
STETSON LAW REVIEW

VOLUME XXXII

SPRING 2003

NUMBER 3

ARTICLES

JUDICIAL TORT REFORM: TRANSFORMING FLORIDA'S WAIVER OF SOVEREIGN IMMUNITY STATUTE*

Thomas A. Bustin**

William N. Drake, Jr.***

I. INTRODUCTION — SCOPE OF ARTICLE

Almost thirty years ago, the Florida Legislature exercised its exclusive power to waive sovereign immunity when it adopted Florida Statutes Section 768.28. The statute, modeled on the Federal Tort Claims Act (FTCA), which has been analyzed in federal court opinions, is straightforward in its language.¹ However, several decades of Florida Supreme Court decisions construing Flor-

* Substantial portions of this Article are published separately by the Authors under the title *Government Tort Liability in Florida: A Tangled Web*, which appears in the February 2003 issue of *The Florida Bar Journal*.

** © 2003, Thomas A. Bustin. All rights reserved. B.A., Ohio State University 1959; J.D., Ohio State University Law School, 1961. Thomas A. Bustin did post-graduate work at Cleveland State University and Emory University. Mr. Bustin is a former City Attorney and County Attorney and is currently an Assistant City Attorney for the City of St. Petersburg.

*** © 2003, William N. Drake, Jr. All rights reserved. B.A., University of Georgia, 1967; M.A., University of Georgia, 1969; J.D., University of Florida College of Law, 1975. William N. Drake is an Assistant City Attorney for the City of St. Petersburg. Mr. Drake specializes in civil litigation.

The Authors wish to thank Stetson University College of Law Student Justin Zinzow, an intern in the Civil Government Clinic, for his assistance in preparing this Article.

1. See *Lewis v. City of St. Pete.*, 260 F.3d 1260, 1262 (11th Cir. 2001) [hereinafter *Lewis II*] (examining Florida's waiver statute).

ida's waiver statute have generated a body of case law so incoherent and confusing that there are no defined legal boundaries of governmental tort liability and there is no clear framework with which to analyze immunity. The Court has effectively transformed the waiver statute to fit the current majority's ideology.

This Article examines the enigmatic body of government tort law that the Florida Supreme Court has created since the Florida Legislature enacted the waiver statute and explores some of the anomalies, inconsistencies, ironies, and paradoxes surrounding this controversial and volatile area of law. Even before the Florida Legislature enacted the first statutory waiver of sovereign immunity, the extent of government insulation from tort liability was the subject of much debate and criticism, but the Florida Supreme Court has compounded the confusion enormously with conflicting and sometimes irreconcilable decisions. The confusion is the product of a number of factors, including the Court's initial failure to consider the language of the waiver statute and its federal counterpart, its failure to construe strictly the scope of the waiver statute, its gratuitous adoption of a nebulous and unwieldy implied immunity for discretionary governmental functions, its unnecessary rejection and revival of the public-duty doctrine, and its ever-changing ideology and views concerning the principle of *stare decisis*.

This Article is organized into three major parts. First, the Article will examine the history and origins of governmental tort immunity in Florida. Next, the Article will survey chronologically and analyze the Florida Supreme Court decisions that have interpreted the extent of governmental tort liability under the Florida waiver statute. Finally, this Article will conduct a comparative analysis of the FTCA and the Florida waiver statute. This analysis will focus on the express language in the statutes, federal court interpretations of the FTCA, and the Florida Supreme Court's differing interpretations of virtually identical language.

II. "COMMON-LAW" GOVERNMENTAL TORT IMMUNITY

A. The State's Absolute Constitutional Immunity

Article X, Section 13 of the Florida Constitution provides that the Legislature may prescribe the classes of cases and conditions under which the State may be sued. In the absence of such legislation, the State and its agencies and instrumentalities enjoy ab-

solute immunity from suit.² Before the Legislature enacted Florida's waiver statute, state constitutional immunity was separate from municipal-corporation sovereign immunity.³

B. Florida Municipal-Corporations' Limited Sovereign Immunity

Municipal corporations enjoyed limited tort immunity or protection from liability before the Legislature passed Florida Statutes Section 768.28, based on their status as sovereigns.⁴ Their immunity had nothing to do with the constitutional immunity of the State.⁵ The common-law doctrine of sovereign immunity is said to have had its inception in the case of *Russell v. The Men of Devon*.⁶ Yet, interestingly, because Florida adopted the English common law as it existed in 1776, it is chronologically difficult to assert that *The Men of Devon* is an ancestor of our sovereign-immunity doctrine.⁷ Nevertheless, by the time the Florida Legislature enacted the first waiver statute in 1969, municipalities had limited tort immunities or exceptions to liability that were the subject of a well-developed body of law.⁸ Our courts often refer to such law as "common law."⁹

The Florida courts developed an analysis distinguishing between a municipality's governmental and proprietary functions.

2. Darrey A. Davis, *Florida Civil Practice before Trial* § 8.4 (2d ed., Fla. B. 1969).

3. Gerald T. Wetherington & Donald I. Pollock, *Tort Suits against Governmental Entities in Florida*, 44 Fla. L. Rev. 1, 11 (1992).

4. See generally Davis, *supra* n. 2, at § 8.13 (explaining the history of municipality tort immunity).

5. Wetherington & Pollock, *supra* n. 3, at 11.

6. 2 T.R. 667, 100 Eng. Rep. 359 (1788); see *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381-382 (Fla. 1981) (citing *The Men of Devon* as "the standard for local-government sovereign immunity"); Wetherington & Pollock, *supra* n. 3, at 10 n. 32 (stating that local government immunity first arose in *The Men of Devon*).

7. *The Men of Devon* was decided in 1788, nearly twelve years after the United States gained its independence from England. *City of Coconut Creek v. Fowler*, 474 So. 2d 820, 822 (Fla. Dist. App. 4th 1985). Florida Statutes Section 2.01 (2002) provides that the "common . . . laws of England . . . down to the 4th day of July, 1776, are declared to be of force in this state." The Florida Supreme Court has recognized this twelve-year anomaly, but has nevertheless confirmed "that the immunity rule had its inception in *The Men of Devon*." *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957).

8. *Com. Carrier v. Indian River County*, 371 So. 2d 1010, 1015 (Fla. 1971).

9. See *Fla. Dept. of Health & Rehabilitative Servs. v. S.A.P.*, 2002 WL 31662590 at *5 (Fla. Nov. 27, 2002) (examining the common-law doctrine); *Tranon Park Condo. Assn. v. City of Hiialeah*, 468 So. 2d 912, 919 (Fla. 1985) (stating that the common-law doctrine is implicit in self-government).

The courts applied tort immunity only to the governmental functions unless there was some special relationship between the government employee or agent and the injured party.¹⁰ If such a relationship existed, then a duty to the individual party, not just a duty to the public, existed, and a breach of such a duty would support a negligence claim.¹¹ This became known as the *Modlin* doctrine, which is referred to as the public-duty doctrine in many foreign jurisdictions, although the latter term was not used in Florida until recently.¹²

III. WAIVER OF GOVERNMENTAL IMMUNITY — THE FEDERAL TORT CLAIMS ACT MODEL

In 1969, the State Legislature first experimented with the waiver of the State's constitutional immunity from tort liability with the passage of Florida Statutes Section 768.15. The statute was brief and was in effect for only a short time before the Legislature repealed it.¹³ The statute read as follows:

The state, for itself and its counties, agencies, and instrumentalities, waives immunity for liability for the torts of officers, employees, or servants committed in the state. The state and its counties, agencies, and instrumentalities shall be liable in the same manner as a private individual, but no action may be brought under this section if the claim:

- (a) Arises out of the performance or the failure to perform a discretionary function;
- (b) Arises out of a riot, unlawful assembly, public demonstration, mob violence, or civil disturbance;
- (c) Arises out of the issuance, denial, suspension or revocation of, or by the failure to issue, deny, suspend, or revoke, a permit, license, certificate, approval, order, or similar authorization; or

10. *Modlin v. City of Miami Beach*, 201 So. 2d 70, 76 (Fla. 1967).

11. *Id.*

12. The first use of the term in Florida appears to have been in *Seguine v. City of Miami*, 627 So. 2d 14, 17 (Fla. Dist. App. 3d 1993).

13. 1969 Fla. Laws ch. 69-357 (repealed 1969).

(d) Arises out of the collection or assessment of taxes.¹⁴

In 1973, the Florida Legislature, exercising the power vested exclusively in it by Article X, Section 13 of the Florida Constitution,¹⁵ again passed a waiver statute, adopted as Florida Statutes Section 768.28. It waived the sovereign immunity of the State, its agencies, counties, and other units of local government, including municipalities.¹⁶ The legislation was limited to the extent provided in the statute.¹⁷

The 1973 version of Florida Statutes Section 768.28, which became effective for the State on July 1, 1974, and for municipalities on January 1, 1975,¹⁸ was more detailed than its 1969 predecessor and contained substantially different language, which was modeled on the FTCA.¹⁹ However, contrary to its predecessor and the FTCA, the statute contained no express exceptions to the waiver. The differences in the language of the two waiver statutes — Sections 768.15 and 768.28 — were significant, and the importance of those differences will be discussed later in this Article.

14. Fla. Stat. § 768.15 (repealed 1969).

15. Article X, Section 13 of the Florida Constitution provides that a “[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”

16. Fla. Stat. § 768.28 (1973). Subparagraph two of the statute identifies the particular government entities subject to waiver of immunity. A provision granting the Legislature authority to allow suits against the State has existed in the Florida Constitution since 1868. Fla. Const. art. X, § 13; see Kelly Armitage, *It's Good to Be King (At Least It Used to Be and Could Be Again): A Textualist View of Sovereign Immunity*, 29 Stetson L. Rev. 599, 603 n. 35 (2000) (providing the historical antecedent of the Florida Constitution's waiver-of-immunity provision).

17. *Hattaway v. McMillian*, 903 F.2d 1440, 1444 (11th Cir. 1990); *Klonis v. Fla. Dept. of Revenue*, 766 So. 2d 1186, 1189 (Fla. Dist. App. 1st 2000); *Schick v. Fla. Dept. of Agric.*, 504 So. 2d 1318, 1322 (Fla. Dist. App. 1st 1987); Wetherington & Pollock, *supra* n. 3, at 26–27.

18. Fla. Stat. § 768.28.

19. *Schick*, 504 So. 2d at 1322 (stating that Florida Statutes Section 768.28 adopted much of the FTCA's language).

IV. SCOPE OF WAIVER: JUDICIAL CONSTRUCTION OF THE STATUTE

A. Florida Supreme Court Construction of Florida Statutes Section 768.28 — Rejection of the Public-Duty Doctrine and Adoption of Implied Discretionary-Function Immunity

1. *The Public-Duty Doctrine*

The public-duty doctrine is predicated upon the notion that

a municipality and its agents are deemed to act for the benefit of the general public rather than specific individuals. Thus, ordinarily, the municipality or its agents may not be held liable to specific individuals for the failure to furnish them with police protection.²⁰

It is a discrete doctrine protecting governments from tort liability in the majority of states, including the two jurisdictions — Washington and New York — from which the Florida Supreme Court, in *Commercial Carrier Corporation v. Indian River County*,²¹ borrowed the concept of an implied discretionary-function immunity, based on separation of powers.²²

20. *Stafford v. Barker*, 502 S.E.2d 1, 3 (N.C. App. 1998).

21. 371 So. 2d 1010 (Fla. 1971).

22. *Marin v. City of N.Y.*, 739 N.Y.S.2d 523, 525 (App. Div. 2002); *Babcock v. Mason County Fire Dist.*, 30 P.3d 1261, 1274 n. 13 (Wash. 2001); see *Adams v. City of Freemont*, 80 Cal. Rptr. 2d 196, 216 (App. 1st Dist. 1998) (applying the public-duty doctrine in California, the state from which *Commercial Carrier* borrowed the operational-planning level analysis). An overwhelmingly majority of other states apply the public-duty doctrine. *E.g. Williams v. State*, 664 P.2d 137, 140 (Cal. 1983); *Burns v. Bd. of Educ.*, 638 A.2d 1, 3 (Conn. 1994); *Redfearn v. Ennis*, 610 A.2d 1338, 1339 (Conn. App. 1992); *Martin v. State*, 2001 WL 112100 at *9 (Del. Jan. 17, 2001); *Castellani v. Del. St. Police*, 751 A.2d 934, 939 (Del. 1999); *Rowe v. Coffey*, 515 S.E.2d 375, 377 (Ga. 1999); *Ruf v. Honolulu Police Dept.*, 972 P.2d 1081, 1088 n. 5 (Haw. 1999); *Leone v. City of Chi.*, 619 N.E.2d 119, 121 (Ill. 1993); *Benton v. City of Oakland City*, 721 N.E.2d 224, 227 (Ind. 1999); *Donahue v. Washington City*, 641 N.W.2d 848, 851 (Iowa App. 2002); *McCormick v. Bd. of County Commrs. of Shawnee*, 35 P.3d 815, 831 (Kan. 2001); *Fudge v. City of Kan. City*, 720 P.2d 1093, 1098 (Kan. 1986); *Ashby v. City of Louisville*, 841 S.W.2d 184, 190 (Ky. App. 1992); *Kniepp v. City of Shreveport*, 609 So. 2d 1163, 1165 (La. App. 2d Cir. 1992); *Lovelace v. Anderson*, 785 A.2d 726, 735 (Md. 2001); *Williams v. Mayor of Baltimore*, 753 A.2d 41, 59 (Md. 2000); *Ashburn v. Anne Arundel County*, 510 A.2d 1078, 1084 (Md. 1986); *Sampson v. Lynn*, 537 N.E.2d 588, 589 (Mass. 1989); *Stanton v. Battle Creek*, 647 N.W.2d 508, 510 (Mich. 2002); *Nawrocki v. Macomb County Rd. Commn.*, 615 N.W.2d 702, 710 (Mich. 2000); *Woehrle v. City of Mankato*, 647 N.W.2d 549, 551–552 (Minn. App. 2002); *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 538 (Mo. 1988); *LaTray v. City of Havre*, 999 P.2d 1010, 1015 (Mont. 2000); *Coty v. Washoe County*, 839 P.2d 97, 98–99 (Nev. 1992); *Island Shores Ests. Condo. v. City of Concord*, 615 A.2d 629, 631 (N.H. 1992); *Wood v. Guilford County*, 558

The extent of protection from tort liability the doctrine affords to the government varies from state to state. In Georgia, for instance, the public-duty doctrine is limited to police protection.²³ In other states, well-developed exceptions to the doctrine have been established.²⁴ But in most states, the doctrine's insulation extends to at least the police and fire-protection functions of government.²⁵

The public-duty doctrine does not create immunity; instead it is predicated on the absence of a duty, an element of traditional negligence. But like immunity, it has the effect of avoiding tort liability.²⁶ This distinction is important because Florida Statutes Section 768.28 "waives sovereign immunity for liability for torts,"²⁷ but it does not create any new liability or establish any new duties for the government.²⁸ Because the absence of duty is different from immunity, and Florida Statutes Section 768.28 addresses only the waiver of immunity and is strictly construed,²⁹ the State's enactment of the Statute should have had no effect on the continued vitality of the public-duty doctrine.³⁰

S.E.2d 490, 494–495 (N.C. 2002); *Ashland City Commrs. v. Dept. of Taxn.*, 590 N.E.2d 730, 735 (Ohio 1992); *Markowitz v. Ohio Dept. of Ins.*, 759 N.E.2d 838, 842–843 (Ohio App. 10th 2001); *Morris v. Musser*, 478 A.2d 937, 939 (Pa. Commw. 1984); *Martinelli v. Hopkins*, 787 A.2d 1158, 1167 (R.I. 2001); *Schultz v. Foster-Glocester Regl. Sch. Dist.*, 755 A.2d 153, 155 (R.I. 2000); *Arthurs v. Aiken County*, 525 S.E.2d 542, 548 (S.C. App. 1999); *E.P. v. Riley*, 604 N.W.2d 7, 12–14 (S.D. 1999); *Matthews v. Pickett County*, 996 S.W.2d 162, 164–165 (Tenn. 1999); *Ezell v. Cockrell*, 902 S.W.2d 394, 404 n. 5 (Tenn. 1995); *Fernandez v. City of El Paso*, 876 S.W.2d 370, 372 (Tex. App. 8th Dist. 1993); *Day v. State ex rel. Dept. of Pub. Safety*, 980 P.2d 1171, 1175 (Utah 1999); *Hillerby v. Town of Colchester*, 706 A.2d 446, 447 (Vt. 1997); *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992); *Babcock v. Mason County Fire Dist. No. 6*, 30 P.3d 1261 (Wash. 2001); *Walker v. Meadows*, 521 S.E.2d 801, 806 (W. Va. 1999).

23. *Hamilton v. Cannon*, 482 S.E. 2d 370, 372 (Ga. 1997); see Karen M. Kenney, Student Author, *Recent Developments*, 27 Stetson L. Rev. 929, 1189 (1998) (discussing the *Hamilton* decision).

24. See Jenifer Kay Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401 (1989) (providing an analysis of Washington's limitation on the public-duty doctrine).

25. See *Holsten v. Massey*, 490 S.E.2d 864, 869 (W. Va. 1997) (providing the traditional scope of the public-duty doctrine as applied to police and fire protection).

26. *Trianon Park*, 468 So. 2d at 918; *Holsten*, 490 S.E.2d at 87.

27. Fla. Stat. § 768.28(1).

28. *Trianon Park*, 468 So. 2d at 917.

29. *Id.*

30. See *S.A.P.*, 2002 WL 31662590 at *5 (stating that Section 768.28(13) has no impact on common-law doctrines, such as equitable estoppel, unless clearly expressed in the statute); *Carlile v. Game & Fresh Water Fish Commn.*, 354 So. 2d 362, 364 (Fla. 1977) (stating that strict construction is required and that nothing within the statute shall be regarded

2. Implied Discretionary-Function Immunity

In *Carlile v. Game and Fresh Water Fish Commission*,³¹ the Florida Supreme Court — considering the issue of venue in an action against the Commission for injuries sustained in a hunting accident — provided a blueprint for the strict statutory construction that would be applied to Florida Statutes Section 768.28.

In determining the meaning of a statute we must look to the intent of the Legislature in enacting that statute. We are guided in this effort by established rules of statutory construction. In 1973 the Legislature passed Chapter 73-313, Laws of Florida, codified as Section 768.28, Florida Statutes (1975), in order to authorize limited tort claims against the state. That statute is clearly in derogation of the common law principle of sovereign immunity and must, therefore, be strictly construed:

Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. 30 Fla. Jur. Statute, Sec. 130.

Inference and implication cannot be substituted for clear expression. *Dudley v. Harrison, McCready & Co.*, 127 Fla. 687, 173 So. 820 (1937).³²

Florida Supreme Court Justice Joseph W. Hatchett authored this opinion, in which Justices Ben F. Overton, Joseph A. Boyd, Jr., and Alan C. Sundberg concurred.

Carlile also found the wording differences of the 1969 and 1975 waiver statutes important in determining whether the latter statute contained a waiver of the common-law venue privilege.³³ The Court stated

as implied).

31. 354 So. 2d 362.

32. *Id.* at 364.

33. *Id.*

[s]ection 768.15(3), effective July 1, 1969, repealed July 1, 1970, is of particular significance. This was the Tort Claims Act of 1969 and was the Legislature's first experiment with the waiver of sovereign immunity in the area of torts. Subsection (3) provided that: "Actions under this section shall be brought in the county where the cause of action arose." However, when the Legislature reenacted the statute in 1975, it excluded the venue provision. The change clearly evidences an intention on the part of the Legislature not to waive the common law privilege in the 1975 statute.³⁴

Oddly, however, with the exception of a brief mention in the case of *McGhee v. Volusia County*,³⁵ neither *Carlile* nor the rules of strict statutory construction upon which it relied are mentioned conspicuously in later Florida Supreme Court opinions interpreting the statute.³⁶ In fact, just two years after the *Carlile* decision, in *Commercial Carrier*, the same Florida Supreme Court considered the same statute, and ignored the above-mentioned language change. Instead, the Court found implied immunity where none was expressed and where the earlier statute had contained an express immunity for discretionary functions omitted from the later statute.

In *Commercial Carrier*, several counties and the State, rather than municipalities, claimed protection from liability based on the argument that they were entitled to the immunity applied to municipal corporations involved in governmental functions before the enactment of Section 768.28.³⁷ As defendants in the trial court, the governments successfully moved to dismiss negligence claims against them for failing to maintain certain traffic-control measures resulting in traffic accidents.³⁸ Their motions argued entitle-

34. *Id.*

35. 679 So. 2d 729, 731 (Fla. 1996).

36. *Carlile* is mentioned only in *McGhee* for the proposition that the waiver statute was not intended to change the common-law definition of "scope of employment." 679 So. 2d 729. It is never mentioned in other Florida Supreme Court opinions construing the statute, including the recent opinion in *S.A.P.*, in which the majority relied upon the case of *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) to support the proposition that Section 768.28 should be strictly construed and "no change in the common law is intended unless the statute is explicit and clear in that regard." 2002 WL 31662590 at *5. *Thornber* construed Florida Statutes Section 111.07 (1981), not Section 768.28 as *Carlile* did.

37. 371 So. 2d at 1015.

38. *Id.* at 1013-1014.

ment to immunity under the *Modlin* doctrine because that immunity — or absence of common-law duty — survived passage of the waiver statute.³⁹

The Florida Supreme Court opined that the *Modlin* doctrine did not survive enactment of Section 768.28 because

[p]redicating liability upon the “governmental-proprietary” and “special duty-general duty” analyses has drawn severe criticism from numerous courts and commentators. Consequently, we cannot attribute to the legislature the intent to have codified the rules of municipal sovereign immunity through enactment of Section 768.28, Florida Statutes (1975).⁴⁰

Despite the statutory-interpretation principle set forth in *Carlile* that “inference and implication cannot be substituted for clear expression,” the Court in *Commercial Carrier* announced that regardless of the absence of an express discretionary function in Section 768.28, the notion of separation of powers demanded that “certain areas of governmental conduct remain immune from scrutiny by judge or jury as to the wisdom of that conduct.”⁴¹ The Court looked to examples of such implied discretionary-function immunity in New York and Washington.⁴² Washington law provided a preliminary test that the *Commercial Carrier* Court “commend[ed]” to use by the lower courts in Florida seeking to identify discretionary functions of government.⁴³

The *Commercial Carrier* Court also adopted the analysis of a California case, *Johnson v. State*,⁴⁴ which involved being “sensitive” to whether the act, omission, or decision involved discretion,

39. *Id.* at 1014.

40. *Id.* at 1016. Paradoxically, Justice Sundberg’s dissent in *Cauley* argued Section 768.28 “did not . . . totally abrogate the rules regarding municipal immunity.” 403 So. 2d at 387 (Sundberg, J., dissenting). Why, then, was it necessary for the Court to abrogate the *Modlin* doctrine in the first place?

41. *Com. Carrier*, 371 So. 2d at 1017–1018 n. 11 (citing *Dalehite v. U.S.*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting), and noting the proposition, “[o]f course, it is not a tort for government to govern”). Article II, Section 3 of the Florida Constitution provides that “[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Implied discretionary-function immunity also is contrary to the Court’s strict-construction approach to section 768.28, more recently presented in *S.A.P.*, 2002 WL 31662590.

42. *Com. Carrier*, 371 So. 2d at 1018.

43. *Id.* at 1022.

44. 447 P.2d 352 (Cal. 1968).

but eschewing consideration of the actual meaning — “semantics” — or definition of the word “discretion.”⁴⁵ Thus, the *Commercial Carrier* Court began its analysis by asking a series of questions about the challenged governmental act, omission, or decision while being sensitive to whether the act, omission, or decision involved discretion.⁴⁶

To preserve the notion of separation of powers, the courts were to take this unusual approach on a case-by-case basis, analyzing whether the particular facts before them called for application of tort immunity.⁴⁷ The analysis invited each court to decide on an ad hoc basis whether it should scrutinize any particular government conduct. The analysis was so hazy and subjective that the result may have been fashioned to suit the majority’s ideological predilection.

Justice Overton, joined by Justice Boyd, dissented and complained that the express language of Section 768.28 was contrary to the majority opinion because the statute provided that the government would be liable “under circumstances in which the state or such agency or subdivision, *if a private person*, would be liable” and that private persons do not engage in uniquely governmental activities such as traffic signal and sign maintenance.⁴⁸ The dissent also criticized the majority’s reliance on seemingly conflicting federal opinions that distinguished between operational and planning-level functions, the latter of which were immune as authority for its analysis.⁴⁹ However, the dissent did not mention *Carlile* or the majority’s failure to adhere to the blueprint for construction contained in that decision.

The nebulous, new implied discretionary-function immunity, which the majority in *Commercial Carrier* admitted would be difficult to apply, quickly began to transmogrify itself to the particular ideological inclination of the Florida Supreme Court, which changed with successive, shifting, new majorities. Within two years of the *Commercial Carrier* decision, the authoring Justice would find himself dissenting in *Department of Transportation v.*

45. 371 So. 2d at 1021.

46. *Id.* at 1019.

47. *Id.* at 1022.

48. *Id.* at 1023 (Overton & Boyd, JJ., dissenting) (emphasis in original).

49. *Id.*

*Neilson*⁵⁰ and criticizing governmental tort immunity as “[t]he enigma . . . shrouded in mystery.”⁵¹ The transformation of the law of governmental immunity has continued to this day as the Florida Supreme Court has changed in composition, modified prior holdings, and spun ever more fine distinctions and exceptions into this tangled web of law.

B. New Majority, New Construction

With the departure of Justice Hatchett from the Florida Supreme Court and the addition of Justice Parker Lee MacDonald, a new majority emerged and ideological division evidenced itself in *Cauley v. City of Jacksonville*.⁵² Justice Overton authored the opinion upholding the cap on government tort liability under Section 768.28(5) against constitutional challenge and applying it to a judgment against the city.⁵³ Justice Sundberg, who led the majority in *Commercial Carrier*, became a dissenter, joined by Justice James C. Adkins.⁵⁴ In *Cauley*, the dissent argued that the same waiver statute, which it previously determined had abrogated the municipal immunity the county and state invoked,⁵⁵ did not apply to municipalities at all.⁵⁶

The year after *Cauley*, in a group of immunity cases authored by Justice Overton that has become known as the “*Neilson* trilogy,”⁵⁷ the Court held that, in general, the government would not be liable for defects inherent in the overall design of a public improvement, such as a public-road system, unless the entity, by the design, created a known dangerous condition that was not apparent to one who may be injured.⁵⁸ Despite the exception for a known dangerous condition,⁵⁹ the decisions generally could be regarded as favorable to government.

50. 419 So. 2d 1071 (Fla. 1982).

51. *Id.* at 1079 (Sundberg & Adkins, JJ., dissenting)).

52. 403 So. 2d 379.

53. *Id.* at 387.

54. *Id.* (Sundberg, C.J. & Adkins, J., dissenting).

55. *Com. Carrier*, 371 So. 2d at 1016.

56. 403 So. 2d at 387–389 (Sundberg, C.J. & Adkins, J., dissenting).

57. *See City of Milton v. Broxon*, 514 So. 2d 1116, 1119 (Fla. Dist. App. 1st 1987) (citing the *Nielson* trilogy).

58. *City of St. Pete. v. Collom*, 419 So. 2d 1082, 1087 (Fla. 1982); *Ingham v. Dept. of Transp.*, 419 So. 2d 1081, 1082 (Fla. 1982); *Neilson*, 419 So. 2d at 1077.

59. *Collom*, 419 So. 2d at 1086.

The majority in *Neilson* relegated the preliminary test from *Commercial Carrier* to footnote status, and the sensitivity analysis of *Johnson*, with its eschewal of semantics, was not mentioned. Justice Sundberg, again dissenting, lamented that “the irreconcilable results among the several district courts of appeal are not harmonized, but rather the confusion is compounded. The enigma is now shrouded in mystery.”⁶⁰

C. Reemergence of the Public-Duty Doctrine

The majority in *Neilson* continued to represent the prevailing view in the early 1980s in a series of cases that generally found governmental immunity while focusing on tort concepts, such as open and obvious dangers and duties.⁶¹ However, in *Harrison v. Escambia County School Board*, while discussing governmental discretionary-function immunity for the determination of where to locate school bus stops, the Court suggested that a duty of care may be lacking as to this type of government activity.⁶²

In *Trianon Park Condominium v. City of Hialeah*,⁶³ the Court radically modified its analysis of governmental-tort-liability issues. In an effort to give the lower courts something more to work with than broad, vague questions and a case-by-case sensitivity analysis, the Court divided the universe of governmental functions into four categories.⁶⁴ The existence or nonexistence of a duty of care on the part of the government depended upon the category into which the function fit.⁶⁵ The categories were

(I) legislative, permitting, licensing, and executive officer functions [for which no common law or statutory duty existed]; (II) enforcement of laws and the protection of the public safety [for which generally no duty of care existed]; (III) capital improvements and property control operations [for which the duty was

60. 419 So. 2d at 1079 (Sundberg, Adkins, JJ., dissenting).

61. See *Payne v. Broward County*, 461 So. 2d 63, 65 (Fla. 1984) (stating that the government does not have a duty to install a traffic light when an intersection is an obvious danger); *Perez v. Dept. of Transp.*, 435 So. 2d 830, 832 (Fla. 1983) (stating that the government has a duty to place warning signs on a bridge); *Harrison v. Escambia County Sch. Bd.*, 434 So. 2d 316, 320 (Fla. 1983) (stating that the location of a bus stop was not a dangerous condition).

62. *Harrison*, 434 So. 2d at 320.

63. 468 So. 2d 912.

64. *Id.* at 919.

65. *Id.* at 919–921.

the same as a private individual]; and (IV) providing professional, educational, and general services [for which there was a duty of care].⁶⁶

The specific activity involved in *Trianon Park*, building code enforcement, was protected from liability as a category II function.⁶⁷

The *Trianon Park* Court was sharply divided, four-to-three, with Justices Overton, Boyd, Alderman, and McDonald in the majority⁶⁸ and Justices Ehrlich, Shaw, and Adkins dissenting.⁶⁹ Justice Shaw, who believed that “[t]he majority opinion commingles the separate issues of sovereign immunity and duty under traditional tort law,”⁷⁰ wrote a lengthy and scathing dissent in the companion case of *Everton v. Willard*.⁷¹ In *Everton*, the Court held that a deputy sheriff’s decision not to arrest a motorist on intoxicated driving charges, which resulted in a subsequent fatal accident, was immune.⁷² Justice Shaw’s criticism of the *Trianon Park* majority’s commingling of discretionary-function immunity and the public-duty doctrine was justified to a degree, in that the majority referred to “[t]he lack of a common law duty for exercising a discretionary police power function.”⁷³

An examination of the cases cited in *Trianon Park*, for the proposition that no common-law duty existed for certain governmental functions, reveals that the basis of the cited holdings is not the lack of a common-law duty, but rather the application of what widely has become known as the public-duty doctrine. The doctrine recognizes that a public entity’s liability to an individual may not be predicated upon the breach of a general duty to the public.⁷⁴ For instance, one of the earliest cases the Court cited, *Shoner v. Concord Florida, Incorporated*,⁷⁵ provides that there is

66. *Id.* at 919. It is a weakness of the decision that there is no reasoning expressed to connect the categories to the actual language of the waiver statute.

67. *Id.* at 922.

68. *Id.* at 914.

69. *Id.* at 923 (Adkins, Erlich & Shaw, JJ., dissenting).

70. *Id.* at 926.

71. 468 So. 2d 936, 940–955 (Fla. 1985) (Shaw, J., dissenting).

72. *Id.* at 937.

73. *Trianon Park*, 468 So. 2d at 920. The use of the term common-law duty in *Trianon Park* appears to be shorthand for a duty recognized in the law predating the waiver statute.

74. *Id.* at 927.

75. 307 So. 2d 505 (Fla. Dist. App. 3d 1975).

no common-law duty in Florida to enforce a city ordinance. *Shoner* is a one-paragraph affirmance based on *Modlin*.

Although Florida's courts did not employ the term "public-duty doctrine" until *Seguine v. City of Miami*,⁷⁶ the roots of the doctrine have a history in Florida municipal-corporations law.⁷⁷ The rationale behind this doctrine was rejected in *Commercial Carrier*, but Justice Overton, a dissenter in that case, revived the rationale in *Trianon Park*, distinguishing *Commercial Carrier* by noting

this Court's decision in *Commercial Carrier*, in rejecting the general duty/special duty dichotomy contained in *Modlin*, . . . did not discuss or consider conduct for which there would have been no underlying common law duty upon which to establish tort liability in the absence of sovereign immunity. Rather, we were dealing with a narrow factual situation in which there was a clear common law duty absent sovereign immunity.⁷⁸

In the years following the *Trianon Park* decision, there has been a battle over the continued vitality of the public-duty doctrine, and as will be seen in the discussion below, the battle continues to this day. *Trianon Park* and its companion cases, *Everton*, *Reddish v. Smith*,⁷⁹ *Carter v. City of Stuart*,⁸⁰ and *City of Daytona Beach v. Palmer*⁸¹ would be a hollow victory for the proponents of shielding some government conduct from tort liability in Florida.

In 1986, a dramatic shift was about to occur in the makeup of the Florida Supreme Court, and yet another group of dissenters was about to become the majority. This new majority would return to the *Commercial Carrier* rationale and recognize discretionary-function immunity as the only immunity surviving the enactment of the waiver statute.⁸² It would reject *Trianon Park*'s revival of the public-duty doctrine and devise a means to circum-

76. 627 So. 2d 14.

77. See *Modlin*, 201 So. 2d at 76 (holding that city was not liable for alleged negligence under the doctrine of respondeat superior).

78. *Trianon Park*, 468 So. 2d at 918.

79. 468 So. 2d 929 (Fla. 1985). *Reddish* held that a prisoner transfer was immune from liability.

80. 468 So. 2d 955 (Fla. 1985). *Carter* protected ordinance enforcement from liability.

81. 469 So. 2d 121 (Fla. 1985). *Palmer* shielded firefighting decisions from liability.

82. See *Dept. of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258, 259 (Fla. 1989) (stating that discretionary-function immunity is an exception to the waiver statute).

vent the *Trianon Park* decision without actually overruling it, just as many observers perceived the *Trianon Park* majority to circumvent *Commercial Carrier*.⁸³

D. Re-rejecting the Public-Duty Doctrine

The addition of Justice Rosemary Barkett to the Florida Supreme Court in 1986 signaled the emergence of the new majority and the beginning of a series of cases that revived the *Commercial Carrier* sensitivity analysis, while minimizing the *Trianon Park* absence-of-common-law-duty element. The Court continued to ignore the actual language of the statute and the requirement of strict construction. This new majority would decide a series of cases almost unrelentingly unfavorable to government.⁸⁴

The first was *Avallone v. Board of County Commissioners of Citrus County*, in which the Court held that while a governmental entity has the discretionary authority to operate or not to operate a swimming facility, once a decision to operate the facility is made, the entity must operate the facility safely because a private individual, under like circumstances, would have the same duty.⁸⁵ Thus, the County could be held liable for alleged negligent operation of the facility resulting in a swimmer's death, because that conduct implemented the decision to operate the facility.⁸⁶

The next three per curiam opinions reflected the new majority's distaste for the *Trianon Park* categories-and-duties analysis. With scant mention of *Trianon Park*, the Court found no immunity for operating another swimming area,⁸⁷ deactivating and blocking a left turn lane on a roadway,⁸⁸ or allowing an intersection to become overgrown with foliage.⁸⁹

83. *Id.* at 261.

84. *Id.*; *Bailey Drainage Dist. v. Stark*, 526 So. 2d 678 (Fla. 1988); *Palm Beach County Bd. of County Commrs. v. Salas*, 511 So. 2d 544 (Fla. 1987); *Butler v. Sarasota County*, 501 So. 2d 579 (Fla. 1986); *Avallone v. Bd. of County Commrs. of Citrus County*, 493 So. 2d 1002 (Fla. 1986).

85. 493 So. 2d at 1005.

86. *Id.* This conclusion is contrary to the rationale of *Dalehite*, 346 U.S. at 35–36, which provided that implementation of governmental policies as well as policy decisions could be immune discretionary functions under the FTCA. See *U.S. v. Varig Airlines*, 467 U.S. 797, 811–812 (1984) (upholding the discretionary function in *Dalehite*).

87. *Butler*, 501 So. 2d 579.

88. *Salas*, 511 So. 2d 544.

89. *Stark*, 526 So. 2d 678.

However, it was not until *Department of Health and Rehabilitative Services v. Yamuni* that Justice Shaw, speaking for the four-to-three majority, dropped any pretense that the Court would attach precedential value to the decisions in *Trianon Park* and *Everton*, calling the categories of governmental functions discussed therein “a rough guide to the type of activities which are either immune or not immune.”⁹⁰ The *Yamuni* Court also receded from the “suggestion . . . that there has been no waiver of immunity for activities performed only by the government and not private persons.”⁹¹

In *Yamuni*, the Court found the Department of Health and Rehabilitative Services liable for negligently failing to detect child abuse.⁹² It further declared that “[t]he only government activities for which there is no waiver of immunity are basic policy making decisions at the planning level.”⁹³ This was a radical conclusion because even *Commercial Carrier* did not limit immunity to governmental decisions.⁹⁴

The majority in *Yamuni* paid lip service to the classification of governmental functions under *Trianon Park*, but in its eagerness to find a government duty to detect child abuse through adequate investigation, classified the function, not as law enforcement or protection of public safety or welfare, but as “provid[ing] professional, educational, and general services for the health and welfare of citizens.”⁹⁵ As the dissenters, particularly Justice Stephen H. Grimes, pointed out, this classification is patently wrong and inconsistent with the *Trianon Park* classification analysis.⁹⁶ *Yamuni* has been the subject of deserved criticism,⁹⁷ but the new majority has ignored the criticism.

90. *Yamuni*, 529 So. 2d at 261.

91. *Id.* at 261; see *Reddish*, 468 So. 2d at 932 (illustrating how the Court actually made an effort to construe the language of the statute).

92. *Yamuni*, 529 So. 2d at 258.

93. *Id.* at 261 (citing *Com. Carrier*, 371 So. 2d at 1020).

94. *Commercial Carrier*, 371 So. 2d at 1019, 1020, 1022, refers to “acts, omissions or decisions” and to “categor[ies] of governmental activity which [involve] broad policy or planning decisions.”

95. *Yamuni*, 529 So. 2d at 261.

96. *Id.* at 267 (Grimes Overton, JJ., dissenting).

97. See Deborah L. Caventer, Student Author, *The Demise of the Discretionary Exception to Sovereign Immunity*, 18 Stetson L. Rev. 615 (1989) (providing a detailed criticism of the Court’s failure to adhere to its own principles).

E. Foreseeable Zone of Risk — Bypassing the Public-Duty Doctrine

In *Kaisner v. Kolb*,⁹⁸ the new majority, led by Justice Barkett, again found liability when a police officer instructed a motorist not to approach the police car after a traffic stop.⁹⁹ When the officer gave this instruction, the motorist was between the police car and his truck. A third vehicle subsequently struck the police car and drove it into the motorist.¹⁰⁰ The plaintiff alleged that the police “breached a duty of care by failing to use proper police procedure in the stop.”¹⁰¹ The Court found the police exercised sufficient custody, control, or detention, which gave rise to a common-law duty of care, and that “[t]he decision as to where motorists will be ordered [to stand did not involve] . . . the type of discretion that needs to be insulated from suit.”¹⁰²

The analysis in *Kaisner* has had a lasting impact not only on governmental-immunity law, but on Florida negligence law in general. Specifically, because it was the Court’s first express adoption of the conclusion that “[w]here a defendant’s conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.”¹⁰³ The *Kaisner* decision became the supporting authority for the application of the foreseeable-zone-of-risk analysis in *McCain v. Florida Power Corporation*,¹⁰⁴ which is now widely cited as authority for the quoted conclusion.¹⁰⁵ However, a

98. 543 So. 2d 732 (Fla. 1989).

99. *Id.* at 733.

100. *Id.*

101. *Id.*

102. *Id.* at 737. The facts discussed in the opinion do not support the conclusion that the officer ordered the motorist to stand anywhere, but only that he told the motorist not to approach the police car.

103. *Id.* at 735.

104. 593 So. 2d 500 (Fla. 1992).

105. *Id.* at 503. *McCain* has spawned numerous decisions finding duty, not on the basis of traditionally accepted factors such as the relationship of the parties and policy concerns, but simply upon the observation that something called a foreseeable zone of risk exists. *Henderson v. Bowden*, 737 So. 2d 532, 535 (Fla. 1999); *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202 (Fla. 1997); *Bolender v. State*, 661 So. 2d 278, 280 (Fla. 1995). The vague standard has been applied with great success to supplant more narrow traditional rules for defining duty and thereby expand liability not only in the case of public entities, but with regard to the general public as well. For instance, in the case of *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), the Court jettisoned the common-law agrarian rule that a land-

close examination of the precedent relied upon in *Kaisner* and later in *McCain* reveals that neither of those precedents, nor any Florida law before *Kaisner*, used the term foreseeable zone of risk or employed its standard.¹⁰⁶

In fact, research indicates that only one other state uses the phrase “foreseeable zone of risk” in discussing the element of duty in negligence law.¹⁰⁷ Nationally, the courts consider numerous relevant factors and recognize that public policy and social considerations, as well as foreseeability, are important among those factors.¹⁰⁸ Employing foreseeability alone as a standard for duty, as Florida does, confuses foreseeability with duty and is contrary to the practice of courts in most jurisdictions.¹⁰⁹

Nevertheless, by holding that the duty element of negligence is satisfied when the defendant’s conduct creates a foreseeable zone of risk, the majority deftly skirted the issue under *Trianon Park* concerning whether there was a common-law duty of care at all. As Justice McDonald pointed out in his dissent, “[t]his is not the foreseeability upon which the law of negligence is based.”¹¹⁰ He could not agree that the police conduct either produced a duty to protect the driver from the third-party driver’s negligent act or

owner owed no duty to persons not on his property. Instead, the Court applied its foreseeable-zone-of-risk analysis to find a service-station owner owed a duty of care to off-premises pedestrians struck by a motorist exiting the service station. *Id.* The motorist claimed foliage on the service-station property obstructed her vision of the pedestrian. *Id.*

106. *Kaisner*, 543 So. 2d at 735–736 (citing *Stevens v. Jefferson*, 436 So. 2d 33, 35 (Fla. 1983). *Stevens* in turn cites *Crislip v. Holland*, 401 So. 2d 1115, 1117 (Fla. Dist. App. 4th 1981); however, neither *Stevens* nor *Crislip* discussed or applied a foreseeable-zone-of-risk test for duty or even used the term. *Stevens*, involving whether a tavern owner could be liable to a patron for injuries intentionally inflicted by a third party, defined the duty of the tavern owner to an invitee patron “to use due care to maintain his premises in a reasonably safe condition commensurate with the activities conducted thereon.” 436 So. 2d at 34. The duty is recognized in the context of established principles of premises liability and the relationship of the parties, not upon the creation of a foreseeable zone of risk. Likewise, in *Crislip*, the issue was not whether a duty of reasonable care existed, but “whether the injuries sustained by the plaintiff were a foreseeable consequence” of the City’s actions. 401 So. 2d at 1116.

107. *Inglehart v. Bd. of County Commns. of Rogers City*, 60 P.3d 497, 502 n. 21 (Okla. 2002). Even in Oklahoma, however, foreseeability is not the sole standard for the existence of duty. It is considered among other factors.

108. 57A Am. Jur. 2d *Negligence* § 87 (1989 & Supp. 2002).

109. *Id.* § 136.

110. *Kaiser*, 543 So. 2d at 740 (McDonald, J., dissenting). Justice McDonald’s dissent is all the more ironic because it is the opinion he authored in *Stevens*, which the majority in *Kaisner* cited as authority for its foreseeable-zone-of-risk test for duty. *Id.* at 735–736.

that there was police conduct that exposed the plaintiff to an unreasonable risk of harm.¹¹¹

The principle of foreseeable zone of risk contained in *Kaisner* has now become pervasive in Florida negligence law.¹¹² Because virtually every activity may be viewed as creating some foreseeable zone of risk, the first step in the *Trianon Park* immunity analysis, determining whether a common-law duty existed, is effectively bypassed.

This foreseeable-zone-of-risk duty analysis has borne little resemblance to the policy-based duty analysis that legal commentators have recognized and that other courts, including some Florida courts, have employed.¹¹³ In fact, of the foreign jurisdictions surveyed for this Article, Oklahoma is the only State that employs the foreseeable-zone-of-risk analysis as a primary test for duty.¹¹⁴ Nevertheless, the Florida Supreme Court has adhered tenaciously to its foreseeable-zone-of-risk analysis, and in the nine decisions employing the test since *Kaisner*, the Court has never failed to find a duty.¹¹⁵ Furthermore, the Court now almost invariably does

111. *Id.* at 739; *cf. Leone*, 619 N.E.2d at 120 (finding, by a divided court, that the special-duty exception to the public-duty doctrine applied to a similar situation involving far greater control by the police officer); *De La Paz v. City of N.Y.*, 743 N.Y.S.2d 116, 117 (App. Div. 2002) (finding no special duty to a motorist who was injured in a rear-end accident while sleeping in his disabled car after police told him they would call a tow truck).

112. *E.g. McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992).

113. *See Dore v. City of Fairbanks*, 31 P.3d 788, 792–793 (Alaska 2001); *Adams*, 80 Cal. Rptr. 2d at 216–217; *Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982); *Levy v. Fla. Power & Light Co.*, 798 So. 2d 778, 780 (Fla. Dist. App. 4th 2001); W. Page Keeton, *Prosser & Keeton on Torts* § 42, 274 (5th ed., West 1984); William Prosser, *Handbook of The Law of Torts* § 53, 325 (4th ed., West 1971) (stating that duty is a legal concept and asking “whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct”).

114. *Johnson v. Fine*, 45 P.3d 441, 443 (Okla. 2002); *Fuller v. Pacheco*, 21 P.3d 74, 78 (Okla. 2001).

115. *See Whitt*, 788 So. 2d at 222 (finding a landowner owed a duty to off-premises persons injured because of natural conditions or landscaping on premises); *Nova S.E. U., Inc. v. Gross*, 758 So. 2d 86, 89–90 (Fla. 2000) (finding a duty on the part of a university to students for assignment to an internship site known to be unreasonably dangerous); *Henderson*, 737 So. 2d at 537 (finding a duty to passengers in car involved in an accident after the car had been stopped and the driver arrested); *Fla. Power & Light Co. v. Periera*, 705 So. 2d 1359, 1361 (Fla. 1998) (finding a duty to a motorcyclist unlawfully operating a motorcycle on a bike path when he struck a power-company guy wire); *Kitchen*, 697 So. 2d at 1208 (finding a firearm provider owed a duty not to give a firearm to person who is known or should be known to be intoxicated); *Union Park Meml. Chapel v. Hutt*, 670 So. 2d 64, 67 (Fla. 1996) (finding a funeral director undertaking to lead procession owed a duty to an injured driver when the driver passed through a red light at an intersection and was injured); *Pate v. Threlkel*, 661 So. 2d 278, 282 (Fla. 1995) (finding a physician owed a duty to

not address whether the common law recognized a duty under the government's police-power functions, as *Trianon Park* required.¹¹⁶ Able to circumvent the duty obstacle with its foreseeable-zone-of-risk analysis, the Court has found a new license to scrutinize government conduct that previously enjoyed protection from civil liability.

1. Scrutiny of Police Pursuits

In *City of Pinellas Park v. Brown*,¹¹⁷ Justices Shaw and Bar-kett joined with Justice Gerald Kogan in concluding that police participating in a vehicle pursuit owed a duty to third-party motorists injured in a collision with the fleeing criminal. The majority concluded the government owed a duty because participating in a "high-speed chase involving a large number of vehicles on a public thoroughfare is likely to result in injury to a foreseeable victim."¹¹⁸ Again, the Court was deeply divided. Justice Overton's dissent, in which Justice McDonald joined, expressed frustration that the majority misinterpreted an earlier decision in *City of Miami v. Horne*,¹¹⁹ which involved a police pursuit in which the Court did not allow recovery.¹²⁰ He stated that the majority would be "making the governmental entity pay for the damages caused by a criminal offender trying to avoid apprehension."¹²¹ Justice Major B. Harding also dissented and separately stated that the *Horne* decision was controlling and that the majority "draws a line too obscure for an officer to clearly know whether to pursue or to cease pursuit."¹²² Even Justice Grimes's swing-vote concur-

warn a patient of genetically transferable nature of a condition for which the physician was treating the patient); *City of Pinellas Park v. Brown*, 604 So. 2d 1222, 1226 (Fla. 1992) (holding that law enforcement owed a duty to third parties injured by a fleeing criminal even though the accident did not involve a police vehicle); *McCain*, 593 So. 2d at 504 (finding a power company owed a duty to a operator of the mechanical trencher to indicate known location of underground cable).

116. *But see Vann v. Dept. of Corrections*, 662 So. 2d 339, 340 (Fla. 1995) (holding that the Department of Corrections was not liable for the criminal acts of an escaped prisoner because there was no duty owed). In *Vann*, the Court did not mention the foreseeable-zone-of-risk analysis.

117. 604 So. 2d 1222.

118. *Id.* at 1225; *but see Bryant v. Beary*, 766 So. 2d 1157 (Fla. Dist. App. 5th 2001) (finding that a fleeing criminal was the sole proximate cause of his own injuries).

119. 198 So. 2d 10, 14 (Fla. 1967).

120. *Brown*, 604 So. 2d at 1230 (Overton & McDonald, JJ., dissenting).

121. *Id.* at 1231.

122. *Id.* at 1231 (Harding, J., dissenting).

rence expressed reservations that this was a “close case because it involve[d] competing public policy considerations.”¹²³

2. Scrutiny of Police Detentions

In *Henderson v. Bowden*,¹²⁴ a much less divided Court, led by Justice Charles T. Wells with Justice Barbara J. Pariente replacing Justice McDonald, continued its scrutiny of law-enforcement activity. The Court found that the sheriff’s deputies owed a duty to passengers of a vehicle stopped for driving under the influence of alcohol because they “placed the passengers in danger” by directing an allegedly intoxicated passenger to drive to a nearby convenience store and call his parents.¹²⁵ The passenger that the police allowed to drive was not in police custody.¹²⁶ After going to the convenience store, he proceeded to drive off and subsequently had an accident, killing two other rear-seat passengers.¹²⁷ Despite those facts, the Court had no difficulty finding a duty under its simple foreseeable-zone-of-risk analysis, thereby avoiding immunity simply by casting the police conduct as acting “negligently during a roadside detention” rather than negligently deciding not to arrest, which was insulated from liability in *Everton*.¹²⁸ Justice Overton, the lone dissenter, pointed out that “the practical effect is that now officers will believe they must, in every instance, impound every car where the driver is taken into custody and take all passengers to the police station.”¹²⁹

F. The Current Status of the Public-Duty Doctrine

Although *Yamuni* and subsequent decisions of the new majority have questioned the viability of the public-duty doctrine in Florida, there is also clear precedent supporting the doctrine’s survival. The Florida Supreme Court reaffirmed the vitality of the

123. *Id.* at 1228 (Grimes, J., concurring).

124. 737 So. 2d 532.

125. *Id.* at 536.

126. *Id.*

127. *Id.* at 534.

128. *Id.* at 538; compare *id.* (finding that police owed a duty to passengers when it directed a driver to call his parents) with *Dore*, 31 P.3d 796 (finding no duty to execute arrest warrant even when the party subsequently killed his spouse); *Leake v. Cain*, 720 P.2d 152, 161 (Colo. 1986) (finding no duty to arrest when police released a drunk driver to his brother and the brother then let him drive, resulting in an accident and six deaths).

129. *Henderson*, 737 So. 2d at 539 (Overton, J., dissenting).

public-duty doctrine in *Vann v. Department of Corrections*.¹³⁰ The decision answered, in the negative, the certified question “WHETHER THE STATE OF FLORIDA, DEPARTMENT OF CORRECTIONS, MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?”¹³¹ Oddly, the decision was unanimous.¹³² Even Justice Shaw concurred, and the holding was firmly bottomed on the public-duty doctrine.¹³³ The Court’s holding rests on the following principle, which was previously stated in *Everton*:

[G]overnmental duty to protect its citizens is a general duty to the public as a whole, and where there is only a general duty to protect the public, there is no duty of care to an individual citizen which may result in liability.¹³⁴

The fundamental concept of the public-duty doctrine could not have been stated more clearly.

Likewise, the Third District Court of Appeal in *Seguine*,¹³⁵ the Fifth District in *Austin v. Mylander*,¹³⁶ and the First District in *Sams v. Oelrich*,¹³⁷ all recognized and applied the public-duty doctrine. The United States District Courts, specifically the Southern District of Florida in *Smith v. City of Plantation*¹³⁸ and the Middle District of Florida in *City of St. Petersburg v. Lewis*,¹³⁹ recognized the application of the doctrine as pronounced by *Trianon Park*.

Despite the recognition of the doctrine by all levels of the Florida courts and by the federal district courts, at least one former member of the new majority has rejected the public-duty doctrine’s existence. In *Lewis v. City of St. Petersburg*,¹⁴⁰ authored by former Florida Supreme Court Justice Barkett, the United States Court of Appeals for the Eleventh Circuit, in *obituro dictum*, declared that the doctrine was abrogated in Florida and partially reversed the Middle District of Florida. *Lewis I* arose because of a

130. 662 So. 2d 339.

131. *Id.* at 340.

132. *Id.*

133. *Id.*

134. *Id.*

135. 627 So. 2d at 17.

136. 717 So. 2d 1073, 1075 (Fla. Dist. App. 5th 1998).

137. 717 So. 2d 1044, 1047 (Fla. Dist. App. 1st 1998).

138. 19 F. Supp. 2d 1323, 1331 (S.D. Fla. 1998).

139. 98 F. Supp. 2d 1344, 1349 (M.D. Fla. 2000) [hereinafter *Lewis I*].

140. 260 F.3d at 1265.

fatal police shooting of a motorist during an attempted traffic stop.¹⁴¹ The plaintiff brought several state-law claims for negligent use of a firearm and negligent training under Florida's Wrongful Death Act. The plaintiff also raised a federal claim under Title 42, Section 1983 of the United States Code.¹⁴² The federal district court granted the defendant City's motion for summary judgment on the federal claim, dismissed the state-law negligent-training claim with prejudice under Florida's public-duty doctrine, and dismissed the negligent-use-of-a-firearm claim without prejudice.¹⁴³ The summary judgment on the federal claims was not appealed, but the dismissals of the state-law claims were.¹⁴⁴ So, the only remaining claims before the Eleventh Circuit were Florida state-law claims.¹⁴⁵

Rather than deferring to Florida's highest court and certifying the important question concerning the vitality and extent of the public-duty doctrine as an earlier panel of the Eleventh Circuit had done in the similar case of *Hamilton ex rel. Hamilton v. Cannon*,¹⁴⁶ which involved Georgia's public-duty doctrine, the Barkett panel in *Lewis II* determined that no Florida Supreme Court guidance was necessary.¹⁴⁷ Even though the Eleventh Circuit expressly acknowledged an "apparent conflict between the District Court of Appeal cases and the Florida Supreme Court"¹⁴⁸ over the public-duty doctrine, the court proceeded to declare "Florida's rejection of the public duty doctrine."¹⁴⁹

The opinion made the following case for the abrogation of the public-duty doctrine:

In *Commercial Carrier . . .*, however, the Florida Supreme Court explicitly held that the public duty doctrine has no continuing vitality under Florida law subsequent to the effective date of Fla. Stat. § 768.28. Despite this ruling, several Florida District Court of Appeal cases have continued to apply the pub-

141. *Id.* at 1261.

142. *Id.*

143. *Id.*

144. *Id.* The Eleventh Circuit incorrectly referred to the summary judgment of the federal claim as a dismissal.

145. *Id.*

146. 114 F.3d 172 (11th Cir. 1997).

147. *Lewis II*, 260 F.3d at 1265.

148. *Id.* at 1266.

149. *Id.*

lic duty doctrine to bar tort liability for governmental acts. *See, e.g., Seguine*, 627 So. 2d at 17. However, no case has overruled *Commercial Carrier* and, in fact, in *Tranon Park*, 468 So.2d at 918, the Florida Supreme Court reaffirmed Florida's rejection of the public duty doctrine.

This apparent conflict between the District Court of Appeal cases and the Florida Supreme Court, and the resulting confusion surrounding the public duty doctrine, stems in part from the doctrine's inherent relation to the "discretionary" act exception to Florida's waiver of sovereign immunity. As noted earlier, a governmental agency is immune from tort liability based upon actions that involve its "discretionary" functions, such as development and planning of governmental goals and policies. This immunity is based upon the concept of separation of powers. *See Yamuni*, 529 So. 2d at 260 (defining an act as "discretionary" if it involves an "exercise of executive or legislative power such that, for the court to intervene by way of tort law would inappropriately entangle it in fundamental questions of policy and planning"). The public duty doctrine, to a certain degree, is based upon the same rationale. Thus, in many cases where the challenged act is "discretionary," the duty alleged to have been breached will be a public duty. For example, in *Everton v. Willard*, the Florida Supreme Court affirmed the dismissal of a complaint alleging the negligent failure to arrest a drunk driver against Pinellas County based upon the discretionary function exception. The Florida Supreme Court stated that the decision to arrest is a "discretionary power . . . considered basic to the police power function of governmental entities . . ." 468 So. 2d at 938. The court then went on to state that:

A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.

Thus, in *Everton*, although the Florida Supreme Court's holding was based upon the discretionary function exception, the duty owed was also a public duty.¹⁵⁰

150. *Id.* at 1265-1266.

While the opinion correctly asserted that *Commercial Carrier* rejected the public-duty-doctrine rationale, it is incorrect that the *Trianon Park* Court “reaffirmed Florida’s rejection.”¹⁵¹ In fact, as previously discussed, the *Trianon Park* Court revived the public-duty doctrine and distinguished *Commercial Carrier* on the basis that the Court “did not discuss or consider conduct for which there would have been no underlying common law duty upon which to establish tort liability.”¹⁵²

The Eleventh Circuit in *Lewis II* further claimed that the public-duty doctrine in Florida was not really the public-duty doctrine at all, but only the implied-discretionary-function immunity, and that the two were being confused because they shared a rationale founded upon the concept of separation of powers and because a discretionary governmental function could involve a public duty.¹⁵³ The point was not compelling, and the entire discussion of the public-duty doctrine was gratuitous, because it was not essential to the holding that the district court properly dismissed plaintiff’s negligent-training claim.¹⁵⁴

As with so many aspects of Florida governmental tort law, there is considerable confusion about the public-duty doctrine.¹⁵⁵ The Eleventh Circuit Court’s gratuitous contribution in the *Lewis II* case has done nothing to clarify the doctrine’s status. It might have been helpful if the court had certified the question of the existence and scope of the doctrine to the Florida Supreme Court, following a process consistent with the *Cannon* case, because the matter was purely one of state law, and the state courts conceded to the confusion. With no federal issues before it, the federal court in *Lewis II* chose instead to announce, through its own dictum, its clarification of the state law.¹⁵⁶

Florida continues to follow the public-duty doctrine, although the Florida courts are now more reluctant than ever to refer to it

151. *Id.* at 1266.

152. *Trianon Park*, 468 So. 2d at 918.

153. *Lewis II*, 260 F.3d at 1266.

154. *Id.*

155. See Eugene McQuillin, *The Law of Municipal Corporations* vol. 18, § 53.04.25, 165–174 (James Perkwitz-Solheim et al. eds., 3d ed., CBC 1993) (citing *Mylander* and *Sams* as public-duty cases, but recognizing *Commercial Carrier* as abrogating the doctrine in Florida); Wetherington & Pollock, *supra* n. 3, at 31 (recognizing the viability of the public-duty doctrine as an exception to government tort liability).

156. *Lewis II*, 260 F.3d at 1266.

as such. Since *Lewis II*, the Florida Supreme Court has remained silent on the doctrine, and its scope, if any, remains a mystery. On February 6, 2002, the Florida Supreme Court heard oral argument in *Pollock v. Florida Department of Highway Patrol* and *Leeds v. Florida Department of Highway Patrol*, which may again address the vitality of the public-duty doctrine in a case involving whether the department had a duty to relay an emergency 911 call regarding a tractor-trailer broken down in the slow lane of an expressway.¹⁵⁷ Although the Florida Highway Patrol had taken a call and indicated it would send someone out to investigate, it had not dispatched a unit one-half hour later when a motorist died after hitting the tractor-trailer.¹⁵⁸

In addressing whether the government owed a special duty to the decedent motorist based on the phone call from another motorist, the Florida Supreme Court will have another opportunity to embrace the public-duty doctrine and address the extent of the protection the doctrine affords in Florida. However, this result seems unlikely given the current trend of the Court's decisions toward ever-expanding government tort liability.¹⁵⁹

157. In the lower court, this case is reported as *State v. Pollack*, 745 So. 2d 446, 447 (Fla. Dist. App. 3d 1999), *rev. granted*, 799 So. 2d 218 (Fla. 2001).

158. *Id.*

159. Florida Supreme Court opinions on governmental-immunity issues since enactment of the waiver statute are as follows: *Florida Department of Natural Resources v. Garcia*, 753 So. 2d 72 (Fla. 2000) (not formally designating liability for operating public-swimming area); *Henderson*, 737 So. 2d 532 (finding liability for police negligence during roadside detention); *Lee v. Department of Health and Rehabilitative Services*, 698 So. 2d 1194 (Fla. 1997) (finding liability for negligent supervision of employees, but no liability for negligent establishment of level of supervision in facility); *Vann*, 662 So. 2d 339 (finding no liability for criminal acts of escaped prisoner); *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So. 2d 906 (Fla. 1995) (finding no liability for allocation of services); *Brown*, 604 So. 2d 1222 (finding liability for negligent police pursuit); *Department of Transportation v. Konney*, 587 So. 2d 1292 (Fla. 1991) (finding no liability for negligent failure to upgrade an intersection); *Department of Health and Rehabilitative Services v. Whaley*, 574 So. 2d 100 (Fla. 1991) (finding liability for negligent failure to protect child in custody from potential harm by third persons); *Slemp v. City of North Miami*, 545 So. 2d 256 (Fla. 1989) (finding liability for negligent failure to operate or maintain drainage pumps to prevent flood damage); *City of Jacksonville v. Mills*, 544 So. 2d 190 (Fla. 1989) (finding liability for maintenance of courthouse); *Kaisner*, 543 So. 2d 732 (finding liability for negligence in police ordering motorist where to stand during roadside detention); *Yamuni*, 529 So. 2d 258 (finding liability for negligent failure to adequately investigate and detect child abuse); *Bailey Drainage Dist.*, 526 So. 2d 678 (finding liability for negligently rendering an intersection dangerous by obstructing visibility and producing a hidden trap); *Salas*, 511 So. 2d 544 (finding liability for blocking off a turn lane and deactivating turn signal, leaving motorists without guidance); *Butler*, 501 So. 2d 579 (finding liability for creating a designated swimming area where a dangerous condition existed);

In Florida, the criticism leveled at the public-duty doctrine is undeserved and has not addressed the desirability of the doctrine as an aspect of governmental-tort law in our State.¹⁶⁰ Rather, critics have attacked the premise of the doctrine as illogical, circuitous reasoning, characterizing it as “a duty to none where there is a duty to all.”¹⁶¹ However, upon close examination, this criticism of the circuitous reasoning underlying the doctrine is both shallow and specious. First, the reasoning behind the doctrine is not circular. Second, the doctrine does not rest on the notion that a general duty negates a specific duty; rather, the doctrine recognizes that the government’s obligation to protect the general public through functions such as law enforcement and firefighting are incompatible as a matter of public policy with the negligence concept of a duty of care to an individual and liability founded upon a breach

Avallone, 493 So. 2d 1002 (Fla. 1986) (finding liability for negligently operating swimming facility); *Ralph v. City of Daytona Beach*, 471 So. 2d 1 (Fla. 1985) (finding liability for negligently failing to warn of motor vehicles on beach); *Palmer*, 469 So. 2d 121 (finding no liability for failure to properly fight a fire); *Carter*, 468 So. 2d 955 (finding no liability for failure to enforce animal-control ordinance); *Rodriguez v. City of Cape Coral*, 468 So. 2d 963 (Fla. 1985) (finding no liability for police failure to take someone into protective custody); *City of Daytona Beach v. Huhn*, 468 So. 2d 963 (Fla. 1985) (finding no liability for police failure to arrest); *Duwall v. City of Cape Coral*, 468 So. 2d 961 (Fla. 1985) (finding no liability for police failing to arrest and permitting intoxicated driver to return to car); *Everton*, 468 So. 2d 936 (finding no liability for police failure to arrest); *Reddish*, 468 So. 2d 929 (finding no liability for Department of Corrections’s classification of prisoner to minimum-custody status); *Trianon Park*, 468 So. 2d 912 (finding no liability for negligent actions of building inspectors enforcing building code); *Payne*, 461 So. 2d 63 (finding no liability for opening a road before all planned improvements had been completed); *Perez*, 435 So. 2d 830 (finding no liability for failure to upgrade and improve bridge, but possible liability for failure to warn of known dangerous condition); *Harrison*, 434 So. 2d 316 (finding no liability for designation of school-bus stop); *Collom*, 419 So. 2d 1082 (finding liability for failure to warn of creation of a known dangerous condition that was not readily apparent); *Ingham*, 419 So. 2d 1082 (finding no liability for alleged defects in the overall plan of a road or for failure to install additional traffic-control devices); *Neilson*, 419 So. 2d 1071 (finding no liability for failure to upgrade existing roads or intersections, or for failure to build roads with particular alignment); *Commercial Carrier*, 371 So. 2d 1010 (finding government liability for failure to maintain existing traffic-control devices). From 1979 through 1985, only two cases out of fifteen found liability. From 1985 through 2002, only three cases out of seventeen found no liability. This expansion is evident not only in the area of governmental tort liability, but in virtually every aspect of tort liability. For instance, in *Whitt*, 788 So. 2d at 222, the Court jettisoned the agrarian rule protecting private landowners from liability for off-premises accidents. In *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 331 (Fla. 2001), the Court changed the burden of proof to allow plaintiffs in slip-and-fall cases to establish more easily their case, against store owners. The Legislature reacted by enacting Florida Statutes Section 768.0710 (2002) to restore the original burden.

160. *Com. Carrier*, 371 So. 2d at 1015 (stating that the critics have improperly characterized the doctrine).

161. *Id.*

of such a duty.¹⁶² It is not circuitous reasoning to conclude that a governmental responsibility to the general public does not necessarily entail a duty of reasonable care to an individual for the breach of which the government may be held liable in tort. Duty in tort is determined largely by the question of whose interests are to be protected.¹⁶³ If, as a matter of public policy, the interests of the individual in recovering for injury are secondary to the public interest in having the government perform certain protective functions without the specter of tort liability looming over the activity, then no legal duty to the individual need be recognized.¹⁶⁴ If, on the other hand, as a matter of public policy, the interest of the individual in recovery for injury outweighs that of the government in performance of the function, then such a duty to the individual may exist.¹⁶⁵

V. CONFUSION

The Florida Supreme Court's recognition of an implied-discretionary-function-immunity exception to the waiver statute has contributed to the confusion and lack of uniformity that characterizes this area of the law. The confusion remains despite the Court's assertion in *Carlile* that implicit interpretation was to be avoided in construing the statute. The Court has created a nebulous analysis for identifying governmental conduct entitled to new implied immunity. It has rejected and revived the public-duty doctrine and has failed to define the doctrine's contours. The Court's creation of the superficial foreseeable-zone-of-risk test for duty has compounded the confusion. Notably, the ongoing ideological battle for dominance on the Florida Supreme Court, between those who want broad governmental tort liability and those who do not, has also contributed to the confusion.¹⁶⁶

162. See generally *Ruf*, 972 P.2d at 1092.

163. Prosser, *supra* n. 113, at § 53, 325.

164. *Id.*

165. *Id.*

166. An example of the confusion that Florida's lower courts face can be found in *Robles v. Metropolitan Dade County*, in which the Third District Court of Appeal ruled that a police officer's act of shooting a school-bus hijacker was discretionary, thus entitling the county to immunity in a personal-injury action brought by the parents of a minor child who was blinded in one eye when he was struck by flying debris from the officer shooting. 802 So. 2d 453 (Fla. Dist. App. 3d 2001). The officer was involved in a law-enforcement function for which there would be no common-law duty of care owing to the injured child under *Tranon Park* and, thus, no liability. *Id.* at 455. However, to reach the conclusion

In addition, from the outset of its interpretation of the waiver statute, the Florida Supreme Court has not strictly construed the statute's language and has not given adequate attention to important federal decisions interpreting the FTCA, on which Florida's statute is modeled. This Article will now focus on the relationship of the FTCA to the Florida waiver statute and discuss how and why the courts should have consulted federal decisions when construing the state statute.

*VI. COMPARING THE FTCA TO THE FLORIDA
WAIVER STATUTE — HOW SECTION 768.28 SHOULD
HAVE BEEN CONSTRUED*

Florida Statutes Section 768.28 is subject to strict construction because the Legislature is the only body possessed of power to create or expand the waiver.¹⁶⁷ The courts do not possess the power to enlarge the waiver or grant any relief contrary to the statute.¹⁶⁸

A. Differences between Federal Court Construction of the
FTCA and the Florida Supreme Court's Construction of
the State's Waiver Statute

Florida Statutes Section 768.28 and the waiver contained therein is the instrument by which subject-matter jurisdiction is granted to the courts to consider tort actions arising from claims

that the conduct was immune, the court analyzed the officer's conduct as "a discretionary act of executive decision making" under the "serious emergency" exception to the liability found in the police chase case of *Brown. Id.*

167. *Carlile*, 354 So. 2d at 364; *Spangler v. Fla. St. Turnpike Auth.*, 106 So. 2d 421, 424 (Fla. 1958); *Dept. of Nat. Resources v. Cir. Ct. of Twelfth Jud. Cir.*, 317 So. 2d 772, 774 (Fla. Dist. App. 2d 1975); 27 Am. Jur. 2d *Statutes* § 274 (2000). A waiver under federal law, as applied to the United States, is to be strictly construed. *U.S. v. Shell Oil Co.*, 294 F.3d 1045, 1051 (9th Cir. 2002). Despite the fact the statute is subject to the rule of strict construction, the question remains as to how often this rule has guided the Florida Supreme Court when determining the scope of the Florida waiver.

168. In that regard, the expression by the majority in *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1375 (11th Cir. 1981) in discussing claims against the United States is instructive. "The federal courts are without power to waive the sovereign immunity of the United States either by affording substantive relief broader than that provided by Congress or by liberalizing statutorily prescribed jurisdictional limitations on such relief." *Id.* A similar understanding of power would apply to Florida courts. What will become apparent upon a review of several of the Florida Supreme Court opinions is the fact that the Court has demonstrated little deference to the principle that the power to change the waiver enacted resides only with the legislature. *See supra* n. 159 (providing an exhaustive list of Florida Supreme Court opinions that address sovereign immunity).

made against the state, its agencies, counties, and municipalities.¹⁶⁹

The language setting forth the jurisdiction and limited waiver can be found in Subsections one and five of Section 768.28 as follows:

- (1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.¹⁷⁰

. . .

- (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment.¹⁷¹

1. Derivation of the Florida Waiver

Florida follows the rule that the adoption of the wording from a statute enacted by another jurisdiction carries with it the previous decisions of the other jurisdiction construing its statute.¹⁷² While debate records do not exist for the Florida waiver statute and there is little legislative history to consult, it is apparent that

169. Fla. Stat. § 768.28(1); *Garcia v. Reyes*, 697 So. 2d 549, 550 (Fla. Dist. App. 4th 1997); *Hutchins v. Mills*, 363 So. 2d 818, 821 (Fla. Dist. App. 1st 1978).

170. Fla. Stat. § 768.28(1).

171. *Id.* § 768.28(5).

172. *Davis v. Strople*, 39 So. 2d 468, 470 (Fla. 1949); *Gray v. Stand. Dredging Co.*, 149 So. 733, 735 (Fla. 1933); see *Hubbard v. State*, 163 N.W.2d 904, 909 (Iowa 1969) (serving as an example of another state that follows a similar rule).

the language of Florida's statute is derived from the language of the FTCA.¹⁷³

The waiver of sovereign immunity that Congress enacted to govern claims made against the United States is tantamount to the language contained in Florida Statutes Section 768.28. Title 28, Section 1346(b) of the United States Code contains the following language pertinent to the comparison:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹⁷⁴

Title 28, Section 2674 of the United States Code provides,

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.¹⁷⁵

Florida's Legislature, exercising its exclusive waiver power, adopted a waiver both as to subject-matter jurisdiction and content that is similar to the jurisdiction and waiver Congress enacted to govern the United States. In fact, in *Commercial Carrier*, the Florida Supreme Court tacitly recognized that the statutes are similar in language.¹⁷⁶

173. For a discussion of the first general waiver statute, consult *supra* notes 13–19 and accompanying text.

174. 28 U.S.C. § 1346(b) (2000). This examination will not deal directly with the several statutory exceptions that have been engrafted on the FTCA, the central purpose being to examine the respective waivers as they were originally adopted. For specific statutory exceptions, consult Title 28, Section 2680(a)–(c) of the United States Code. Florida Statutes Section 768.28 does not contain similar statutory exceptions.

175. 28 U.S.C. § 2674 (2000).

176. 371 So. 2d at 1016.

The United States Congress first adopted FTCA in 1946.¹⁷⁷ Decisions of the United States Supreme Court construing the same waiver language also found in Florida Statutes Sections 768.28(1) and (5) predated the adoption of Florida's statute.¹⁷⁸ It is incumbent upon a party seeking to pursue a claim against the United States to "allege facts that, under similar circumstances in a state common law tort action, would create a cause of action against a private individual."¹⁷⁹ Like the Florida waiver statute, the waiver under the FTCA is also subject to the rule of strict construction.¹⁸⁰ The manner in which the federal courts have applied federal waiver should have provided Florida courts parallel reasoning as to the meaning and scope of the waiver the Florida Legislature adopted.¹⁸¹

2. Federal Tort Claims Act Waiver

Central to this part of the analysis is an examination of the federal-court opinions that have construed and applied the language of waiver contained in the FTCA, particularly the language relating to liability "to the same extent as a private individual under like circumstances."¹⁸² The waiver set forth in the FTCA is a limited waiver.¹⁸³

In *Federal Deposit Insurance Corporation v. Meyer*,¹⁸⁴ the United States Supreme Court identified six elements that must exist for a claim made against the United States to allow subject-matter jurisdiction under Title 28, Section 1346(b) of the United States Code. The claim must be

177. See *U.S. v. Yellow Cab Co.*, 340 U.S. 543, 547–548 (1951) (providing a detailed recitation of the FTCA's historical beginnings).

178. For a discussion that refers to a United States Supreme Court opinion setting forth the test that should govern the specific language consult *infra* notes 187–193 and accompanying text.

179. *First Natl. Bank in Brookings v. U.S.*, 829 F.2d 697, 700 (8th Cir. 1987) (quoting *Tuepker v. Farmers Home Administration*, 708 F.2d 1329, 1333 (8th Cir. 1983)).

180. *Id.*

181. *Schick*, 504 So. 2d at 1322. Even though the Florida Supreme Court chose not to follow federal decisions, other state courts have decided otherwise. See *Adam v. Mt. Pleasant Bank & Trust Co.*, 340 N.W.2d 251, 252 (Iowa 1983) (following legislative choice and noting federal decisions "are therefore entitled to great weight" when interpreting the Iowa Act, which was based on the FTCA).

182. 28 U.S.C. § 2674.

183. *U.S. v. Agronics, Inc.*, 164 F.3d 1343, 1345–1347 (10th Cir. 1999).

184. 510 U.S. 471, 477 (1994).

(1) against the United States, (2) for money damages . . . , (3) for injury or loss of property, or personal injury or death, (4) caused by the negligent or wrongful act or omission of any employee of the Government, (5) while acting within the scope of his office or employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.¹⁸⁵

Assuming that subject-matter jurisdiction is present, the following are some of the tests the federal courts have employed to determine whether the United States is subject to liability “in the same manner and to the same extent as a private individual under like circumstances.”¹⁸⁶

- (a) Is there an analogous private party who could stand in the shoes of the United States? What is the most reasonable private analogy?¹⁸⁷
- (b) Is there a cause of action against a private person that would be comparable in nature that is recognized by the jurisdiction where the tort occurred?¹⁸⁸
- (c) Is the court involved with conduct that is governmental in character for which no private analogy exists? Do the alleged federal acts constitute violations of analogous duties

185. *Id.* (citing 28 U.S.C. § 1346(b)). Compare the FTCA with the jurisdictional grant contained in Florida Statutes Section 768.28(1) to determine what criteria Florida courts apply to ascertain subject-matter jurisdiction. Both the FTCA and Florida’s waiver statute contain similar substantive provisions. Within the Florida decisions, however, no parallel criteria can be found. *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 486–488 (Fla. 2001); *Provident Mgmt. Corp. v. City of Treasure Island*, 718 So. 2d 738, 741–742 (Fla. 1998) (Overton, J., dissenting); *Sams v. Oelrich*, 717 So. 2d 1044, 1046 (Fla. Dist. App. 1st 1998). It appears that jurisdiction never was raised, even by the court itself. Given that an action can be maintained only by virtue of Florida Statutes Section 768.28(1), it would appear that courts should be looking to that Subsection to ascertain whether a party maintained the action was in full compliance with the statute. *See Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002) (setting forth the principle that “no suit may be maintained . . . unless the suit is brought in exact compliance with the terms of a statute” (citing *Kohler v. U.S.*, 153 F.3d 263, 265 (5th Cir. 1998))).

186. *U.S. v. Muniz*, 374 U.S. 150, 153 (1963). The tests outlined herein are current opinions. The United States Supreme Court in *Rayonier v. United States*, 352 U.S. 315, 319 (1957), followed the same test, which was available when the Florida Supreme Court issued the *Commercial Carrier* opinion in 1979.

187. *Bush v. Eagle-Picher Indus., Inc.*, 927 F.2d 445, 452 (9th Cir. 1991).

188. *Akutowicz v. U.S.*, 859 F.2d 1122, 1125 (2d Cir. 1988).

imposed on a private party under law of the place where tort occurred?¹⁸⁹

- (d) Do all the circumstances involved create liability for the private party or do the circumstances under which a private person would incur liability differ in a material respect from those involved under which the government act occurred?¹⁹⁰
- (e) Does state law impose liability on a private individual under like circumstances? Would a private individual be responsible for similar negligence under the laws of the state where the acts occurred?¹⁹¹
- (f) Does the conduct engaged in by the Federal government involve only conduct such as administrative acts that only it could be involved in and a private party could not?¹⁹²
- (g) Can the government be analogized to a similarly situated private party?¹⁹³

In *Kleer v. United States*,¹⁹⁴ the United States Court of Appeals for the Eleventh Circuit used such a test to deny liability on the part of the United States because a private individual would not be liable under like circumstances.¹⁹⁵ *Kleer* involved the Ocala National Forest, a federally owned preserve in North Florida that the United States Forest Service maintained. The preserve contained several distinct areas. Portions were developed for public use, and federal-service employees supervised those areas. Fees were charged in those areas.

189. *Chen v. U.S.*, 854 F.2d 622, 625–627 (2d Cir. 1988); *Cecile Indus., Inc. v. U.S.*, 793 F.2d 97, 99–100 (3d Cir. 1986).

190. *Reynolds v. U.S.*, 927 F. Supp. 91, 96–97 (W.D.N.Y. 1996).

191. *Dorking Genetics v. U.S.*, 76 F.3d 1261, 1266 (2d Cir. 1996).

192. *Sea Air Shuttle Corp. v. U.S.*, 112 F.3d 532, 537 (1st Cir. 1997); *Dorking Genetics*, 76 F.3d at 1266.

193. *Nationwide Mut. Ins. Co. v. U.S.*, 3 F.3d 1392, 1396 (10th Cir. 1993).

194. 761 F.2d 1492, 1494–1495 (11th Cir. 1985).

195. Florida courts, when directly faced with a similar issue, have refused to apply the waiver language contained in Florida Statutes Section 768.28(5), as was done in *Kleer*. *Beard v. Hambrick*, 396 So. 2d 708, 712 (Fla. 1981) and *Morano v. City of St. Petersburg*, No. 98-7947-CI-21 (Fla. 6th Jud. Cir. 1998). Would the Sheriff's contention have resulted in the same answer had the court strictly construed the statute? Possibly; however, the more consistent answer is provided by a proper application of the actual language contained within the waiver statute. See *Winn v. U.S.*, 593 F.2d 855, 856 (9th Cir. 1979) (construing the FTCA's express language concerning revival of claims); *Poindexter v. U.S.*, 647 F.2d 34, 36–37 (9th Cir. 1981) (same).

Mr. Kleer jumped off of a bridge and into a creek in an undeveloped area of the preserve where there was no charge for entry; he suffered a fractured neck. He sued the United States, which claimed the benefit of Florida Statutes Section 375.251, a statute that exempted landowners who gratuitously provided public outdoor-recreation areas from tort liability. The United States government asserted that, because the Forest Service did not charge a fee for entry and no commercial activity occurred, the statute should control. Kleer contended that because the Forest Service charged a fee for the use of another area of the park, the statute's language provided no protection. Kleer also contended that because the statute was contrary to the common law, it should be strictly construed. The district court, on the eve of trial, dismissed the suit under Federal Rules of Civil Procedure 41(b) accepting the view that the action against the United States was barred by Florida Statutes Section 375.251.¹⁹⁶

The Eleventh Circuit noted that the United States would have only the liability that a private person would have under the law of the place where the accident happened.¹⁹⁷ The court, citing to state law, concluded that the fact that commercial activity occurred in another area of the park did not preclude application of Florida Statutes Section 375.251 to the area where the accident happened.¹⁹⁸ The statute's protection for private individuals providing recreational property also applied to the United States Government, and the Eleventh Circuit affirmed the district court's dismissal.¹⁹⁹

Likewise, decisions of other state jurisdictions with waiver statutes similar in language to that contained in the FTCA have applied this "private analog analysis."²⁰⁰

196. *Kleer*, 761 F.2d at 1493.

197. *Id.* at 1494–1495.

198. *Id.*

199. *Id.* at 1495. Interestingly, this same statute has been held inapplicable to local governments in Florida. *Chapman v. Pinellas County*, 423 So. 2d 578, 580 (Fla. Dist. App. 2d 1982); *Metro. Dade County v. Yelvington*, 392 So. 2d 911, 913 (Fla. Dist. App. 1st 1980). However, in neither of the cases did the government argue that its immunity had been waived only to the extent that its liability was coextensive with that of a private party under like circumstances.

200. *Denis Bail Bonds, Inc. v. State*, 622 A.2d 495, 498 (Vt. 1993); see *O'Brien v. State*, 555 A.2d 334, 338 (R.I. 1989) (inquiring whether the activity is a type "that a private person . . . would be likely to carry out"); *Ruf*, 972 P.2d at 1091–1092 (looking for the presence of an existing common-law cause of action); *Sanford v. Manternach*, 601 N.W.2d 360, 370

3. *The Florida Supreme Court: Disregarding Federal Precedent*

Unlike the federal courts, Florida courts have failed to create comparable tests to determine the reach of the waiver actually enacted under state law.²⁰¹ Since the adoption of Florida Statutes Section 768.28, no state-court opinions have addressed the grant of jurisdiction contained therein, nor have they discussed the elements that must be present for jurisdiction to exist, as have the federal courts considering the FTCA.²⁰² Further, none of the state-court opinions establish tests to guide lower courts in applying the statute's language. The Florida Supreme Court has demonstrated little concern to strictly construe the specific language of the statute.²⁰³ The reasoning contained in federal-court opinions applying similar language has not influenced or guided the Florida Supreme Court.²⁰⁴

(Iowa 1999) (determining whether there is a common-law cause of action already existing). Iowa courts look to federal cases for guidance. *Estate of Bryan Voss v. Iowa*, 553 N.W.2d 878, 881 (Iowa 1996).

201. Compare *Sea Air Shuttle Corp.*, 112 F.3d at 537 (finding the Federal Aviation Authority owed no duty to a claimant because no state law would support a claim under the FTCA); *Goodman v. City of Le Claire*, 587 N.W.2d 232 (Iowa 1998) (finding no governmental liability under a statute similar to Florida's statute) with *Yamuni*, 529 So. 2d at 260 (using identical statutory language under Florida Statutes Section 768.28, yet providing dramatically opposed results).

202. See *Tinch v. U.S.*, 189 F. Supp. 2d 313, 317 (D. Ind. 2002) (serving as an example of a court determining jurisdiction of the FTCA, a limited waiver statute, like Florida Statutes Section 768.28). The absence of a similar approach to jurisdiction where Florida's waiver statute is concerned further demonstrates the Court's lack of understanding concerning the Legislature's power and the courts where sovereign immunity is concerned.

203. If both statutory schemes are subject to the rule of strict construction, then why has the Florida Supreme Court abstained from narrowly construing the language of waiver? There is no question that the Florida Supreme Court in *Carlile* held that Florida Statutes Section 768.28 was subject to the rule of strict construction. That opinion, which Justice Sundberg, who authored *Commercial Carrier* joined, has not been overruled.

204. See *Rutten v. U.S.*, 299 F.3d 993, 995 (8th Cir. 2002) (providing an example of how the Florida Supreme Court should apply the doctrine of strict construction to the waiver statute). Reference in this portion of the Article will be to the following cases: *Henderson*, 737 So. 2d 532; *Kaisner*, 543 So. 2d 732; *Yamuni*, 529 So. 2d 258; *Everton*, 468 So. 2d 936; *Reddish*, 468 So. 2d 929; *Trianon Park*, 468 So. 2d 912; *Collom*, 419 So. 2d 1082; *Neilson*, 419 So. 2d 1071; and *Commercial Carrier*, 371 So. 2d 1010. These opinions are representative of the Court's continued confusion since the Florida Legislature first adopted Florida Statutes Section 768.28. These opinions demonstrate rather forcefully the confused and muddled state of the law concerning Florida's sovereign immunity and its waiver. One should also consult note 183 and the test set forth in *Rayonier*, in addition to the quotation set out at page ___ of this Article. One problem may arise from the fact that governmental agencies involved in these cases have allowed the issue to be presented as one of a return to the proprietary governmental dichotomy as opposed to requiring the court to examine whether a private person would be responsible for similar negligence under the laws where

For example, in *Commercial Carrier*, arguments in support of the lower appellate-court decisions that dismissed each of the complaints in the consolidated cases consisted of contentions

(1) that section 768.28 was intended to make the tort liability of the state and its political subdivisions coextensive, . . . measured by the scope of liability of municipal corporations at the time of enactment of the statute; (2) that there can be no tort liability under the act for essentially governmental functions because “private persons” do not perform such functions; and (3) that the acts or omissions complained of are discretionary in nature, thereby immunizing the governmental authority from liability.²⁰⁵

Petitioner argued for a much broader reading of the statute.²⁰⁶ Construing the language in Subsections one and five of Section 768.28, the Court rejected the respondent’s argument relating to the fact that private individuals do not engage in governmental conduct, citing *Indian Towing Co. v. United States*,²⁰⁷ which involved the parallel language of the FTCA.²⁰⁸ While the remainder of the majority opinion then proceeded to create an implied-discretionary-function exception and an elaborate test for identifying when that immunity would apply,²⁰⁹ no part of the opinion actually discussed what the Legislature intended when it indicated that liability would arise “in the same manner and to the same extent as a private individual under like circumstances.”²¹⁰

The majority opinion, when dealing with the scope of the actual waiver under Florida Statutes Section 768.28, did not examine former Florida Statutes Section 768.15 and did not announce that it had previously been determined that the statute was subject to the rule of strict construction.²¹¹ The chief problem with the majority’s analysis of the waiver language was its failure to recognize that the United States Supreme Court, in applying the FTCA waiver provision, actually looked to the most analogous

the tort occurred. See *Cheney v. Dade County*, 353 So. 2d 623, 627 (Fla. Dist. App. 3d 1977).

205. 371 So. 2d at 1014.

206. *Id.*

207. 350 U.S. 61, 76 (1955).

208. *Com. Carrier*, 371 So. 2d at 1016–1017.

209. *Id.* at 1021–1022.

210. Fla. Stat. § 768.28(5).

211. *Com. Carrier*, 371 So. 2d at 1016–1017.

private activity, which in the *Indian Towing* case involved the “good samaritan doctrine.” The Florida Supreme Court also failed to recognize that the United States Supreme Court in *Rayonier v. United States*²¹² held

[b]ut as we recently held in *Indian Towing Co. v. United States*, 305 U.S. 61, the test established by the Tort Claims Act for determining the United States’ liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred.²¹³

The United States Supreme Court, in *Indian Towing*, answered the government’s argument that the operation of a lighthouse was a purely governmental function and that, under Title 28, Section 2674 of the United States Code, there was no analogous private liability.²¹⁴ The United States Supreme Court opinion interpreted the statute, not as though the language of the statute related to a private person under the same circumstances, but as it is worded under “like circumstances.”²¹⁵ *Indian Towing* implies “that if a private individual would have incurred liability under the general law of torts, [of the state where the act occurred,] had he been engaged in the same activity as the government,” then the government would incur liability.²¹⁶

The *Commercial Carrier* opinion provided the general analytical approach the Florida Supreme Court would take in all of its opinions that would follow construing Section 768.28. The majority opinion stated the Legislature intended to waive sovereign immunity on a broad basis,²¹⁷ yet how the Court arrived at that conclusion is unknown. Because the Court did not examine the language contained in the predecessor Florida Statutes Section 768.15, it did not acknowledge the change in the language of Sec-

212. *Indian Towing*, 350 U.S. at 64–65.

213. 352 U.S. at 319. What the United States Supreme Court was addressing in *Indian Towing*, relied upon by the Florida Supreme Court, was the federal government’s argument that its liability should be the same as a municipal corporation, while pointing out what happens in the case of a private person when the “good samaritan doctrine” applies. 350 U.S. at 64–65.

214. Jack F. Dunbar, Student Author, *Torts — Federal Tort Claims Act — Liability for Negligent Performance of Purely Governmental Operations*, 27 Miss. L.J. 252, 254 (1956).

215. *Id.*

216. *Id.*

217. *Com. Carrier*, 371 So. 2d at 1022. We are not provided with any understanding with respect to what the conclusion means in the context of the waiver language.

tion 768.28. Further, no reference was made in the majority opinion to any legislative records or debate that would support the conclusion that the Legislature intended for the waiver to be broad.²¹⁸ However, the actual waiver language in Section 768.15 and Section 768.28 was never again considered in any meaningful way in subsequent cases, although several of those cases touched on the subject.²¹⁹

For instance, in *Trianon Park*,²²⁰ the Florida Supreme Court acknowledged that law-enforcement and fire-suppression activities should not subject the City to tort liability.²²¹ However, the City argued “that since there is no analogous cause of action against private parties for the negligent enforcement of building codes, there can be no liability for the city.”²²² The City referenced a series of federal cases that indicated there was no liability on the part of the United States for regulatory enforcement activities.²²³ It also cited to thirteen states that followed the concept that no liability can arise from building-inspection activity.²²⁴ The City further argued that under the *Restatement of Torts (Second)* Sections 288 and 315, law enforcement was not the kind of activity engaged in by private individuals; therefore, it was not included within the language of the waiver statute.²²⁵

The Florida Supreme Court found the City’s arguments persuasive and, in part, recognized as follows:

218. See *id.* at 1017–1018 (reciting only a conclusion but not providing a test about how the specific waiver language was to operate in the future).

219. Given that Florida’s waiver statute mirrors the federal waiver, the *Commercial Carrier* decision should be examined in the light of *Goodman*, in which the Iowa Supreme Court provided an analysis to demonstrate that some reason existed why federal decisions construing the federal act would be entitled to great weight. 587 N.W.2d at 235–236. In contrast, the *Commercial Carrier* Court failed to provide an analysis demonstrating that some reason existed why it would not give great deference to federal decisions construing the FTCA. Particularly this is true when it is clear the Legislature intended the Florida waiver to have the same effect as the federal waiver. When the term “meaningful way” is used, the writer means that the actual waiver language never assumed the role a strict application of such language would require. See *Henderson*, 737 So. 2d 535 (providing a brief, unconnected conclusion relating to the waiver statute).

220. For a detailed discussion of *Trianon Park*, consult *supra* notes 63–78 and accompanying text.

221. *Trianon Park*, 468 So. 2d at 915.

222. *Id.* at 916.

223. *Id.*

224. *Id.*

225. *Id.* at 917.

[i]t is important to recognize that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities. The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care. Section 768.28 provides that governmental entities "shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." This effectively means that the identical existing duties for private persons apply to governmental entities.²²⁶

The majority further reasoned

[i]n addition, although the *Evangelical Brethren* test works properly in instances where a common law or statutory duty exists, it need not be applied in situations where no common law or statutory duty of care exists for a private person because there clearly is no governmental liability under those circumstances.²²⁷

Thus, the *Trianon Park* majority somewhat recognized the waiver language. It did not, however, develop a test directly related to the statutory language that lower courts could use. Unlike the federal-court decisions, the language of the waiver statute did not become *Trianon Park's* principal focus.²²⁸

In *Reddish*, the Florida Supreme Court again attempted to construe the actual language of Section 768.28.²²⁹ The Department of Corrections reclassified a prisoner to a minimum-security facility, from which the prisoner escaped, and in the course of a robbery, shot the plaintiff.²³⁰ The theory asserted in the complaint was that the Department of Corrections failed to conform to the proper standard of care to be taken in classifying and assigning

226. *Id.*

227. *Id.* at 919. At this point, the Florida Supreme Court could have indicated that the rule of strict construction was applicable and could have created a test that lower courts could use in applying the language of Section 768.28 "in the same manner and to the same extent as a private individual under like circumstances." That omission has led to a total failure on the part of lower courts to focus on this language. *See supra* n. 166 (discussing a recent appellate decision and the trouble the court encountered in applying the analysis).

228. For a discussion of tests relating to statutory language that various federal courts used, consult *supra* notes 187–193 and accompanying text.

229. 468 So. 2d 932.

230. *Id.* at 930.

prisoners.²³¹ The circuit court dismissed the complaint and the district court reversed that dismissal, applying the four-part test relating to discretionary-function immunity found in *Commercial Carrier*. The district court certified the following question to the Florida Supreme Court: “May prisoner classifications ever give rise to tort liability, and, if so, under what circumstances?”²³²

The Florida Supreme Court first indicated that in the case of classification and assignment of prisoners, all four parts of the test for discretionary-function immunity found in *Commercial Carrier* could be answered in the affirmative.²³³ Then, the Court cited to the *Trianon Park* opinion and the language contained in Section 768.28(1) defining the extent of the waiver of immunity as “under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state”²³⁴

The Court then asserted that the above-quoted language clarified that recovery would be allowed only to the extent available against a private person for the same kind of conduct that a state employee committed and that was charged as being tortious.²³⁵ The majority applying the language of the waiver concluded with respect to the conduct

[b]ut the decision to transfer a prisoner from one corrections facility to another is an inherently governmental function not arising out of an activity normally engaged in by private persons. Therefore the statutory waiver of sovereign immunity does not apply.²³⁶

The Florida Supreme Court majority in *Trianon Park* and *Reddish* provided consistent, if not emphatic, direction that the waiver language would be applied to determine whether an analogous liability existed for a private person for the government employee’s conduct alleged to be tortious in nature. If no analogous private action could be found, the waiver would not apply.²³⁷

231. *Id.*

232. *Id.* (citing *Smith v. Dept. of Corrections*, 432 So. 2d 1338, 1343 (Fla. Dist. App. 1st 1983)).

233. *Id.* at 931.

234. *Id.* at 932 (emphasis omitted).

235. *Id.*

236. *Id.*

237. *Trianon Park*, 468 So. 2d at 916.

However, in *Yamuni*, decided only three years after *Reddish*, the Court declared a dramatic reversal and again departed from the actual language of the statute in construing its meaning.²³⁸ *Yamuni* involved an infant who was being physically abused, yet was allowed to remain in the custody of an abusive mother, as opposed to being placed under protective supervision, as ordered by the circuit court. The child suffered serious injuries and the circuit court found the Department of Health and Rehabilitative Services negligent. The district court affirmed, finding no immunity because the caseworker was engaged in operational-type activities.²³⁹

On appeal to the Florida Supreme Court, the Department of Health and Rehabilitative Services presented two arguments: (1) the activity of the caseworker fit into the category of planning-level activities for which immunity existed; and (2) under the language of Section 768.28(1), the Court was not presented with a factual situation in which sovereign immunity had been waived because such services were not provided by a private person.²⁴⁰ As to the first argument, the Florida Supreme Court applied the four-part test set forth in *Commercial Carrier* and determined that the function the caseworker performed was an operational, as opposed to planning-level, activity and therefore, discretionary immunity did not apply.²⁴¹ As to the second argument, the majority opinion swept aside the reasoning previously stated in *Reddish* relating to the waiver's statutory language, calling it dicta

238. *Yamuni*, 529 So. 2d at 260–261.

239. *Id.* at 259.

240. *Id.* at 259–260.

241. *Id.* at 260. While the subject of discretionary immunity has received detailed treatment in Part I of this Article, it should be noted here that the planning–operational level dichotomy followed by the Florida Supreme Court has been the subject of some criticism by the courts and commentators as being either too simplistic or too complicated and specious. *Patterson v. U.S.*, 856 F.2d 670, 673–674 (4th Cir. 1988); *Smith v. U.S.*, 375 F.2d 243, 246 (5th Cir. 1967); *Begay v. U.S.*, 768 F.2d 1059, 1062–1063 n. 2 (9th Cir. 1985); *Goodman*, 587 N.W.2d at 236–238; Norma Jean Mungenast, Student Author, *Federal Tort Claims Act: The Development and Application of the Discretionary Function Exception*, 13 Cumb. L. Rev. 535, 541–557 (1982/1983); Jeffrey Robinson, Student Author, *The Discretionary Function Exception: Is It a Bar to Federal Jurisdiction?* 1983 Utah L. Rev. 117, 121–126. The United States Supreme Court also has spoken on the issue. *U.S. v. Gaubert*, 499 U.S. 315, 324–326 (1991); *Berkovitz v. U.S.*, 486 U.S. 531, 536–537 (1988). The United States Court of Appeals for the Tenth Circuit recently applied the *Berkovitz* analysis to ascertain the true existence of discretionary activity that courts should consider immune. *Elder v. U.S.*, 312 F.3d 1172, 1176–1177 (10th Cir. 2002).

and indicating that the language of waiver set forth in the statute waived all immunity except for planning-level decisions.²⁴² The *Yamuni* opinion contained neither acknowledgment of the rule of strict construction nor federal or state court decisions dealing with statutes containing similar waiver language.²⁴³

A substantial impact has been created by this series of Florida Supreme Court opinions that have not adhered to the specific language of waiver and have not indicated to the lower courts that it is the specific language of waiver that is to be applied.

VII. CONCLUSION: WHAT IS NEEDED TO CLARIFY THE STATUS OF GOVERNMENT-TORT LIABILITY IN FLORIDA?

In the last several decades since the Florida Legislature waived the State's immunity from suit for torts, a series of Florida Supreme Court opinions have interpreted the statute. In *Carlile*, the Court announced clear principles for strict interpretation of the statute.²⁴⁴ However, a few years later in *Commercial Carrier*, the Court ignored those principles and interpreted the scope of the statute, not by reference to the express language or by reference to interpretations by the federal courts of similar language in the FTCA, but by divining an implied immunity for discretionary functions and devising a nebulous test for determining when the immunity would apply.²⁴⁵ The *Commercial Carrier* Court also announced the abrogation of Florida's common-law public-duty doctrine, despite the statute's lack of reference to common-law doctrines or their abrogation.²⁴⁶

The *Commercial Carrier* opinion further promised that the discretionary-function immunity would be grounded upon the concept of separation of powers and would protect from tort liability "certain functions of coordinate branches of government [which] may not be subjected to scrutiny by judge or jury."²⁴⁷ The promise has proven false. In the progeny of cases that have ap-

242. *Yamuni*, 529 So. 2d at 260–261.

243. *Id.*

244. *Carlile*, 354 So. 2d at 364.

245. *Com. Carrier*, 371 So. 2d at 1022.

246. *Id.* at 1016. In *S.A.P.*, Justice Shaw, writing for the majority, found that when the "plain language of section 768.28(13) [did] not expressly change the common law doctrine of equitable estoppel," the doctrine applied to the government, because the statute derogates from the common law. 2002 WL 31662590 at **6–7.

247. *Com. Carrier*, 371 So. 2d at 1022.

plied the vague analysis of immunity, the Court has exercised unprecedented judicial scrutiny of the functions of the executive branch and of local government.²⁴⁸

The very doctrine of discretionary-function immunity that the Court gave assurance would protect the concept of separation of powers has become a threat to that concept.²⁴⁹ The Court permitted judicial scrutiny of everything from the way state and local police pursue and deal with criminals to the way the Florida Department of Children and Families handles child abuse complaints. This scrutiny subjects all such conduct to potential tort liability.²⁵⁰

Moreover, in doing so, the Court flouts or ignores its own precedent, established principles of construction, and the time-honored principle of stare decisis. There are sound public-policy reasons for protecting government from civil liability in tort, and it is the exclusive province of the Legislature to weigh those considerations against the competing considerations that oppose such protections.²⁵¹ As Justice Wells said in his dissent of a recent Florida Supreme Court decision holding that a twenty-year-old claim for negligent supervision of a foster child could be brought against the Florida Department of Children and Families, even though the statute of limitations had run

[t]he waiver of sovereign immunity is solely a prerogative of the legislative branch of government. Because this waiver is

248. For a thorough citation to Florida precedent, consult *supra* note 159.

249. See *Harrisburg Sch. Dist. v. Hickok*, 762 A.2d 398, 411–412 (Pa. Cmmw. 2000) (discussing the doctrine of separation of powers and what takes place when the exercise of power is committed exclusively to the legislature); *Tex. S. U. v. Fed. Sign*, 889 S.W.2d 509, 511–512 (Tex. App. 14th Dist. 1994) (discussing separation of powers in the context of waiver of sovereign immunity). The majority opinions of *Commercial Carrier* and *Yamuni* did not adhere to this principle.

250. Separation of powers is required by Article III of the Florida Constitution.

251. See *Wetherington & Pollock*, *supra* n. 3, at 25–27.

Public policy in support of sovereign immunity includes: (a) protecting public funds from excessive encroachments; (b) insulating the Legislature's authority over budget expenditures from judicial directives to disburse funds; (c) enabling government officials to engage in decision making without risking liability; and (d) ensuring that the efficient administration of government is not jeopardized by the constant threat of suit. Policy against sovereign immunity includes: (a) leaving those who have been injured by governmental negligence without remedy; (b) failing to deter wrongful government conduct; and (c) limiting public knowledge of governmental improprieties.

Fla. Sen. Govtl. Oversight & Productivity Comm., *Sovereign Immunity* n. 2 (Feb. 21, 2001) (quoting Fla. H.R. Comm. on Claims, *Sovereign Immunity: A Survey of Florida Law* 1–2 (Jan. 25, 2001)).

solely a prerogative of the legislative branch and not the judicial branch, I believe the Court is without authority to exercise judicial equity powers to extend the waiver of sovereign immunity beyond that which the Legislature has expressly granted.²⁵²

What the Florida Supreme Court has done in its cases interpreting Florida's waiver statute, Section 768.28, amounts to judicial tort reform.

The Florida Supreme Court needs to put aside the ideological considerations that have characterized its treatment of the governmental-tort law following the enactment of Section 768.28. Lower appellate courts are struggling to apply the incomprehensible law in this area.²⁵³ There are few activities that state and local government can have confidence will not be subject to judicial scrutiny and potential liability. The Court needs to stabilize the law in this area by consistently applying a coherent, meaningful analysis to identify those areas of government conduct that should be shielded from tort liability. This analysis should be developed in light of the language of the statute itself, federal, and sister-state decisions, the question of whether a common-law duty attends the government conduct, and the constitutional provision on separation of powers.

The Court needs to furnish some useful tools to assist the government and lower courts in navigating through the fog surrounding this area of the law. In stabilizing and clarifying the

252. *S.A.P.*, 2002 WL 31662590 at *14 (Wells, J., dissenting).

253. The impact of this series of Florida Supreme Court opinions on various district courts of appeal can be exemplified by *Sams*, a case in which law enforcement took an arrested person to the emergency room for treatment, and the arrested man tried to escape, injuring a third person. 717 So. 2d 1044. How does the determination of duty comport with the actual language of waiver strictly construed? The Second District Court of Appeal provides additional examples. *Discovery Experimental v. State*, 735 So. 2d 516, 517, 517–518 (Fla. Dist. App. 2d 1999); *Hillsborough County v. Morris*, 730 So. 2d 367, 368 (Fla. Dist. App. 2d 1999). In both cases, the actual waiver language is vigorously avoided. An extreme example can be found in *Provident Management*, in which the court ignored the issue of jurisdiction and acknowledged no private liability. 738 So. 2d at 359. Liability of the municipality, however, was determined to exist without any consideration of the waiver language contained in Florida Statutes Section 768.28. *Id.* Finally, there is the case of *Cusick v. City of Neptune Beach*, which recognized a greater standard of care for a municipality than would result to a private person. 765 So. 2d 175, 177–179 (Fla. Dist. App. 1st 2000). As a result of the Florida Supreme Court opinions reviewed herein, it appears that the various district courts of appeal do not even confront the actual language of waiver.

law, the Court would do well to abandon the nebulous and unwieldy analysis it has created to identify implied-discretionary-function immunity. As previously discussed, the recognition of such an implied immunity is unwarranted in light of the omission of the express-discretionary-function exemption that appeared in the earlier and subsequently removed waiver statute, and in view of the principles of strict construction set forth in the *Carlile* case.²⁵⁴ Abandonment of implied immunity, however, should not result in jettisoning the notion of separation of powers upon which *Commercial Carrier* based the immunity. Article II, Section 3 of the Florida Constitution requires the separation of powers, and the Court should be quick to restrain itself from any action that would violate the provision.

Furthermore, the Court should follow the federal court applications of the private-analog test to first determine whether the claim is cognizable. The public-duty doctrine, followed in the majority of states and having roots in Florida law both before and after the enactment of the waiver statute, should be applied, and its scope should be clearly well-defined, employing a meaningful analysis of whether a common-law duty of care exists for the government function in question in light of policy considerations — not simply whether government conduct creates a foreseeable zone of risk.

If the Court does not take the necessary remedial measures, the Legislature should enact express exemptions to the waiver statute, as legislatures have done in other states, and expressly define government conduct that will be shielded from ever-expanding-judicial scrutiny.²⁵⁵ The Legislature must ensure that

254. For a discussion of the confusion that surrounds Florida law, consult *supra* note 166 and accompanying text.

255. For instance, California has an extensive Tort Claims Act with broad express exceptions from liability, in addition to judicially recognized protections such as the public-duty doctrine. *Zelig v. County of L.A.*, 45 P.3d 1171 (Cal. 2002). Further, Florida Statutes Section 768.28 could be amended to read as follows:

- (1) The provisions of Florida Statutes Section 768.28(1) and (5) shall not apply to
 - (a) any claim based upon an act or omission of an employee of those entities subject to the above statute, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the designated governmental entity or an employee of the designated governmental agency, whether or not the discretion involved be abused;

separation of powers does not become a usurpation of powers. As the Fourth District recently remarked, “Judicial policy making is not a freewheeling exercise.”²⁵⁶ In the case of governmental-tort liability in Florida, unfortunately that is just what it has become, as amply demonstrated by the last several decades of case law.

(b) any claim involving a function relating to legislation, licensing, permitting, executive-officer functions and enforcement of laws and protection of the public safety and fire inspections and fire suppression.

- (2) When applying the provisions of Florida Statutes Section 768.28(1) and (5) to discretionary functions, the courts shall apply the test delineated in *Berkovitz v. United States*, 486 U.S. 531 (1988).

256. *Levy*, 798 So. 2d at 781–782.