the direct result of the condition of the public property. If the tortious acts of third parties intervene in the cause of the injury, application of this exception may be precluded.

### C. Statutory Exceptions: Insurance Coverage

The final consideration in determining whether the general rule of immunity applies in an action against a public entity is whether the entity has

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Valley R-III School Dist., 671 S.W.2d 415 (Mo. Ct. App. 1984) (holding that "property" as used in Mo. REV. STAT. § 537.600 refers to both real and personal property); *Twente v. Ellis Fischel State Cancer Hosp.*, 665 S.W.2d 2 (Mo. Ct. App. 1983); *Bates v. State*, 664 S.W.2d 563 (Mo. Ct. App. 1983).

93. *Kanagawa v. State*, 685 S.W.2d 831 (Mo. 1985); *Twente v. Ellis Fischel State Cancer Hosp.*, 665 S.W.2d 2 (Mo. Ct. App. 1983); *Bates v. State*, 664 S.W.2d 563 (Mo. Ct. App. 1983).

94. 685 S.W.2d 831 (Mo. 1985).

95. *Id.* at 835. Specifically, the plaintiff alleged that the fences were inadequate and a gate was left unlocked at the prison. *Id.*

96. *Id.*

97. *Id.*

98. 665 S.W.2d 2 (Mo. Ct. App. 1983).

99. *Id.* at 5.

100. *Id.* at 12.

procured insurance. As noted above, insurance coverage is no longer a prerequisite for applying the exceptions established by Section 537.600.<sup>101</sup> Insurance coverage, however, remains relevant to the application of sovereign immunity because of Sections 71.185<sup>102</sup> and 537.610<sup>103</sup> of the Missouri Revised Statutes.

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101. See *supra* notes 70-90 and accompanying text.

102. MO. REV. STAT. § 71.185 (1978) provides:

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.

103. MO. REV. STAT. § 537.610 (1978) provides:

1. The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed eight hundred thousand dollars for all claims arising out of a single occurrence and shall not exceed one hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workmen's compensation law, chapter 287, RSMo, and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.

2. The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650, shall not exceed eight hundred thousand dollars for all claims arising out of a single accident or occurrence and shall not exceed one hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workmen's compensation law, chapter 287, RSMo.

3. No award for damages on any claim against a public entity within the scope of sections 537.600 to 537.650, shall include punitive or exemplary damages.

4. If the amount awarded to or settled upon multiple claimants exceeds eight hundred thousand dollars, any party may apply to any circuit court to apportion to each claimant his proper share of the total amount limited by subsection 1 of this section. The share apportioned to each claimant shall

As explained below, Section 71.185 clearly provides that a waiver of sovereign immunity will result from the purchase of liability insurance by a municipality.<sup>104</sup> Section 537.610 may allow for a similar waiver of sovereign immunity in cases involving municipalities as well as other public entities.<sup>105</sup> However, as a result of the legislature's failure to clarify this statute at the time Section 537.600 was amended,<sup>106</sup> the meaning of Section 537.610 is now uncertain. The courts have not yet had the opportunity to rule on this issue, but in light of the amendments to Section 537.600, they should find that Section 537.610 provides for a waiver of sovereign immunity as a result of the purchase of insurance.<sup>107</sup>

Under Section 71.185 municipalities that purchase liability insurance waive their immunity from tort claims arising from the exercise of governmental functions. The liability for such torts is limited to "the extent of the insurance so carried."<sup>108</sup> Thus, to bring his case within this exception, a plaintiff must plead and prove<sup>109</sup> that the defendant is a municipality within the meaning of Section 71.185,<sup>110</sup> and that the defendant was covered by liability insurance for the exercise of the governmental function which caused the plaintiff's injuries.<sup>111</sup>

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be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for claims arising out of the accident or occurrence, but the share shall not exceed one hundred thousand dollars.

104. See *infra* notes 108-11 and accompanying text.

105. MO. REV. STAT. § 537.610.1 (1978) pertains to "tort claims made against the state or the political subdivision [of this state]." Section 537.610.2 applies to "[t]he liability of the state and its public entities." Thus, this statute is applicable to all governmental units within the state of Missouri, including municipalities and the state itself. If this statute is indeed found to create a waiver by insurance, (as this comment recommends, see *infra* notes 130-37 and accompanying text) it would have the effect of superseding Section 71.185. Note that avoiding this result was one of the majority's reasons for refusing to find a waiver by insurance in Section 537.610 in the *Bartley* case. See *Bartley v. Special School Dist.*, 649 S.W.2d 864, 869 (Mo. 1983) (en banc).

106. See *supra* notes 70-90 and accompanying text for a discussion of the amendments to MO. REV. STAT. § 537.600.

107. See *infra* notes 130-37 and accompanying text.

108. MO. REV. STAT. § 71.185 (1978).

109. The plaintiff must include in his petition affirmative allegations asserting that Section 71.185 applies, in order to bring his case within this exception to sovereign immunity. See *Newson v. City of Kansas City*, 606 S.W.2d 487 (Mo. Ct. App. 1980).

110. See *supra* note 65 (discussing the interpretation of "municipality" under Section 71.185).

111. It should be noted that if the case involves a proprietary function rather than a governmental function, Section 71.185 does not apply. However, if that is the case, the common law proprietary function exception will prevent sovereign immunity from barring the action. See *supra* notes 11-42 and accompanying text.

As noted above, unlike Section 71.185, the meaning of Section 537.610<sup>112</sup> is not entirely clear. This section states that the commissioner of administration and the governing body of each political subdivision of Missouri have the authority to purchase liability insurance. This section also recites limits to the tort liability of the state, its political subdivisions, and its public entities, and provides that “[s]overeign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by” their insurance policies or self-insurance plans.<sup>113</sup>

As explained in the foregoing sections of this Comment, *Bartley*<sup>114</sup> held that this statute merely modifies Section 537.600. According to the *Bartley* case, the purchase of liability insurance under this section results in a waiver of sovereign immunity *only* where the motor vehicle or dangerous condition of property exceptions of Section 537.600 also apply. However, the 1985 amendment to Section 537.600 makes it clear that the motor vehicle and dangerous condition of property exceptions now stand alone, i.e., they may be invoked regardless of insurance coverage.<sup>115</sup> Thus, there is no question that to some extent, *Bartley* has been overruled. Unfortunately, the legislature’s changes in Section 537.600 do not include an explanation of what meaning should now be given to Section 537.610. At least four (and possibly many more) interpretations can be given to Section 537.610.<sup>116</sup> Although it cannot be stated with certainty what course the Missouri courts will follow, it is the recommendation of this commentator that the fourth possibility described below be followed, for the reasons explained herein.<sup>117</sup>

The first possible interpretation of Section 537.610 in light of the amendments to Section 537.600, is that the older statute (Section 537.610) has been repealed by implication. Support for this reading of the statute is found in

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112. MO. REV. STAT. § 537.610 (Supp. 1984). For the full text of this statute, see *supra* note 103.

113. *Id.* The application of Section 537.610 to self-insurance plans is limited to those which are “duly adopted by the governing body of any *political subdivision* of the state” (emphasis added). This indicates that Section 537.610 would not apply to a self-insurance plan adopted by the state itself. Thus, although an argument can be made that the State Legal Expense Fund, provided for by MO. REV. STAT. §§ 105.711-.726 (Supp. 1984), is a plan of self-insurance, the existence of this fund should not trigger the application of Section 537.610.

Moreover, it should be noted that there are strong arguments against the conclusion that the State Legal Expense Fund even qualifies as a self-insurance plan. The Fund does not carry many of the traditional indicia of plans of self-insurance, such as the establishment of reserves.

114. *Bartley v. Special School Dist.*, 649 S.W.2d 864 (Mo. 1983) (en banc).

115. See *supra* notes 75-78 and accompanying text.

116. Of course, the four interpretations presented herein do not necessarily represent every possible interpretation of this statute.

117. See *infra* notes 130-37 and accompanying text.

the new language of Section 537.600, which states that its "express waiver[s] of sovereign immunity . . . are *absolute* waivers."<sup>118</sup> It can be argued that by "absolute," the legislature meant that these waivers are not to be limited in any way. In other words, *Bartley's* holding that Section 537.610 limits the motor vehicle and dangerous condition of property exceptions has been rejected by the legislature. Therefore, Section 537.610 no longer has any application—since according to *Bartley* its sole purpose was to limit the two exceptions found in Section 537.600. Because the new statute is inconsistent with Section 537.610, it can be concluded that the older statute had been repealed by implication.<sup>119</sup>

This extreme interpretation has an obvious weakness since it is axiomatic that a repeal by implication is an unfavored statutory interpretation. As the court observed in *Bartley*, "[W]here two acts are seemingly incompatible, they must, if feasible, be so construed that the later act will not operate as a repealer by implication, since if they are not irreconcilably inconsistent, both must stand."<sup>120</sup> Thus, if a less extreme interpretation can be supported, this first possibility must be rejected. And, as explained below, at least three other, less extreme interpretations exist.

Moreover, this interpretation arguably misconstrues the meaning of the term "absolute" in the new statute. The new statute states that the motor vehicle and dangerous condition of property exceptions "are absolute waivers of sovereign immunity *whether or not the public entity was functioning in a . . . governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.*"<sup>121</sup> This language suggests that "absolute" means simply without regard to whether the defendant was acting in a governmental capacity and without regard to the defendant's insurance coverage.

Another reading of the term "absolute" is encompassed by the second possible interpretation of Section 537.610. Under this interpretation, the motor vehicle and dangerous condition of property exceptions are absolute in the sense that they apply whether or not the public entity has procured insurance.<sup>122</sup> However, liability in cases where these exceptions apply is limited

118. MO. REV. STAT. § 537.600.2 (Supp. 1985) (emphasis added).

119. See *Colabianchi v. Colabianchi*, 646 S.W.2d 61, 63 (Mo. 1983) (en banc) ("Where there are two acts on one subject, both should be given effect if possible, but if they are repugnant in any of their provisions, the later act, even *sans* a specific repealing clause, operates to the extent of the repugnancy to repeal the first."); See also *In re Estate of Patterson*, 652 S.W.2d 252, 255 (Mo. Ct. App. 1983).

120. *Bartley*, 649 S.W.2d at 867 (citing *State v. Kraus*, 530 S.W.2d 684, 685 (Mo. 1975)).

121. MO. REV. STAT. § 537.600.2 (Supp. 1985) (emphasis added).

122. References to insurance in this discussion should be read as including "any self-insurance plan duly adopted by the governing body of any political subdivision of the state." MO. REV. STAT. § 537.610.1 (1978).

to the *amount* of insurance coverage<sup>123</sup> or, if there is no insurance, to \$800,000.<sup>124</sup>

This second interpretation relies on a reading of the statute in which the first two subsections of Section 537.610 act independently: subsection one applies where the defendant has procured insurance, and subsection two applies where the defendant has not. This is inconsistent with the *Bartley* ruling which stated that these two subsections are redundant.<sup>125</sup> However, this interpretation is to be favored over *Bartley*'s, since it should not be presumed that any part of a statute is meaningless if such a result can be avoided.<sup>126</sup>

The narrow reading of "absolute" employed in the first interpretation explained above<sup>127</sup> is also followed in the third possible reading of Section 537.610. The idea that Sections 537.600 and 537.610 operate independently is central to this interpretation. It can be argued that since the motor vehicle and dangerous condition of property exceptions now apply regardless of insurance coverage, this new statute and Section 537.610 should be read and interpreted entirely separately. In other words, it should be concluded that the legislature has rejected *Bartley*'s view that the two statutes are interdependent.<sup>128</sup>

Although Section 537.610 does not modify Section 537.600, under this reading the older statute still has a meaning. Thus, this third interpretation does not encompass repeal by implication. Instead, it can be concluded that the \$800,000 limits on liability which are mentioned in Section 537.610 apply to a third exception—a waiver by insurance exception which the statute itself creates. In sum, under this third interpretation, there are three exceptions to

123. See MO. REV. STAT. § 537.610.1 (1978) ("Sovereign immunity . . . is waived only to the maximum amount of . . . such policy of insurance purchased pursuant to the provisions of this section and in such amount . . . provided in any self-insurance plan . . .").

124. See MO. REV. STAT. § 537.610.2 (1978) ("The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650 shall not exceed eight hundred thousand dollars . . .").

One problem with this interpretation is that it would allow the unreasonable result of permitting a governmental entity to limit its liability under Section 537.600 to a nominal amount by procuring only minimal insurance coverage. See *infra* notes 131-32 and accompanying text.

125. *Bartley*, 649 S.W.2d at 869. ("[T]he plain fact is that regardless of what construction is placed on § 536.610(2), it remains circumlocutory in relation to § 537.610(1) . . .").

126. See *Brown Group v. Administrative Hearing Comm'n.*, 649 S.W.2d 874, 881 (Mo. 1983) (en banc) ("[A]ll provisions of a statute must be harmonized and every word, clause, sentence and section must be given some meaning.").

127. That is, "absolute" means that amount of liability under the motor vehicle and dangerous condition of property exceptions is not limited in any way by Section 537.610 or any other provision.

128. *Bartley*, 649 S.W.2d at 868.

sovereign immunity created by Sections 537.600 and 537.610. Section 537.600 (the "new statute") provides for the motor vehicle and dangerous condition of property exceptions. These exceptions are "absolute," i.e., they are not limited in any way by insurance coverage or as to amount of liability. Section 537.610 (the "old statute") provides the third exception. It occurs when the State of Missouri or its political subdivisions purchase insurance or when a political subdivision of the state adopts a plan of self-insurance. This third exception is limited to the amount of insurance which may not exceed \$800,000.<sup>129</sup>

Support exists for the three foregoing interpretations of Section 537.610. Nevertheless it is the fourth interpretation which is the most reasonable and which should be adopted by the Missouri courts.<sup>130</sup> This interpretation is premised on the idea that in amending Section 537.600, the legislature sought to reject the *Bartley* opinion. Courts should view this amendment as an opportunity to reevaluate the meaning of Section 537.610 without the encumbrance of the *Bartley* ruling.

Under this interpretation, the second subsection of Section 537.610 limits liability under the motor vehicle and dangerous condition of property exceptions to \$800,000. Additionally, Section 537.610.1 creates a third exception, one that is applicable whenever the state and its political subdivisions procure insurance or when the governing body of any political subdivision of the state duly adopts a plan of self-insurance.<sup>131</sup>

This interpretation relies on the most reasonable reading of the term "absolute" as used in Section 537.600, i.e., that the application of the motor vehicle and dangerous condition of property exceptions are not affected in any way by insurance coverage. That is to say that these exceptions apply to all defendants to the same extent, regardless of the existence of *or the amount of* insurance coverage. Thus, just as a public entity can no longer avoid these exceptions by failing to insure against them, neither can the entity limit its liability by insuring itself for only a nominal amount.

Certainly it should not be assumed that the legislature intended to permit public entities to limit their liability under Section 537.600 by using the option

129. Note that under this interpretation, as under the interpretation given this statute by *Bartley*, the first two subsections of Section 537.610 are redundant. See *Bartley*, 649 S.W.2d at 869.

130. See *State ex rel McNary v. Hais*, 670 S.W.2d 494, 495 (Mo. 1984) (en banc) ("[W]e presume that the legislature did not intend to enact an absurd law and we favor a construction that avoids unjust or unreasonable results.") (citation omitted); see also 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.12 (N. Singer 4th ed. 1984 rev.) ("It is said to be a 'well established principle of statutory interpretation that the law favors rational and sensible construction.'") (footnote omitted).

131. See MO. REV. STAT. § 537.610.1, .610.2 (1978).



of insuring for a nominal amount.<sup>132</sup> Moreover, it should not be assumed that the legislature intended to limit liability to the amount of insurance coverage only where the public entity has procured a *reasonable* amount of insurance coverage, since there is nothing in the statutes to suggest what amount of coverage should be considered reasonable. Instead, the only limitation on the liability of a public entity for torts arising from the operation of motor vehicles and dangerous conditions of property should be found in the \$800,000 cap of the second subsection of Section 537.610.

It should be noted that Sections 537.610.2 and 537.600 both use the term "public entity."<sup>133</sup> The first subsection of 537.610, on the other hand, uses the term "political subdivisions" of the state.<sup>134</sup> The use of these terms suggests that an interrelationship exists between the new statute and the second subsection of the old statute, and that no such interrelationship exists between the new statute and Section 537.610.1.<sup>135</sup>

A second consideration which weighs in favor of this interpretation is that it gives meaning to all the language of Sections 537.600 and 537.610.<sup>136</sup> Furthermore, this interpretation avoids the unreasonable result of repeal by implication.<sup>137</sup> In sum, this interpretation makes the most sense—it does not rely on any linguistic contortions or illogical presumptions. It merely relies on the plain language of the statutes. Thus, this fourth interpretation should followed by the Missouri courts.

#### IV. CONCLUSION

The foregoing discussion can be summarized by a series of questions. These questions, when answered in light of the cases and statutes discussed,

132. See *State ex rel. McNary v. Hais*, 670 S.W.2d 494, 495 (Mo. 1984) (en banc) ("[W]e favor a construction that avoids unjust or unreasonable results."); *Tribune Publishing Co. v. Curators of Univ. of Mo.*, 661 S.W.2d 575, 583 (Mo. Ct. App. 1983) ("It is assumed that the intent of the legislature in enacting a statute is to serve the best interests and welfare of the citizenry at large. This assumption must strike a proper balance with the further assumption that the legislature did not intend to effect an unreasonable, oppressive or absurd result.") (citations omitted).

133. See Mo. REV. STAT. § 537.610.2 (1978) ("[t]he liability of the state and its *public entities* ") (emphasis added); Mo. REV. STAT. § 537.600 (Supp. 1985) ("the immunity of the *public entity*") (emphasis added); Mo. REV. STAT. § 537.600.2 (Supp. 1985) ("[W]hether or not the *public entity* was functioning in a governmental or proprietary capacity and whether or not the *public entity* is covered by a liability insurance") (emphasis added).

134. See Mo. REV. STAT. § 537.610.1 (1978) ("tort claims made against the state or the political subdivision"; "Sovereign immunity for the state of Missouri and its political subdivisions is waived.").

135. See *Bartley v. Special School Dist.*, 649 S.W.2d 864, 872 (Mo. 1983) (en banc) (Wasserstrom, Special Judge, dissenting).

136. See *Brown Group v. Administrative Hearing Comm'n*, 649 S.W.2d 874, 881 (Mo. 1983) (en banc) ("[A]ll provisions of a statute must be harmonized and every word, clause, sentence and section must be given some meaning.").

137. A repeal by implication is an unfavored result. See *supra* note 120 and accompanying text.

indicate whether a particular case should be barred by the doctrine of sovereign immunity in Missouri:

1. Is the suit: (1) a tort action, (2) for money damages, (3) against a public entity—an entity created by the legislature for purposes of public policy? If any of these three elements is not present, the case should not be barred by sovereign immunity, but continue with this analysis to find additional exceptions which may apply. If all these elements are present, proceed to question 2.

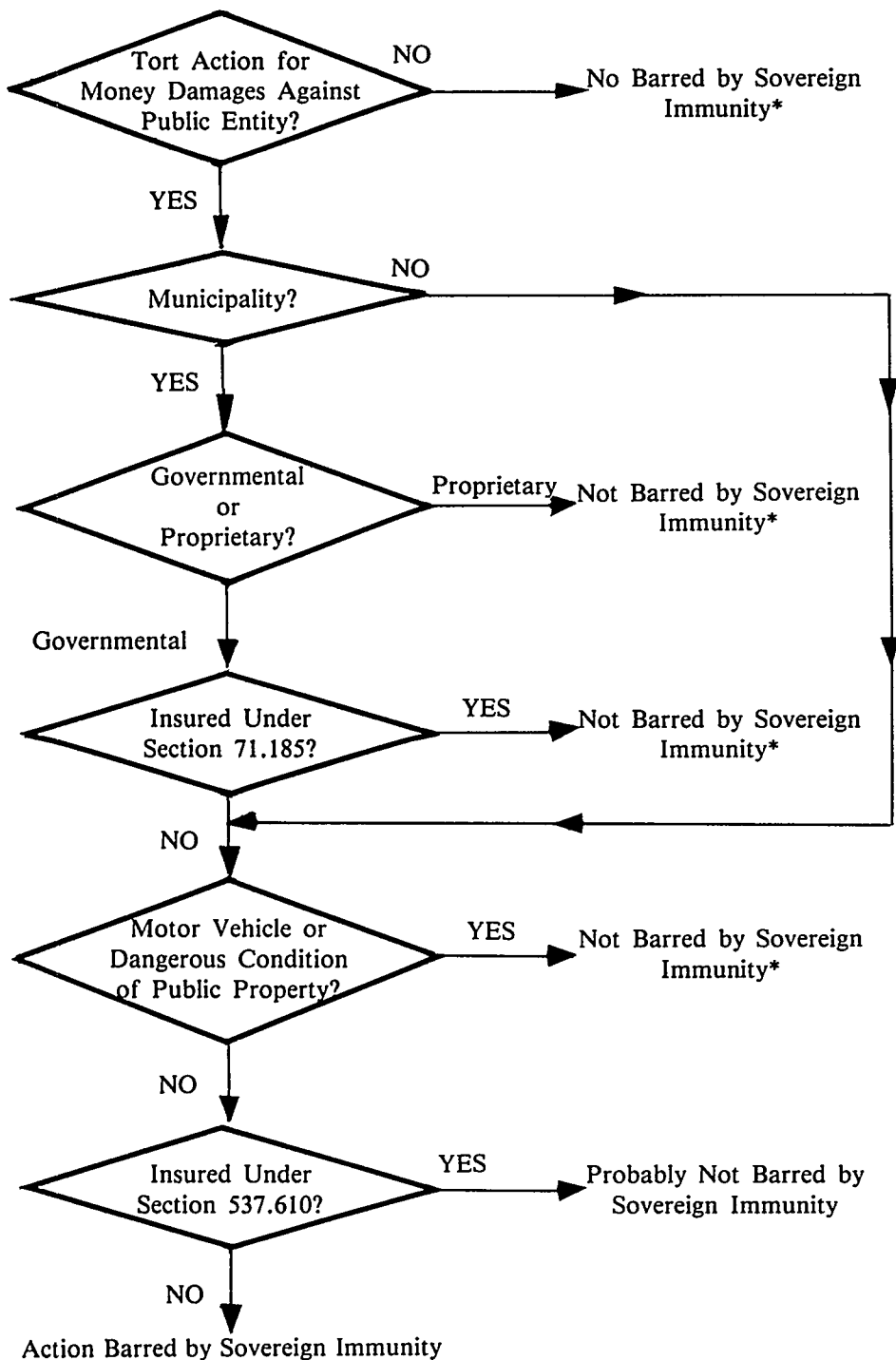
2. Is the entity a municipality capable of exercising both governmental and proprietary functions? If so, did the alleged tortious action occur as the result of the exercise of a proprietary function? If it did, then the action should not be barred by sovereign immunity. Continue with this analysis to determine if any of the statutory exceptions also apply in your case. If the defendant is a municipality and the suit arose from the exercise of a governmental function, proceed to question 3. If the defendant is not a municipality, proceed to question 4.

3. Is the defendant a municipality within the meaning of Section 71.185? If so, is the defendant covered by liability insurance for the exercise of the governmental function which caused the plaintiff's injuries? If so, then the defendant has waived its sovereign immunity to the extent of the liability insurance so carried. Continue through this analysis to find additional exceptions which may apply. If the defendant is not a municipality under this statute, or if the defendant was not insured, proceed to question 4.

4. Did the action arise out of a dangerous condition of public property or the governmental operation of a motor vehicle, as defined by Section 537.600? If so, the action should not be barred by sovereign immunity although the amount of recovery may be limited by Section 537.610. Continue with this analysis to find additional exceptions which may apply. If the action did not arise from one of these situations, proceed to question 5.

5. Is the entity covered by liability insurance for its alleged tortious action? If so, an argument can be made that under Section 537.610 the defendant's sovereign immunity has been waived. If not, and none of the preceding questions has indicated that the action will not be barred, then the action should be barred by sovereign immunity.

This series of questions is illustrated by the following flow chart:



\*continue through flow-chart to find additional exceptions which may apply

Thus, despite much ambiguity in the law of sovereign immunity in Missouri and the many sources of this doctrine, a systematic framework for analyzing sovereign immunity problems can be applied. Unfortunately, as this Comment illustrates, each step of this analysis contains numerous issues which defy simple resolution. The legislature has recently taken the first step in eliminating some of the confusion in this area by amending Section 537.600. It is to be hoped that the courts can further this initiative toward simplifying the law of sovereign immunity in Missouri by adopting a reasonable interpretation of Section 537.610.

CAROLE LEWIS ILES

