Florida Law Review

Volume 37 | Issue 2 Article 4

March 1985

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Recommended Citation

Laura Robinson, *Rebuilding the Wall of Sovereign Immunity: Municiple Liability for Negligent Building Inspection*, 37 Fla. L. Rev. 343 (1985).
Available at: https://scholarship.law.ufl.edu/flr/vol37/iss2/4

NOTES

REBUILDING THE WALL OF SOVEREIGN IMMUNITY: MUNICIPAL LIABILITY FOR NEGLIGENT BUILDING INSPECTION*

I. INTRODUCTION

Construction litigation, although costly and time consuming, is frequently initiated in Florida.[1] Seeking damages for latent construction defects, discontented homeowners have customarily instituted actions against the standard construction defendants: the developer, contractor and design professionals. Historically, these defendants apportioned blame among themselves, seeking contribution and indemnification through separate actions and crossclaims.[2] Re-

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* *Editor's Note:* This note received the *Gertrude Brick Law Review Apprentice Prize* for the best student Note submitted in the Fall 1984 semester.

1. FLORIDA CONDOMINIUM LAW AND PRACTICE § 15.1 (Fla. Bar Continuing Legal Educ. 1982).

2. *Id.* §§ 15.5, .8, .25. *See, e.g.*, Conklin v. Hurley, 428 So. 2d 654 (Fla. 1983) (purchasers sought recovery from developer for collapse of sea wall abutting their lots); Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So. 2d 515 (Fla. 4th D.C.A. 1981) (condominium

cently, however, defendants and private homeowners have attempted to shift part of the responsibility for construction defects to municipalities. Claiming reliance on municipal approval of building plans, construction inspection and grants of certificates of occupancy, construction defendants and homeowners have successfully joined municipalities in construction suits.

Finding that sovereign immunity was no longer a barrier, two Florida district courts of appeal have agreed that municipalities can be held liable for negligent building inspection.[3] However, the Florida Supreme Court, in a lengthy and confused decision, recently held that municipalities are immune from such actions.[4] Some commentators fear that imposing construction liability on municipalities would turn the government into insurers of private construction.[5] Yet, others advocate government liability as a remedy to governmental inefficiencies.[6]

This Note will explore the ramifications of municipal liability for negligent building inspection. Specifically, Part II will trace the abrogation of sovereign immunity in Florida, while Part III will examine municipal liability under current Florida law. Part IV will present the ramifications of municipal liability in Florida construction litigation, and Part V will suggest alternatives to the current Florida position.

II. The Abrogation of Sovereign Immunity

Courts and legal scholars have long called for the abolition of sovereign immunity.[7] Although characterized as "an anachronism without rational basis,"[8] sovereign immunity has deep roots in the common law.[9] The original basis of

association sought to recover damages from developer for failing to construct condominium in accordance with Building Code); Navajo Circle, Inc. v. Development Concepts, Corp., 373 So. 2d 689 (Fla. 2d D.C.A. 1979) (condominium association sought recovery from architect and contractor for defective roof). Generally the developer claims he relied on the architect and general contractor and the contractor claims he relied on the architect, engineer, and developer. *See, e.g.*, Biscayne Roofing Co. v. Palmetto Fairway Condominium Ass'n, 418 So. 2d 1109 (Fla. 3d D.C.A. 1982) (subcontractor was required to indemnify general contractor who in turn was required to indemnify owner-developer); A.R. Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973) (general contractor recovered economic damages he had suffered due to the negligence of the supervising architect).

3. Manors of Inverrary XII Condominium Ass'n, v. Atreco-Florida, Inc., 438 So. 2d 490 (4th D.C.A. 1983), *pet. for rev. dismissed sub nom.*, Lauderhill v. Manors of Inverrary XII Condominium Ass'n, 450 So. 2d 485 (Fla. 1984); Trianon Park Condominium Ass'n v. City of Hialeah, 423 So. 2d 911 (3d D.C.A. 1982), *quashed*, 468 So. 2d 912 (Fla. 1985).

4. Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d at 912, (Fla. 1985).

5. *See infra* notes 96-99 and accompanying text.

6. *See infra* note 196 and accompanying text.

7. *See generally* Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924) (credited with helping to begin the trend toward the abolition of sovereign immunity); Mosk, *The Many Problems of Sovereign Immunity*, 3 SAN DIEGO L. REV. 7 (1966) (evaluation of groundbreaking legislation and judicial decisions denying sovereign immunity).

8. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961) (Traynor, J., in the decision in which California abolished sovereign immunity).

9. Most commentators agree that sovereign immunity was introduced into the common law by the English case of Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788). In *Russell*, the plaintiff sued all of the male inhabitants of the County of Devon for damages caused to his wagon

sovereign immunity is often cited as the empty maxim, "the King can do no wrong."[10] However, many sound policy reasons have been asserted in its defense.[11] The justifications stem from the premise that governmental entities are unique because they engage in activities that are not undertaken by private individuals.[12] Opponents of sovereign immunity base their position on the belief that all victims of wrongful conduct are entitled to relief, even when the perpetrator is the government.[13] This position is advanced by the Florida Constitution, which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[14]

A vast majority of states, including Florida, have enacted legislation which partially waives sovereign immunity.[15] Although statutes have restricted sovereign immunity, judicial exceptions have created new barriers limiting liability of governmental entities. Judicial treatment of municipal liability for negligent building inspection illustrates the legal community's ambivalence over sovereign immunity. Florida courts, which once criticized the rule of sovereign immunity as harsh, unconstitutional and undemocratic,[16] now express concern over the possible permutations of government liability.[17]

Traditionally, three major judicial barriers have shielded municipalities from liability for negligent inspection: the governmental-proprietary distinction, the

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by an ill-kept bridge. The House of Lords granted immunity to the men of Devon because of the lack of a common fund from which to collect the judgment. *Id.* at 362. For a historical perspective of sovereign immunity, see Borchard, *supra* note 7, at 129, 229.

10. 1 W. Blackstone, Commentaries 244 (T. Codey 3d ed. 1884); Note, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 Wash. L. Rev. 537, 538 (1983).

11. This note will focus on municipal tort immunity. The traditional justifications for municipal immunity are: (1) a municipality derives no pecuniary benefit from the exercise of public functions; (2) many of the activities municipalities perform are so dangerous that no private industry would undertake the risk; (3) unlike a private corporation, a municipality cannot just cease to perform the function if it cannot afford the costs since the function may be necessary for the public welfare; and (4) municipal liability will drain the public treasury, diverting money from needed public services. Municipalities will thus be forced to increase taxes. *See generally* Little, *Con Article X, § 13, In Defense of the 1968 Constitution's Statement on Sovereign Immunity*, 52 Fla. B.J. 666 (1978) (arguments in favor of retaining some degree of sovereign immunity); Spence, *Pro Article X, § 13, Abolition of Sovereign Immunity in Florida: An Idea Whose Time Has Come*, 52 Fla. B.J. 655 (1978) (arguments for the abolition of sovereign immunity).

12. *See* Degrazia & Oldani, *Governmental Immunity, More: A Call for Legislative Action*, 63 Mich. B.J. 126, 128 (1984) (quoting the findings of the California Law Revision Commission Study of governmental immunity, "[g]overnment cannot merely be made liable as private persons are for public entities are fundamentally different from private persons").

13. *See* Spence, *supra* note 11, at 657.

14. Fla. Const. art. I, § 21.

15. *See* Note, *supra* note 10, at 540-47 (classification of the 50 states by the degree of sovereign immunity retained).

16. *See, e.g.*, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957) ("[T]he time has arrived to declare this doctrine anachoristic [sic] not only to our system of justice but to our traditional concepts of democratic government.").

17. *See, e.g.*, Wallace v. Nationwide Mut. Fire Ins. Co., 376 So. 2d 39, 40 (Fla. 4th D.C.A. 1979) ("[T]he possible permutations resulting in the Government bearing the financial responsibility for the misdeeds of the private sector, simply because it is trying to safeguard the general public by regulatory action, is staggering.").

public duty doctrine, and discretionary-operational dichotomy.[18] Historically, Florida courts utilized the proprietary-governmental distinction and the public duty doctrine. The operational-discretionary distinction is the standard currently applied in Florida, the federal courts[19] and numerous other jurisdictions.[20]

A. The Governmental-Proprietary Distinction

While the State of Florida and its counties once enjoyed absolute immunity for tortious actions, Florida municipalities have never enjoyed a similar status.[21] In *City of Tallahassee v. Fortune*,[22] the Florida Supreme Court held a municipal corporation may sue and be sued like any other corporation.[23] Municipal liability was subsequently limited by the introduction of the distinction between governmental and proprietary activities.[24] In *Keggin v. Hillsborough County*,[25] the court declared that a municipality enjoys the state's immunity only when it acts as an arm of the state, and not when the municipality exercises its quasi-private corporate functions.[26] This holding prompted the rule that municipalities may be held liable for proprietary functions but not for governmental functions.[27] The rule was justified by the fact that citizens have a proprietary interest in the municipality's property.[28] Thus, unless a municipality is acting as a governmental body, it should be subject to the same legal obligations as a private corporation.[29] Generally, functions are proprietary if they are performed to obtain a special benefit for the citizens within the city's corporate limits.[30] A governmental function stems from the state's sovereignty and is performed for the benefit and welfare of the public at large.[31] These overlapping definitions proved difficult for the courts to apply and consequently created much confusion

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18. *See* Note, *Municipal Liability for Negligent Inspection*, 23 LOY. L. REV. 458, 460-78 (1977).
19. 28 U.S.C. § 2680(a) (1982); *see infra* note 70.
20. *See* Note, *supra* note 10, at 543.
21. Budetti & Knight, *The Latest Event in the Confused History of Municipal Tort Liability*, 6 FLA. ST. U.L. REV. 927, 929 (1978). *See generally* Ostrow & Lowe, *Sovereign Immunity*, 33 U. MIAMI L. REV. 1297 (1979) (presents an extensive history of sovereign immunity in Florida).
22. 3 Fla. 19 (1850).
23. *Id.* at 26. The city was held liable for the death of a horse which fell into a ditch in the street.
24. *See* STAFF OF FLA. SENATE COMM. ON GOVERNMENTAL OPERATIONS, A REVIEW OF SOVEREIGN IMMUNITY FROM TORT LIABILITY 21 (Dec. 1982) (Senator Warren S. Henderson, Chairman) [hereinafter cited as STAFF REVIEW].
25. 71 Fla. 356, 71 So. 372 (1916).
26. *Id.* at 362, 71 So. at 373.
27. *See* STAFF REVIEW, *supra* note 24, at 21.
28. *Keggin*, 71 Fla. at 361, 71 So. at 373.
29. *Id.*
30. *See, e.g.*, City of Avon Park v. Giddens, 158 Fla. 130, 27 So. 2d 825 (1946) (the negligent operation of a police car); Smoak v. City of Tampa, 123 Fla. 716, 167 So. 528 (1936) (the pick-up and disposal of garbage is proprietary).
31. City of Miami v. Oates, 152 Fla. 21, 24, 10 So. 2d 721, 723-24 (1942). *See also* Ballard v. City of Tampa, 124 Fla. 457, 168 So. 654 (1936) (narrowed governmental function to include actions that were *solely* governmental).

and uncertainty. Courts were forced to make decisions on a case-by-case basis and the results were often harsh and inconsistent.[32]

The first Florida decision involving municipal enforcement of a building code occurred during the governmental-proprietary era. In *Akin v. City of Miami*,[33] the city condemned plaintiff's building and refused to issue plaintiff a building permit, thereby preventing the building's repair. The Florida Supreme Court denied relief and held the granting or withholding of a building permit was a purely governmental function for which the city could not be liable.[34] In response to the rising judicial criticism of the governmental-proprietary distinction, the court claimed that the responsibility for altering the rule rested with the legislature.[35]

Four years later the court itself attempted to end the confusion and injustice surrounding the governmental-proprietary distinction. In *Hargrove v. Town of Cocoa Beach*,[36] the court held a municipal corporation may be liable under the doctrine of respondeat superior. Discarding the governmental-proprietary distinction, the court determined that municipalities were liable for injuries proximately caused by the negligence of a municipal employee acting within the scope of his employment.[37] However, the court added one caveat to this general rule. Municipalities could not be liable for negligent performance of legislative, judicial, quasi-legislative or quasi-judicial acts.[38] Since these exceptions are analogous to the current discretionary function exception, isolating these types of municipal acts is a task Florida courts still wrestle with today.[39]

B. The Public Duty Doctrine

By limiting the applicability of sovereign immunity, *Hargrove* prompted a change the judiciary had been demanding for years. However, ten years later, *Modlin v. City of Miami Beach*[40] erected a new barrier to shield municipalities from liability. The *Modlin* court adopted the public duty doctrine, which provides

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32. *Compare* Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697 (1922) (city liable for the negligent operation of a fire truck) *with* Brownlee v. City of Orlando, 157 Fla. 524, 26 So. 2d 504 (1946) (city immune from liability when jailor assaulted prisoner).

33. 65 So. 2d 54 (Fla. 1953).

34. *Id.* at 55.

35. *Id.* at 56. The belief that change must come from the legislature stemmed from the fact that Florida adopted the common law of England that was in force on July 4, 1776. However, since the case credited with first adopting sovereign immunity, Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788), was not decided until 1788, sovereign immunity could not have been adopted by Florida when the common law was adopted as of July 4, 1776. City of Miami v. Bethel, 65 So. 2d 34, 35 (Fla. 1953) (Hobson, J., concurring specially in judgment of reversal).

36. 96 So. 2d 130 (Fla. 1957).

37. *Id.* at 133. Mrs. Hargrove brought suit against the city alleging that the negligence of the town jailer had caused her husband's death. Mr. Hargrove, jailed for drunkenness, had died in a fire when he was left unattended in the jail with all of the doors locked. *Id.* at 131.

38. *Id.* at 133.

39. The discretionary exception became the law in 1979. *See infra* notes 70-78 and accompanying text. It has been described as judicial, legislative, quasi-judicial and quasi-legislative. Department of Transp. v. Neilson, 419 So. 2d 1071, 1079-80 (Fla. 1982) (Sundberg, J., dissenting).

40. 201 So. 2d 70 (Fla. 1967).

that where a duty is owed to the public, no duty arises to an individual absent a showing of a special relationship.[41]

In *Modlin*, the City of Miami Beach approved building plans for the construction of an overhead storage mezzanine. Additionally, the city inspected the construction during the progress of the work. Five years later Mrs. Modlin was crushed to death when the mezzanine collapsed on her while she was shopping. Applying *Hargrove*, the Third District Court of Appeal held the city could not be liable because the enforcement of building regulations was an exercise of a legislative, judicial, quasi-legislative or quasi-judicial function.[42]

On appeal, the Florida Supreme Court found the Third District had interpreted *Hargrove* too broadly. The court maintained that issuing building permits and inspecting construction sites were executive functions which did not fall within the *Hargrove* exception.[43] The court reasoned that since the city was vicariously liable for the building inspector's negligence, the city was entitled to use whatever defenses were available to the inspector.[44] Applying the public duty doctrine, the court held that a public official cannot be liable for negligence unless the plaintiff shows the official owed the plaintiff a greater duty than that owed the general public.[45] Because the building inspector owed no special duty to Mrs. Modlin, the city was not liable.[46]

The district courts interpreted *Modlin* as a partial resurrection of the governmental-proprietary distinction.[47] After *Modlin* municipalities continued to be subject to the same tort liability as private corporations for proprietary activities. However, the public duty doctrine imposed tort liability on municipalities for governmental functions only in limited situations. Municipalities could only be liable if the tort was committed against one in privity with the city or against one who directly transacted with the city.[48]

Following the legislative waiver of sovereign immunity in Florida the public duty doctrine was abolished.[49] A majority of jurisdictions still rely on the public

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41. *Id.* at 76.

42. Modlin v. Washington Ave. Food Center, 178 So. 2d 596 (Fla. 3d D.C.A. 1965).

43. *Modlin*, 201 So. 2d at 73-74. The court further refined the *Hargrove* exception by explaining the meanings of legislative and judicial acts. The court held that legislative actions prescribe a general rule for future operation. Judicial actions were described as the application of general rules to specific situations accompanied by the judicial procedures of notice and hearing. Executive functions, which were not covered by the *Hargrove* exception, were described as the application of general rules to specific situations without utilizing judicial procedures. *Id.*

44. *Id.* at 75.

45. *Id.*

46. *Id.* at 76.

47. City of Tampa v. Davis, 226 So. 2d 450, 452-53 (Fla. 2d D.C.A. 1969) (the *Modlin* requirement of special duty was applicable only to governmental functions, not proprietary functions).

48. Gordon v. City of W. Palm Beach, 321 So. 2d 78 (Fla. 4th D.C.A. 1975) (liability of the city for negligence in the design, construction, and maintenance of the streets is unaffected by the *Modlin* requirement of a special duty since it involves a proprietary function).

49. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1015 (Fla. 1979). The court stated,

> we believe it to be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its poiltical subdivisions where the

duty doctrine, even after the waiver of sovereign immunity.[50] Recovery for negligent building inspection is generally denied in these jurisdictions on the ground that building codes do not create a duty to an individual.[51] Rather, building codes are designed to protect the community as a whole. Thus, a city's failure to properly enforce the code is not negligence per se.[52] The public duty doctrine recognizes a duty to an individual only if the statute indicates a clear intent to benefit a particular class of individuals[53] or the plaintiff establishes a special relationship with the municipality.[54]

The Florida Supreme Court has held the public duty doctrine is merely a vestige of sovereign immunity.[55] However, other jurisdictions insist the public duty doctrine is based on traditional tort principles which are independent of sovereign immunity.[56] These jurisdictions maintain that imposing a duty of care on municipalities merely because an inspection is undertaken would create a

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> duty breached is said to be owed to the public at large but not to any particular person. This is the "general duty-special duty" dichotomy emanating from *Modlin*. By less kind commentators, the theory has been characterized as one which results in a duty to none where there is a duty to all.

Id.

50. *See* Note, *supra* note 18, at 467.

51. *See, e.g.*, Dufrene v. Guarino, 343 So. 2d 1097 (Ct. App.) (government not liable for damages incurred in fire, even where a prior inspection of the premises had been negligently made), *cert. denied*, 343 So. 2d 446 (La. 1977); Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (inspections mandated by the fire code are a duty owed to the general public and not to the owner or occupier of the premises); Georges v. Tudor, 16 Wash. App. 407, 556 P.2d 564 (1976) (building owner had no cause of action against city for negligently issuing building permit and negligent inspection since building inspection is conducted for the benefit of the public).

52. Generally the negligence per se standard is not imposed on private individuals for failing to comply with building codes. *See, e.g.*, Atlantic Nat'l Bank v. Modular Age, Inc., 363 So. 2d 1152 (1st D.C.A. 1978), *cert. denied*, 372 So. 2d 466 (Fla. 1979). *Cf.* Brown v. South Broward Hosp. Dist., 402 So. 2d 58 (Fla. 4th D.C.A. 1981) (violation of building code constitutes negligence per se).

53. *See* Halvorson v. Dahl, 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978) (city was liable for the death of a man in a fire caused by the city's failure to enforce a housing code based on the court's finding of a clear intent in the statute to protect the welfare of the occupants). *Cf.* Wilson v. Nepstad, 282 N.W.2d 664, 671 (Iowa 1979) ("A general statutory duty is ordinarily for the benefit of all persons who are likely to be exposed to injury from its nonobservance.") (quoting Hansen v. Kemmish, 201 Iowa 1008, 1012, 208 N.W. 277, 277 (1926)).

54. A special relationship was established in Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975). In *Campbell*, the city's electrical inspector discovered a dangerous electrical current in a neighborhood stream after the plaintiff requested that the city come out and make an inspection. The inspector failed to take corrective action and the plaintiff's wife was electrocuted while attempting to save her son who had fallen into the stream. *Id.* at 235-36. *See also* Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806-07 (Minn. 1979) (four factors which should be considered in finding a special relationship are: (1) actual knowledge of the dangerous condition; (2) reasonable reliance by persons on the municipality's representations and conduct; (3) an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and (4) the municipality must use due care to avoid increasing the risk of harm).

55. *See supra* note 49.

56. *See, e.g.*, Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 808 (Minn. 1979); J. & B. Dev. Co. v. King County, 100 Wash. 2d 299, 303, 669 P.2d 468, 471-72 (1983).

new tort.[57] Since the waiver of sovereign immunity does not create new causes of action,[58] defenders of the public duty doctrine find this liability unsupportable.[59]

Although not yet a majority position, the trend is to abolish the public duty doctrine.[60] Rejecting the notion that a duty to all is a duty to none,[61] a number of courts have found that a municipality must be held to have foreseen that a negligent inspection might result in harm to an individual.[62] Thus, once an inspection is undertaken a duty to exercise reasonable care arises.[63] These courts have held governmental agencies liable for negligent building inspections; however, courts have been reluctant to impose liability for a failure to inspect.[64]

III. Municipal Liability Under the Operational-Discretionary Dichotomy

In 1973 the Florida Legislature waived sovereign immunity by enacting Florida Statutes section 768.28 which provides that the state, its agencies and subdivisions shall be liable for tort claims to the same extent as private individuals.[65] Section 768.28 prohibits punitive damages and interest for the period before judgment.[66] Additionally, the statute limits liability to $100,000 for a claim by one person and to the aggregate sum of $200,000 per incident.[67] If a judgment in excess of the statutory limit is rendered, the excess may be

57. J. & B. Dev. Co. v. King County, 100 Wash. 2d 299, 303, 669 P.2d 468, 471-72 (1983).

58. *See, e.g.*, Hoffert v. Owatonna Inn Towne Motel, 293 Minn. 220, 223, 199 N.W.2d 158, 159-60 (1972) (statutory waiver of sovereign immunity did not create new liability for municipalities). *Cf.* Feres v. United States, 340 U.S. 135, 141 (1950) (the Federal Tort Claims Act does not create new causes of action).

59. *See Cracraft*, 279 N.W.2d at 806.

60. H. Miller, Trends in Government Tort Liability for Negligent Code Inspection 4 (Draft prepared for the Fed. Emergency Management Agency, 1982). *See, e.g.*, Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); Adams v. State, 555 P.2d 235 (Alaska 1976); Brennen v. City of Eugene, 285 Or. 401, 591 P.2d 719 (1979); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

61. *See, e.g.*, Adams v. State, 555 P.2d 235, 241 (Alaska 1976).

62. *Id.*

63. Private inspectors have been held to owe a duty to those injured as a result of a negligent inspection. *See* Hill v. United States Fidelity & Guar. Co., 428 F.2d 112 (5th Cir. 1970) (plaintiff injured in a hotel fire had a cause of action against hotel's insurer who had allegedly negligently inspected the hotel), *cert. denied*, 400 U.S. 1008 (1971).

64. *See* H. Miller, *supra* note 60, at 6.

65. Fla. Stat. § 768.28(5) (1985) ("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."). *See also* Fla. Const. art. X, § 13 ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."). The Florida Statutes specifically include municipalities in the definition of state agencies or subdivisions. Fla. Stat. § 768.28(2) (1985). Thus, the statute breaks with history and makes the liability of municipalities co-equal with the liability of other subdivisions of the state. *See supra* note 21 and accompanying text.

66. Fla. Stat. § 768.28(5) (1985).

67. *Id.*

reported to the legislature.[68] The legislature may pay the excess or any part of it at its discretion.[69]

The Federal Tort Claims Act[70] and many state statutes which waive sovereign immunity expressly provide that the government shall not be liable for discretionary activities.[71] The Florida statute, however, contains no such exception. The Florida Supreme Court added this exception in *Commercial Carrier Corp. v. Indian River County.*[72] Here, the supreme court stated that the separation of powers concept, rather than sovereign immunity, made the exception necessary. To prevent judicial intrusion into the executive branch, the court held that the wisdom of governmental discretionary activities cannot be reviewed by judge or jury.[73] Thus, the court concluded that certain policy-making, planning or judgmental government functions cannot be the subject of traditional tort liability.[74]

In an effort to avoid the type of semantic labels which had confused courts in the past, the supreme court rejected a definitional approach to establish what activities are discretionary.[75] Instead, the court suggested that the four-prong test devised by the Washington Supreme Court in *Evangelical United Brethren Church v. State*[76] be used on a case-by-case basis to aid courts in determining what governmental activities are to be immune from liability. The test consists of the following questions:

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68. *Id.*

69. *Id.* The legislature may authorize payments through claims legislation. Claims bills are designed to insure that injured parties are fully compensated. Between 1978 and 1982 a total of $1,639,270.26 in unsatisfied judgments was reported to the legislature. The legislature satisfied the total amount and added $30,000 to the amount of the awarded judgment in one case. STAFF REVIEW, *supra* note 24, at 49.

70. 28 U.S.C. §§ 2671-2680 (1976). The discretionary function exception to the Federal Tort Claims act bars:

> (a) Any claim based upon an act or omission of an employee of the Government, 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 a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1982).

71. *See, e.g.*, ALASKA STAT. § 09.50.250(1) (1983); IOWA CODE ANN. § 25A.14(1) (West 1967); MINN. STAT. ANN. § 466.03(6) (West 1980); OR. REV. STAT. § 30.265(3)(c) (1980); UTAH CODE ANN. § 63.30.10(1)(a) (1983). The predecessor to Florida's current waiver of sovereign immunity contained an exception for discretionary functions. FLA. STAT. § 768.15 (1969) (repealed 1970).

72. 371 So. 2d 1010 (Fla. 1979).

73. *Id.* at 1017-20.

> To accept a jury's verdict as to the reasonableness and safety of a plan of governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.

Id. at 1018 (quoting Weiss v. Fote, 7 N.Y.2d 579, 586, 167 N.E.2d 63, 66, 200 N.Y.S.2d 409, 413 (1960) (Fuld, J.)).

74. *Id.* at 1019.

75. *Id.* at 1020-21.

76. 67 Wash. 2d 246, 407 P.2d 440 (1965) (implied a discretionary function exception into Washington's legislative waiver of sovereign immunity).

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy program or objective?

2. Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course of the policy, program, or objective?

3. Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?[77]

If the questions can all be answered affirmatively, then the act is to be considered discretionary. If one or more of the questions is answered negatively, further inquiry is required.[78]

Following *Commercial Carrier*, municipalities have been held liable for a myriad of activities.[79] Although courts have applied the four-prong test adopted by *Commercial Carrier*, several courts have concluded the test is of little aid in determining the governmental activities which should remain immune from tort liability.[80] The decision has essentially been reduced to whether a municipal activity is labeled "operational" or "discretionary."[81] Applying these labels has also proven burdensome. The question of which governmental activities are "planning level" and which are "operational level" has produced a rash of cases certified to the Florida Supreme Court.[82] As the law in this area becomes

77. *Commercial Carrier*, 371 So. 2d at 1019 (quoting *Evangelical United Brethren Church*, 67 Wash. 2d at 255, 407 P.2d at 445).

78. *Id.*

79. *See, e.g.*, City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982) (design of city's water drainage system); Shite v. Palm Beach County, 404 So. 2d 123 (Fla 4th D.C.A. 1981) (operation of jail); Mathews v. City of St. Petersburg, 400 So. 2d 841 (2d D.C.A. 1981) (alteration of natural state of creek), *aff'd*, 419 So. 2d 1082 (Fla. 1982).

80. *See* Bryan v. State, Dep't of Bus. Reg., 438 So. 2d 415, 420 (Fla. 1st D.C.A. 1983) (the application of the four-prong test involves the application of the proverbial square peg to the round hole); Neumann v. Davis Water & Waste, Inc., 433 So. 2d 559, 562 (2d D.C.A.) (the four-prong test was found to be uninstructive), *pet. for rev. denied*, 441 So. 2d 632 (Fla 1983).

81. Neumann v. Davis Water & Waste, Inc., 433 So. 2d 559, 562 (Fla. 2d D.C.A. 1983) ("We were handed a new set of labels to apply to governmental activity — discretionary and nondiscretionary, or operational and planning level.").

82. *See* City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982); Ingham v. State, Dep't of Transp., 419 So. 2d 1081 (Fla. 1982); Department of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982); Carter v. City of Stuart, 433 So. 2d 699 (4th D.C.A. 1983), *aff'd*, 468 So. 2d 955 (Fla. 1985). Faced with the issue of whether a municipality can be liable for failing to enforce a dogcatcher ordinance, the *Carter* court stated:

more confusing and uncertain, courts are questioning the broad waiver of sovereign immunity effected by Florida Statutes section 768.28.[83]

A. *Application to Municipal Building Inspection*

Despite the confusion created by the operational level/planning level dichotomy, two Florida district courts have concluded that governmental inspections are an operational level activity.[84] In *Trianon Park Condominium Association, Inc. v. City of Hialeah*,[85] Florida's Third District Court of Appeal stated that the initial decision to inspect and certify construction is a planning level decision. However, the court held the actual inspection, plan review and certification are operational level activities for which a municipality may be subject to tort liability.[86]

In *Trianon*, the roof of a sixty-five unit condominium collapsed three years after the City of Hialeah issued a certificate of occupancy. Filing a class action suit, the condominium association claimed the developer was liable for breach of warranty, negligence and strict liability. Additionally, the association alleged the City of Hialeah was negligent in approving the building plans, inspecting the construction and issuing the certificate of occupancy. At trial, the condominium association presented evidence which established the defects which caused the roof to collapse were in violation of the applicable building code. The court found the city had breached its duty to the association by failing to properly enforce the code requirements. The damages totaled $290,938.84. The developer settled with the association prior to trial for $153,000. The court entered judgment against the city for $50,000.[87]

On appeal, the city argued that its actions were immunized by the doctrine of sovereign immunity.[88] This argument failed and the court increased the judgment against the city from $50,000 to $100,000.[89] In concluding that building

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> As to the overall question of what constitutes "planning" and what is "operational," it is our view that the Florida case law is in disarray. Indeed, the only way out of the impasse at the District Court level is to certify each and every case to the Supreme Court, on its particular facts, and let our superiors show us the way until the law is clarified or Commercial Carrier is receded from.

433 So. 2d at 670.

83. *See* Bryan v. State, Dep't of Bus. Reg., 438 So. 2d 415, 421 (Fla. 1st D.C.A. 1983); Wallace v. Nationwide Mut. Fire Ins. Co., 376 So. 2d 39, 40 (Fla. 4th D.C.A. 1979).

84. *See* Manors of Inverrary XII Condominium Ass'n v. Atreco-Florida, Inc., 438 So. 2d 490 (4th D.C.A. 1983), *pet. for rev. dismissed sub nom.*, Lauderhill v. Manors of Inverrary XII Condominium Ass'n, 450 So. 2d 485 (Fla. 1984); Byran v. State, Dep't of Bus. Reg., 438 So. 2d 415 (Fla. 1st D.C.A. 1983); Trianon Park Condominium Ass'n v. City of Hialeah, 423 So. 2d 911 (3d D.C.A. 1982), *quashed*, 468 So. 2d 912 (Fla. 1985); Jones v. City of Longwood, 404 So. 2d 1083 (5th D.C.A. 1981), *pet. for rev. denied*, 412 So. 2d 467 (Fla. 1982).

85. 423 So. 2d 911 (3d D.C.A. 1982), *quashed*, 468 So. 2d 912 (Fla. 1985).

86. 423 So. 2d at 913.

87. *Id.* at 912.

88. *Id.*

89. *Id.* at 914. The judgment was increased according to statute. The relevant Florida statute provided that a state and its agencies and subdivisions shall be liable to pay a claim or judgment by any one person for up to $50,000 and may be liable up to $100,000 per incident. FLA. STAT.

inspection was an operational activity, the appellate court relied on the four-prong test adopted by *Commercial Carrier*.[90] The court determined that questions (1) and (4) could be answered affirmatively. Municipal inspection and certification of buildings involved a basic governmental policy, and the city possessed the requisite authority to undertake those actions. The court found that questions (2) and (3) required a negative response. City inspections, plan reviews and certification for a particular condominium did not change the overall direction of a government policy. Moreover, enforcement of the building code standards did not involve basic policy evaluations but rather involved purely ministerial acts.[91]

Florida's Fourth District Court of Appeal followed the *Trianon* decision in *Manors of Inverrary XII Condominium Association, Inc. v. Atreco-Florida, Inc.*[92] *Manors* involved an action similar to that in *Trianon*; however, the damages in *Manors* consisted solely of the cost of repairing the defects.[93] Here, the district court held the examination of plans and specifications for the issuance of a building permit and on-site inspections to determine building code compliance were operational activities.[94] Thus, the doctrine of sovereign immunity did not shield a municipality from liability for the negligence of its building inspector in approving plans, specifications and construction which violated the South Florida Building Code.[95]

In dissent, Chief Judge Anstead argued that the municipality owed no duty to the condominium owners and that a finding of municipal liability made the government insurers of the quality of private developments.[96] The dissent urged that the responsibility of building in compliance with building codes should rest solely on the developer and his agents.[97] Judge Anstead noted that allowing the condominium association to recover from the municipality will lead to a situation in which the developer may also be able to recover from the municipality.[98]

§ 768.28(5) (1975). The court determined that the 65 unit owners were entitled to the per incident level of recovery rather than the per person level. 423 So. 2d at 914. The legislature subsequently increased the amount recoverable against the state, a county, or a municipality to $100,000 per person and $200,000 per incident. FLA. STAT. § 768.28(5) (1985).

90. *See supra* notes 76-78 and accompanying text.

91. *Trianon*, 423 So. 2d at 913.

92. 438 So. 2d 490 (4th D.C.A. 1983), *pet. for rev. dismissed*, 450 So. 2d 485 (Fla. 1984).

93. 438 So. 2d at 495-96.

94. *Id.* at 492.

95. *Id.*

96. *Id.* at 495. Several federal courts have found this argument compelling in federal regulatory inspection situations. *See, e.g.*, Clemente v. United States, 567 F.2d 1140, 1151 (1st Cir. 1977) ("We do not believe that the expanded role of the federal government in the safety area through such legislation as OSHA indicates an intent of Congress to make the United States a joint insurer of all activity subject to inspection under that statute or others. Nor do we believe that there is any sound policy basis for requiring that government attempts to protect the public must be accompanied by per se tort liability if they are unsuccessfully carried out."), *cert. denied*, 435 U.S. 1006 (1978). *See generally* Dombroff, *Certification and Inspection: An Overview of Government Liability*, 47 J. AIR L. & COM. 229 (1982) (government inspections are so pervasive that to hold the government liable for negligence would make the government a party defendant in virtually every suit).

97. *Manors*, 438 So. 2d at 498.

98. *See infra* notes 144-61 and accompanying text.

Judge Anstead concluded that to allow such municipal liability will allow the construction industry to rely on the government to guarantee building code compliance.[99] Alternatively, Judge Anstead contended that if municipalities are to be held liable, the type of damages recoverable should be limited. While public safety may justify damages for injuries, Judge Anstead found no justification for requiring the municipality to pay for repairs or improvements needed to bring a building up to code standards.[100]

B. *The Reversal of Trianon*

In a split decision the Florida Supreme Court reversed the Third District Court of Appeal's decision in *Trianon*[101] and held that the city was immune from liability for its police functions, including negligent building inspection. The court found that city building inspectors owed no duty to individual citizens and that the state did not intend to waive its immunity for activities such as building inspections.[102] Both of these justifications for municipal immunity have been previously asserted and rejected.[102]

Despite condemning the public duty doctrine in *Commercial Carrier*, the supreme court embraced this doctrine in *Trianon*.[104] The court maintained, however, that the *Commercial Carrier* opinion was not being receded from.[105] Relying on basic negligence principles, the court reasoned that government liability cannot exist without either a common law or statutory duty. The court found that the waiver of sovereign immunity established no new duty of care for government entities. Since no duty existed at common law to prevent the misconduct of third persons, the court held no common law duty existed for a government entity to enforce the law. Additionally, the court found that the adoption of a building code created no statutory duty for the benefit of individual citizens.[106]

Attempting to distinguish *Commercial Carrier*'s rejection of the public duty doctrine, the *Trianon* court found that *Commercial Carrier* dealt with a narrow factual situation in which a clear common law duty existed absent sovereign immunity.[107] *Commercial Carrier* involved the maintenance of existing traffic lights. As Justice Ehrlich pointed out in his dissent in *Trianon*, however, no common law duty existed to maintain traffic control devices. The government performed

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99. *Manors*, 438 So. 2d at 498.
100. *Id.*
101. 468 So. 2d 912 (Fla. 1985).
102. *See id.* at 915, 921.
103. *See supra* notes 24-32 & 49 and accompanying text.
104. *Trianon*, 468 So. 2d at 918.
105. *Id.* at 923.
106. *Id.* at 917-18, 921-23. However, in dissent Justice Ehrlich explained: "It is well settled at common law that a statute creates a duty running from one whose behavior is the subject of the statute to an individual if that individual is in the class designed to be protected by the statute and the injury suffered is the harm the statute is intended to prevent." The Justice further explained that the building code statute clearly mandated no building permit or certificate of occupancy be issued unless the building code was complied with. Justice Ehrlich found that a statutory duty was created thereby. *Id.* at 925.
107. *Id.* at 918.

this service and, prior to *Commercial Carrier*, the government was immune from suit. Thus, this specific common law duty could never have developed prior to *Commercial Carrier.*[108]

The *Trianon* court's attempt to distinguish *Commercial Carrier* also fails considering the facts of *Modlin*. *Modlin* was the first Florida decision to recognize the public duty doctrine[109] and was expressly overruled in *Commercial Carrier.*[110] The *Modlin* court held that city building inspectors owed no duty to individuals injured by their negilgence but owed a duty only to the general public.[111] Although *Modlin* had been expressly overruled, the *Trianon* court, in a building inspection case similar to *Modlin*, attempted to distinguish that rejection.

The *Trianon* court's second basis for finding that the city was immune from liability was also specifically rejected in *Commercial Carrier.*[112] The argument that exclusively government activities are immune from suit because they are not the type of activities engaged in by private individuals has also been rejected by the United States Supreme Court in construing the Federal Tort Claims Act.[113] Like the Federal Tort Claims Act, Florida's statute waiving sovereign immunity provides for government liability "in the same manner and to the same extent as a private individual under like circumstances."[114] The court in *Commercial Carrier* agreed with the United States Supreme Court that this language was not intended to revive the government-proprietary distinction that had led to such confusion in the past.[115]

While private persons may not have been liable for specific government activities, private individuals have been held liable under the "Good Samaritan" doctrine.[116] An individual, like the government, may be liable for the failure to use reasonable care if the individual undertakes to warn the public of a danger and thereby induces reliance.[117] The broad scope of the Good Samaritan doctrine demonstrates that an action for negligence does not depend on the specific task undertaken or whether a previous defendant has negligently performed the precise task in question. However, the court in *Trianon* disregarded its previous analysis and held that the waiver of sovereign immunity was not intended to create causes of action for activities that are inherently governmental in nature.[118]

The *Trianon* court also relied on the operational-discretionary distinction established in *Commercial Carrier*. In an attempt to clarify the law, the court divided government functions into four categories: (1) legislative, permitting, licensing, and executive officer functions; (2) enforcement of laws and the pro-

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108. *Id.* at 924.
109. *See supra* notes 40-41 and accompanying text.
110. *See supra* note 49 and accompanying text.
111. *See supra* notes 40-46 and accompanying text.
112. *Commercial Carrier*, 371 So. 2d at 1016-17.
113. Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1950).
114. *See supra* note 65 and accompanying text.
115. Indian Towing Co. v. United States, 350 U.S. 61, 65 (1950).
116. RESTATEMENT (SECOND) OF TORTS § 323 (1965).
117. *See infra* notes 218-19 and accompanying text.
118. *Trianon*, 468 So. 2d at 921.

tection of the public safety; (3) capital improvements and property control operations; and (4) providing professional, educational, and general services for the health and welfare of the citizens.[119] The court found there could be no tort liability for government activities which fell in categories 1 and 2 due to the separation of powers doctrine; moreover, a common law duty of care has never existed with regard to these types of government activities. Building inspection, along with other regulatory functions, was found to fall within category 2 and thus was labeled a discretionary function which is immune from tort liability. Government functions which fall within categories 3 and 4 may give rise to government liability. The court found that these two categories should utilize the four-prong test adopted by *Commercial Carrier.*[120] By dividing government functions into these categories, the court essentially separated activities that only the government performs from activities that both the government and private citizens perform. The court then proceeded to enlarge the discretionary function exception to the waiver of sovereign immunity to include all government activities that only the government performs.

C. *Building Inspection — Operational or Discretionary?*

In an effort to avoid substandard housing, local governments have been enforcing minimum building standards since colonial times.[121] Building codes became increasingly popular during the late nineteenth and early twentieth centuries as local governments attempted to deal with the problems of fire and disease in crowded cities.[122] The purpose of the frequently used modern building codes is to provide minimum requirements to safeguard life, health and public welfare and to protect property.[123]

The Florida Building Codes Act[124] requires local governments and state agencies with building construction responsibilities to adopt a building code.[125] Local governments may choose from a list of nationally recognized model codes. Although the *Trianon* court determined that building inspectors have discretionary power to enforce compliance, local governments are obligated by statute to enforce the code adopted.[126] Florida's building code enforcement system as outlined in the Florida Building Codes Act is typical of the system in most jurisdictions. Under this system, the builder must first apply for a building permit

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119. *Id.* at 919.

120. *Id.* at 919-21.

121. Note, *The Home Buyers' Protection Act: An Alternative to Building Codes for Single Family Homes*, 54 S. CAL. L. REV. 529, 529 (1981). Structural defects were dealt with severely by Babylonian law. The Code of Hammurabi provides: "If a builder builds a house for man and does not make its construction firm, and the house which he has built collapses and causes the death of the owner of the house, the builder shall be put to death." Blawie, *Legal Liability of Building Officials for Structural Failures*, 57 CONN. B.J. 211, 211 (1983).

122. *See* Note, *supra* note 121, at 530.

123. STANDARD BUILDING CODE, preface (SBCC 1979).

124. FLA. STAT. §§ 553.70-.895 (1983).

125. *Id.* § 553.73(1)(a).

126. *Id.* § 553.73(2)-(5).

by paying a fee and submitting the building plans.[127] The building official examines the plans for compliance with the building code. If the plans comply, a building permit is issued and construction may begin.[128] After completion of specified phases of construction an inspector is sent to the site to ensure that the construction conforms to the plans and meets reasonable standards of workmanship.[129] The building inspector has the power to issue stop work orders[130] and to revoke building permits in the enforcement process.[131] Upon completion of construction, a final inspection is required and a certificate of occupancy is issued if code requirements have been met.[132]

The Third District Court of Appeal in *Trianon* concluded that the majority of an inspector's work involved making simple measurements and merely enforcing the building code as written.[133] Many commentators agree that little discretion is exercised in enforcing most inspection statutes.[134] However, others claim the complexity of building codes leaves much discretion to the building official.[135] Building officials determine the meaning of building code provisions when applied to a particular set of plans.[136] Additionally, to prevent the stifling of innovative construction, the model codes all provide that the building official shall determine whether proposed alternative methods are at least equivalent to the methods prescribed by the code.[137] This decisionmaking mandates expertise and judgment calls.[138]

Professional judgment and expertise, however, do not elevate a decision to a discretionary level. Federal courts applying the operational/discretionary dichotomy have held that, although regulatory inspections often call for judgmental

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127. STANDARD BUILDING CODE 105.1-.4 (SBCC 1979).

128. *Id.* 106.3.

129. The Standard Building Code requires at least three inspections: (1) Foundation Inspection — made after trenches are excavated and forms erected; (2) Frame Inspection — to be made after the roof, all framing, fire-blocking and bracing is in place and all pipes, chimneys, and vents are complete; (3) Final Inspection — to be made after the building is completed and ready for occupancy. The inspector may make other inspections deemed necessary. *Id.* 108.1-.2.

130. *Id.* 103.2.

131. *Id.* 103.3.

132. Three inspections by the city are not the equivalent of supervision. *See* Blawie, *supra* note 121, at 221.

> It is absurd to think that an occasional visit of short duration by a building official can given anything but a superficial knowledge of the manner in which a large job is being performed. The larger the city, and the more building sites or buildings there are to examine, the more cursory will be the municipal building official's inspection.

Id.

133. *Trianon*, 423 So. 2d at 913.

134. *See* Stone & Rinker, *Governmental Liability for Negligent Inspections*, 57 TUL. L. REV. 328, 346 (1978) (duties of governmental inspector ministerial); Note, *State Tort Liability for Negligent Fire Inspection*, 13 COL. J.L. & SOC. PROBS. 303, 343 (1977) (fire inspection a purely ministerial act).

135. *See* Blawie, *supra* note 11, at 215-18; Note, *supra* note 121, at 535. *Cf.* Fiduccia v. Summit Hill Constr. Co., 109 N.J. Super. 249, 255, 262 A.2d 920, 923 (1970) (issuance of a certificate of occupancy does not involve planning or policy functions; however, it does involve the exercise of discretion).

136. *See* Note, *supra* note 121, at 535.

137. *See, e.g.*, STANDARD BUILDING CODE 103.6 (SBCC 1979).

138. *See* Note, *supra* note 121, at 535.

determinations, the type of judgment involved is generally of an expert or scientific nature.[139] The discretionary exception is designed to immunize public policy decisions, not merely professional decisions.[140] Thus, while building inspection involves the exercise of discretion, it does not involve policy level decisions which, if subject to judicial review, would raise the issue of separation of powers.[141] Almost all governmental functions involve the exercise of some discretion.[142] Reading the discretionary exception as broadly as the Florida Supreme Court did in *Trianon* immunizes the majority of governmental activities, making governmental immunity the rule rather than the exception.[143]

IV. The Possible Permutations of Municipal Liability

The reversal of *Trianon* stemmed the tide of municipal liability. *Trianon* and *Manors* both involved the duty municipalities owe to the purchasers of new homes. The *Manors* dissent suggested that the next step in municipal liability would be to extend the municipality's duty to the developer.[144] The *Manors* dissent questioned the extent to which a developer or other party could shift the loss from construction defects onto the municipality were municipalities held liable for negligent building inspection. The fear that developers would attempt

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139. *See* Hylin v. United States, 715 F.2d 1206, 1213 (7th Cir. 1983) (federal mine inspections not within discretionary function exception); Blessing v. United States, 447 F. Supp. 1160, 1184 (E.D. Pa. 1978) (exercise of professional discretion in conducting OSHA inspection not within discretionary function). *But cf.* United States v. S.A. Empresa De Viaco Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 2755 (1984). The *Varig* Court reversed two Ninth Circuit decisions which held that inspections by the Federal Aviation Administration did not fall within the discretionary function exception. The Court found that there was no evidence that the specific airplanes invovled were actually inspected. Accordingly, the Court interpreted the claim against the FAA to allege negligence in implementing a spot-checking program not negligence in conducting an actual inspection. *Id.* at 2757-58. However, the decisions of the Ninth Circuit were based on negligence in carrying out an inspection. Neither decision mentioned the possibility that the two planes involved were not actually inspected. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205 (9th Cir. 1982); United Scottish Ins. Co. v. United States, 614 F.2d 188 (1979), *following remand*, 692 F.2d 1209 (9th Cir. 1982).

140. Griffin v. United States, 500 F.2d 1059, 1064 (3d Cir. 1974) (the critical inquiry is not merely whether judgment was exercised, but also whether the judgment called for policy considerations). The leading case on the federal discretionary function exception is Dalehite v. United States, 346 U.S. 15 (1953). In *Dalehite*, the United States Supreme Court held that cabinet level decisions on the control of manufacturing, handling and shipping of fertilizer were discretionary functions. The government was thus immunized from liability stemming from an explosion of fertilizer which killed 560 and injured thousands. *Id.* at 48 (Jackson, J., dissenting). *See also* Indian Towing Co. v. United States, 350 U.S. 61 (1955) (operation of a lighthouse not within discretionary function exception).

141. *See supra* notes 72-73 and accompanying text.

142. Johnson v. State, 69 Cal. 2d 782, 788, 447 P.2d 352, 357, 73 Cal. Rptr. 240, 245 (1968) ("It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.") (quoting Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920)).

143. Department of Transp. v. Neilson, 419 So. 2d 1071, 1079 (Fla. 1982) ("[A] finding of immunity is the exception rather than the rule.") (Sunberg, J., dissenting).

144. *See supra* notes 98-99 and accompanying text.

to recover from municipalities for negligent inspection may have influenced the supreme court's decision in *Trianon*. Were municipalities not protected by sovereign immunity, developers could attempt to recover from municipalities on three bases: direct actions, indemnification and contribution.

A. Direct Actions — Would the Municipality Owe a Duty to the Developer?

Florida courts have not addressed the issue of whether municipalities owe a duty to the developer to use reasonable care in making building inspections. Florida courts have held, however, that the owner of property being developed has a nondelegable duty to see that the home constructed is reasonably free from dangerous latent defects.[145] Additionally, building codes commonly provide that compliance with the code is the responsibility of the owner.[146] These guidelines suggest the developer would not be able to hold the municipality liable for damages caused by noncompliance with the building code, even if municipalities were not protected by sovereign immunity.

Cases from other jurisdictions, however, suggest that if an owner-developer relies on a municipal inspection, the owner-developer may be entitled to recover from the city.[147] In *J. & B. Development Co. v. King County*,[148] a builder who began construction relying on a negligently issued building permit was awarded economic damages. The builder had already begun construction when the city discovered that the development did not comply with the zoning setback requirements.[149] The Washington Supreme Court held that because the county issues building permits, inspects for compliance and is aware that permit holders rely on the permits, the county has a duty to exercise reasonable care.[150] The court recognized that the builder had the same opportunity to detect the error as the county and held that the builder's damages may be reduced under the rules of comparative negligence.[151]

In *Garrett v. Holiday Inn, Inc.*,[152] a town negligently approved changes in the building plans of a motel which were in conflict with fire safety laws. The New York Court of Appeals held the town had violated a duty it owed to the motel owners but that the town owed no duty to the motel visitors who were injured in the fire. Applying the public duty doctrine, the court found the town had

145. Green Springs, Inc. v. Calvera, 239 So. 2d 264, 265 (Fla. 1970).

146. *See* Brown v. South Broward Hosp. Dist., 402 So. 2d 58, 60 (Fla. 4th D.C.A. 1981); *see also* FLORIDA CONDOMINIUM LAW AND PRACTICE § 15.25 (Fla. Bar Continuing Legal Educ. 1982).

147. *But see* Johnson v. Salem Title Co., 246 Or. 409, 412, 425 P.2d 519, 521 (1967) (architect cannot escape liability for failing to comply with building code due to reliance on the city building inspector).

148. 100 Wash. 2d 299, 669 P.2d 468 (1983).

149. *Id.* at 302, 669 P.2d at 470-71.

150. *Id.* at 307, 669 P.2d at 473. Relying on the public duty doctrine, the court held that permit and inspection requirements do not create a duty of care owing to the public generally. However, the court found that a special duty is owed to builders who rely on the accuracy of permits. The court rejected the lower court's abandonment of the public duty doctrine but affirmed the lower court's conclusion. *Cf.* J. & B. Dev. Co. v. King County, 29 Wash. App. 942, 631 P.2d 1002 (1981) (abolishing the public duty doctrine).

151. *See J. & B. Dev. Co.*, 100 Wash. 2d at 303 n.1, 669 P.2d at 474 n.1.

152. 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

breached a special duty it owed to the motel owners by failing to require them to comply with applicable fire and safety laws.[153] Based on the duty to the motel owners, the court held the town proportionately liable for the harm suffered by the motel guests.[154]

Both the *J. & B. Development Co.* and *Garrett* decisions based the existence of a duty on the reliance of the owner.[155] Neither case addressed whether the owner was entitled to rely. Some federal cases involving regulatory inspection suggest that a party in the position of an owner-developer is not entitled to rely. In *United Scottish Insurance Co. v. United States*,[156] plaintiff sued the Federal Aviation Administration for negligently inspecting and certifying a commercial aircraft. The Ninth Circuit Court of Appeals stated that the government does not undertake a primary duty to provide services when it engages in regulatory inspections.[157] The court further found that government inspections do not relieve other actors of their primary duty to assure that the underlying activity is accomplished within the minimum government standards.[158] In *Raymer v. United States*,[159] the Sixth Circuit Court of Appeals held that parties primarily responsible for mine safety were precluded from relying on federal mine inspections as a matter of law.[160] Under this line of reasoning, developers would be precluded from instituting direct actions against municipalities for negligently failing to detect code violations during routine building inspections.[161]

B. *Shifting the Loss by Indirect Actions*

The waiver of sovereign immunity effected by Florida Statutes section 768.68

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153. *Id.* at 257, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

154. *Id.* at 263-64, 447 N.E.2d at 722, 460 N.Y.S.2d at 778-79. Relying on the public duty doctrine, the court held that the mere failure of the city to uncover fire and safety violations would not constitute a sufficient basis for imposing liability on the city. The court found, however, that the city owed a special duty to the motel owners if, as the complaint alleged, the city had known that the dangerous violations existed but had gone ahead and certified the premises as safe. The court held that the city could be liable to the owners for direct injuries and any economic damages the owners may suffer as a result of judgments against them. *Id.* at 262-63, 447 N.E.2d at 722, 460 N.Y.S.2d at 778-79. *See generally* Note, Garret v. Holiday Inns, Inc.: *Expanding the Right of Apportionment and Municipal Tort Liability*, 4 PACE L. REV. 673 (1984).

155. *J. & B. Dev. Co.*, 100 Wash. 2d at 306-07, 669 P.2d at 472. *See also Garrett*, 58 N.Y.2d at 778, 147 N.E.2d at 274 (1983).

156. 614 F.2d 188, 193 (1979), *following remand*, 692 F.2d 1209 (9th Cir. 1982), *rev'd*, United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 2755 (1984). *See supra* note 139.

157. 614 F.2d at 193 ("Although such functions are carried out pursuant to statute or to regulations, they do not arise from a primary duty to provide the service in question.").

158. *Id. See, e.g.*, Blessing v. United States, 447 F. Supp. 1160, 1196 (E.D. Pa. 1978) (by conducting OSHA inspections the government has not undertaken to perform any duties of the employer).

159. 660 F.2d 1136 (6th Cir. 1981).

160. *Id.* at 1143.

161. *See also* Runkel v. Homelsky, 145 N.Y.S.2d 729 (App. Div. 1955) (city was entitled to recover from owners since owner was primarily responsible for maintaining building in safe condition).

has not been limited to direct tort actions.[162] Thus, rather than initiating a direct action against the municipality, the developer could join the municipality in a third-party action seeking either indemnification or contribution. Such third-party actions are common in construction litigation as defendants attempt to shift their liability.[163]

1. Indemnification

The law of indemnity allows a defendant held liable in tort for damages to shift his entire loss to another responsible party.[164] The distinction between active and passive negligence[165] has been abolished in Florida and thus, indemnity no longer involves a weighing of relative fault of the tortfeasors.[166] Accordingly, liability may only be shifted if the party seeking indemnity is totally without fault and has been legally compelled to pay due to constructive or derivative liability.[167] The party seeking indemnification can only recover from the party who caused the constructive liability to be imposed.[168]

While damages may be recoverable from a developer for negligent construction,[169] if the developer engaged in no independent acts of negligence, the developer is only vicariously liable.[170] Accordingly, a developer may be entitled to seek indemnification from parties who were negligent and whose negligence was imputed to the developer.[171] Since no basis exists for imputing the negligence

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162. *Commercial Carrier*, 371 So. 2d at 1022 ("Actions for contribution or indemnity grounded on tortious conduct of the state or its agencies and subdivisions are no less tort claims for purposes of section 768.28 than direct actions."). *See also* Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1978) (term "person" in Uniform Contribution Among Tortfeasors Act includes municipalities). *Cf.* United States v. Yellow Cab Co., 340 U.S. 543 (1951) (waiver of immunity effected by Federal Tort Claims Act not limited to direct actions).

163. *See supra* note 2 and accompanying text.

164. Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 493 (Fla. 1979). *See generally* Wetherington, *Tort Indemnity in Florida*, 8 FLA. ST. U.L. REV. 383 (1980) (tortfeasor at fault denied common law indemnity).

165. Houdaille Indus., Inc. v. Edwards, 374 So. 2d at 493. Active negligence is the negligent creation of a dangerous condition. Passive negligence is the negligent failure to discover a dangerous condition. Prior to the abolition of this distinction, a party who was passively negligent was entitled to indemnification from the party who was actively negligent. Wetherington, *supra* note 164, at 293. Were the active-passive distinction still applicable in Florida, a city held liable for negligent building inspection could recover its loss from the construction defendants who actually created the defects.

166. Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 493 (Fla. 1979).

167. *Id.*

168. *Id.* ("Indemnity can only be applied where the liability of the person seeking indemnity is solely constructive or derivative and only against one who, because of his act, has caused such contructive liability to be imposed."). *See generally* Chesrow, Howard & Howard, *Fault and Equity. Implied Indemnity After* Houdaille, 34 U. MIAMI L. REV. 727 (1980) (implied indemnity severely restricted by requiring indemnitee to be without fault).

169. *See supra* note 2.

170. Biscayne Roofing v. Palmetto Fairway Condominium Ass'n, 418 So. 2d 1109 (Fla. 3d D.C.A. 1982) (owner-developer who engaged in no independent acts of negligence was only vicariously liable for defective roof).

171. *Id.* at 1110. The Restatement of Restitution provides: "A person who, without personal

of a city building inspector to a developer,[172] the developer would not be entitled to indemnification from a municipality which had negligently inspected the construction. The developer hires a contractor, architect and engineer to comply with construction standards; thus, these are the parties the developer can look to for damages paid if the building was not properly constructed.[173] Therefore, the fear expressed by the *Manors* dissent,[174] that without sovereign immunity the total liability for noncompliance with building codes would fall on the municipality, is unfounded.

2. Contribution

Contribution allows multiple tortfeasors who are liable to the same plaintiff for the same injury to equalize the burden between them by compelling each other to pay a pro rata share of the judgment.[175] The Uniform Contribution Among Tortfeasors Act provides that the relative degrees of fault of the parties is the basis for determining each party's pro rata share.[176] Although the statute does not require joint action, courts have required some interrelation among the acts to sustain an action for contribution.[177] In *VTN Consolidated, Inc. v. Coastal Engineering*,[178] Florida's Second District Court of Appeal denied contribution to a surveyor whose negligent acts had combined with the negligence of an engineering firm to cause a single injury. The surveyor had negligently prepared topographic maps. Two years later the engineering firm had allegedly negligently misused these maps. Although the plaintiff, a land developer, suffered a single injury, the court held the liability of the surveyor and the engineering firm did not arise out of the same transaction or series of transactions. Additionally, the court held that the surveyor and the engineering firm did not share a common burden and thus a claim for contribution was not stated.[179]

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fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability." RESTATEMENT OF RESTITUTION § 96 (1937).

172. The city building official is not an agent of the developers, nor does the building official inspect on behalf of the developer. *See supra* notes 156-60 and accompanying text.

173. FLORIDA CONDOMINIUM LAW AND PRACTICE § 15.25 (Fla. Bar Continuing Legal Educ. 1982). *See Manors*, 438 So. 2d at 498 (Anstead, J., dissenting).

174. *See supra* notes 93-100 and accompanying text.

175. Lincenberg v. Issen, 318 So. 2d 386, 390 (Fla. 1975) (receding from principle of no contribution in Florida); *see generally* Coffey, *Contribution Among Joint Tortfeasors: A Florida Case Law Survey and Analysis*, 35 U. MIAMI L. REV. 971 (1981) (effect of release from liability on joint tortfeasors who settle with plaintiffs under the Uniform Contribution Among Tortfeasors Act).

176. FLA. STAT. § 768.31(2)(a) (1985). The Uniform Contribution Among Tortfeasors Act provides in part:

> Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

Id.

177. *See* Coffey, *supra* note 175, at 975.

178. 341 So. 2d 226 (2d D.C.A. 1976), *cert. denied*, 345 So. 2d 428 (Fla. 1977).

179. 341 So. 2d at 229. *See also* Touche Ross & Co. v. Sun Bank, 366 So. 2d 465 (3d D.C.A.)

Distinguishing *VTN*, Florida's First District Court of Appeal, in *Salley v. Charles R. Perry Construction, Inc.*,[180] held that an architect and contractor are engaged in a common effort to design and construct a building. The court found that the architect and contractor both owed duties to the owner simultaneously; thus, the architect's cross-claim stated a claim for contribution against the contractor.[181]

Applying these decisions to the negligent building inspection scenario, it appears that, without sovereign immunity, a developer would be able to claim contribution from the municipality if the developer were sued by the purchaser of a new home. The municipality and developer are simultaneously involved in a common enterprise to comply with building codes. Therefore, a municipality could be joined in an action originally brought against a developer and be required to pay a portion of the damages. Such an action would require the municipality to have negligently inspected the construction and the defects to have resulted from noncompliance with the building code. While the municipality would only be required to pay its pro rata share, this liability would shift some of the burden of code compliance off the construction industry.

C. *Policy Considerations*

The prime impetus for the abrogation of sovereign immunity was the injustice of leaving an injured plaintiff without a remedy when the government was the wrongdoer.[182] However, in the negligent building inspection context, not only are alternative remedies available, but other policy goals are furthered by encouraging homeowners to pursue these remedies.[183] Construction law in

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(accounting firm failed to establish a contribution theory against bank when the bank's potential liability arose from honoring embezzled funds and the firm's liability arose from its failure to discover the loss), *cert. denied*, 378 So. 2d 350 (Fla. 1979).

180. 403 So. 2d 556 (Fla. 1st D.C.A. 1981).

181. *Id.* at 557.

182. *See, e.g.*, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957); Williams v. City of Green Cove Springs, 65 So. 2d 56, 57 (Fla. 1953); City of Miami v. Bethel, 65 So. 2d 34, 37 (Fla. 1953). *See* Note, *supra* note 134, at 349.

183. The availability of alternative remedies has often been considered a factor in determining the extent of government immunity. In Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961), the court stated:

> [V]arious factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits [against government] for damages.

Id. at 230, 359 P.2d at 467, 11 Cal. Rptr. at 99 (quoted with approval in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1021 (1979), *aff'd per curiam*, 398 So. 2d 488 (Fla. 1981). *See also* Johnson v. Collier County, 468 So. 2d 249 (Fla. 2d D.C.A. 1985) (considering that claims were being pursued against other parties against whom the plaintiff may have recourse beside the county); Neumann v. Davis Water & Waste, Inc., 433 So. 2d 559, 563 (2d D.C.A.) (taking notice of pending claims against private parties, the court considered that the plaintiff had remedies available other than a claim against the government), *pet. for rev. denied*, 441 So. 2d 632 (Fla. 1983); Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 808 (Minn. 1979) (court considered that there were other viable defendants besides the city).

Florida has developed to take the burden of construction defects off the home buyer and to place it on those who profit from the sale: the construction industry.[184]

Prior to 1972 the general rule of caveat emptor applied in Florida.[185] New homeowners had little chance of recovery for latent construction defects discovered after purchase of their new homes. The extension of an implied warranty of habitability to the sale of new homes in *Gable v. Silver*[186] marked the beginning of a new era in Florida construction litigation.[187] Following *Gable,* traditional tort remedies were also expanded to offer further protection to the buyers of new homes.[188] In addition to actions against the developer, homeowners can now bring direct actions against contractors and architects with whom they never dealt.[189] Purchasers of new condominiums also enjoy a three-year statutory warranty in Florida.[190] In addition to the variety of remedies available to a disgruntled home buyer, the typical construction claim involves a host of possible defendants.[191]

Imposing an implied and statutory warranty of liability on the developer rightfully shifts the cost of defects away from the unwary buyer and onto the developer.[192] The developer has the knowledge and opportunity to prevent defects and the ability to distribute the cost through the market.[193] Direct actions for negligence against architects, contractors and other parties place liability on those who are actually involved in the construciton.

The liability that has been imposed on the developer and its agents serves to ensure that quality homes are built. Municipal building inspection provides an additional check on the private construction industry by policing its compliance with minimum government standards. Since municipal building inspections do not reduce the developer's duty to meet these standards,[194] no justification exists for shifting a portion of the financial liability onto the municipality. While holding the municipality partially responsible for defective con-

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184. *See* Manne, *Condominium Construction Litigation,* 54 FLA. B.J. 762, 763 (1980).

185. *Id.*

186. 258 So. 2d 11, 18 (4th D.C.A.), *aff'd,* 264 So. 2d 418 (Fla. 1972). *See generally* Comment, *Implied Warranties in the Sale of New Homes,* 23 U. FLA. L. REV. 626 (1971) (discussion of caveat emptor in Florida and its gradual abandonment in other jurisdictions).

187. FLORIDA CONDOMINIUM LAW AND PRACTICE § 15.11 (Fla. Bar Continuing Legal Educ. 1982) (following *Gable* Florida courts applied products liability theories to defective construction situations).

188. Navajo Circle, Inc. v. Development Concepts, 373 So. 2d 689 (Fla. 2d D.C.A. 1979) (absence of contractual privity does not affect a plaintiff's negligence claim).

189. FLORIDA CONDOMINIUM LAW AND PRACTICE § 15.9 (Fla. Bar Continuing Legal Educ. 1982).

190. FLA. STAT. § 718.203 (1985) (three-year warranty of fitness and merchantability).

191. The principal participants in a construction project are the owner (generally the developer), architect, general contractor and subcontractors. *See* FLORIDA CONSTRUCTION LITIGATION 29-35 (Fla. Bar Continuing Legal Educ. 1982).

192. 258 So. 2d at 18; *see* Conklin v. Hurley, 428 So. 2d 654, 658 (Fla. 1983).

193. *See* Note, *supra* note 121, at 551.

194. *See supra* notes 156-60 and accompanying text.

struction would not negate the developer's responsibility, it would provide an economic disincentive for developers to conduct their own inspections.[195]

In support of imposing liability on municipalities, some commentators argue that the threat of tort liability will motivate municipalities to upgrade their inspection programs.[196] Yet many of the inefficiencies in current building inspection programs are directly related to understaffing caused by a lack of funding.[197] These problems would only be exacerbated by imposing tort liability on the municipality. Rather than improving inspection programs, municipalities may be forced to reduce the number of inspections they perform.[198] The likelihood of this result is evidenced by the recent trend to remove mandatory inspection language from government inspection legislation.[199]

Due to the extensive nature of government inspection activities, the risk of excessive liability is cited as a reason to limit municipal liability.[200] The trend in million dollar verdicts has frightened city officials.[201] Overly generous judgments against municipalities have been blamed on the mistaken belief of jurors that when the government pays, no one loses.[202] Many commentators dismiss fears of crippling judgments as unsubstantiated and argue that the government's ability to pay should have no bearing on judicial determinations of liability.[203] This argument is based on the mistaken belief that tort law is divorced from policy considerations. Policy questions, however, are inherent in the establishment of a duty.[204] These commentators also claim that municipal liability will be limited by traditional tort principles.[205] The plaintiff must still prove the breach of a duty, causation and damages. However, while a city would only have to pay damages for its negligence, the cost of defense and the diversion of litigation would take their toll.[206]

V. LIMITS ON LIABILITY

Even states with comprehensive waivers of sovereign immunity have imposed

195. *See* Note, *supra* note 10, at 560.

196. *See, e.g.*, Stone & Rinker, *supra* note 134, at 344; Note, *supra* note 134, at 350.

197. *See* H. MILLER, *supra* note 60, at 8.

198. *See* Note, *Municipal Liability for Negligent Building Inspections — Demise of the Public Duty Doctrine?*, 65 IOWA L. REV. 1416, 1439-40 (1980).

199. *See* H. MILLER, *supra* note 60, at 8.

200. *See* Cochran v. Herzog Engraving Co., 155 Cal. App. 3d 405, 205 Cal. Rptr 1 (1984).

201. *See* Young, *Tort Judgments Against Cities: The Sky's the Limit*, 4 DET. C.L. REV. 1509 (1983) (article by Mayor of City of Detroit addressed to members of the Bar).

202. *See* Little, *supra* note 11, at 661; Young, *supra* note 201, at 1509 ("Modern juries seem to have the impression that municipalities have access to a bottomless pot of gold ....").

203. *See* Stone & Rinker, *supra* note 134, at 341; Note, *supra* note 134, at 344-45. *Cf.* Wilson v. Nepstad, 282 N.W.2d 664, 674 (Iowa 1979) (financial consequences of legislation are the responsibility of the legislature).

204. W. PROSSER, LAW OF TORTS 325-26 (4th ed. 1971) ("'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection").

205. *See Trianon*, 468 So. 2d at 925 (Ehrlich, J., dissenting); Stone & Rinker, *supra* note 196, at 328.

206. *See* Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979).

either statutory or judicial limitations on governmental liability.[207] The primary limitations utilized are the public duty doctrine and the operational-discretionary dichotomy. Once considered rejected in Florida, the role of the public duty doctrine in municipal liability is now unclear after *Trianon*. The *Trianon* court also considered the operational-discretionary distinction a shield to municipal liability for negligent inspection; however, this position is disputable.[208] This section will examine other available means of limiting liability.

A. Limiting Liability Through Proximate Cause

In *Jones v. City of Longwood*,[209] the city escaped liability for negligently failing to inspect an abandoned building due to a lack of proximate cause. In *Jones*, a twelve-year-old child playing in an abandoned building was killed when a 2,000 pound cabinet fell on her. A local ordinance directed the building official to periodically inspect all buildings and to report any unsafe conditions to the city council. In a pre-*Trianon* decision, Florida's Fifth District Court of Appeal conceded that building inspection was an operational activity for which the city enjoyed no immunity. However, the court held that, as a matter of law, the failure of the city to inspect and uncover the dangerous condition was not the proximate cause of the child's death. The court reasoned that the building official's inspection and subsequent report to the city council was only the first step in the chain of events which would lead the city to condemn the property.[210] The dissent viewed the court's holding as merely an excuse to extend sovereign immunity.[211]

Other Florida courts have addressed the proximate cause issue indirectly. The Third District Court of Appeal in *Trianon* raised the issue in the question it certified to the Florida Supreme Court by limiting the question of liability to a situation where the municipality plays no part in the actual construction of the building.[212] By framing the question in this manner, the court suggested that perhaps the city may not have been sufficiently involved in the undertaking to warrant a finding of legal causation. Justice McDonald, in his concurring opinion in *Trianon*, also suggested a weak causal connection existed in negligent building inspection cases. Justice McDonald indicated that governments should not be liable where they did not directly cause the harm.[213]

Florida's Second District Court of Appeal raised the issue more directly in *Neumann v. Davis Water & Waste, Inc.*[214] In *Neumann*, the district court held that the Department of Environmental Regulation (DER) was not liable for negli-

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207. H. Miller, *supra* note 60, at 2.

208. *See supra* notes 110-20, 124-43 and accompanying text.

209. 404 So. 2d 1083, 1085 (5th D.C.A. 1981), *pet. for rev. denied*, 412 So. 2d 467 (Fla. 1982).

210. 404 So. 2d at 1086.

211. *Id.*

212. 423 So. 2d at 914-15 ("Whether, ... a municipality retains its sovereign immunity from a suit predicating liability solely upon the allegedly negligent inspection of a building, where the municipality played no part in the actual construction of the building.").

213. *Trianon*, 468 So. 2d at 923.

214. 433 So. 2d 559 (2d D.C.A.), *pet. for rev. denied*, 441 So. 2d 632 (Fla. 1983).

gently failing to inspect a sewage treatment tank in which a three-year-old child drowned. Although DER required the area to be fenced, the area was not inspected to ascertain whether the required fencing was in place. Declining to label DER's activity as either operational or discretionary, the court held that DER's actions were protected by sovereign immunity. To justify its conclusion, the court stated that DER did not design, construct, own, operate or maintain the sewage treatment plant. The court concluded that the accident was not caused by a "direct" operational act of the government.[215]

Both the *Trianon* and *Neumann* decisions suggest an essential difference between government inspection activities and other types of government activities. When the government engages in highway maintenance or traffic regulation, the government is providing a direct service and thus undertakes a primary duty to use reasonable care in its actions. However, when the government undertakes inspection responsibilities, the government is merely supplementing another's primary duty. The government's duty is only secondary.[216] Before a government inspection activity can be labeled the proximate cause of an injury, the government's conduct must have contributed to the cause of the injury in some positive way.[217].

Federal courts have dealt with the proximate cause issue in government inspections by relying on the Good Samaritan doctrine as codified in the Restatement (Second) of Torts, sections 323 and 324A.[218] Before a Good Samaritan may be held liable for nelgigent performance of an undertaking, he must have contributed to the injury either by: (i) undertaking to perform the duty that another person owes to a third party; (ii) increasing the risk of harm; or (iii) inducing reliance on his undertaking. Only when the requirements of the Restatement are met does negligent inspection contribute to subsequent injuries sufficiently to warrant a finding of proximate cause.

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215. 433 So. 2d at 563; *see also* Johnson v. Collier County, 468 So. 2d 249, 251 (Fla. 2d D.C.A. 1985) (the county did not design, construct, own, operate, or maintain the cause of the injury).

216. *See* Cracraft v. City of St. Louis Park, 279 N.W.2d 802, 804 (Minn. 1979); Dufrene v. Guarino, 343 So. 2d 1097, 1099 (La. Ct. App. 1977); Duran v. City of Tucson, 20 Ariz. App. 22, 25, 509 P.2d 1059, 1062 (1973). *See, e.g.*, Rayford v. United States, 410 F. Supp. 1051 (M.D. Tenn. 1976).

217. Blessing v. United States, 447 F. Supp. 1160, 1199 (E.D. Pa. 1978).

218. Section 324A of the Restatement provides:

> *Liability to Third Person for Negligent Performance of Undertaking.*
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATMENT (SECOND) OF TORTS § 324A (1965). *Cf. id.* § 323 (applying where one person undertakes to render a service directly to another person).

In *Blessing v. United States*[219] the United States District Court of the Eastern District of Pennsylvania held that the first condition which would trigger liability under the Good Samaritan doctrine was inapplicable to federal OSHA inspections. The court held that since OSHA inspections do not replace the duty that employers owe to their employees, the government does not undertake to perform the duty that another person owes to a third party.[220] The second condition has been held applicable to federal regulatory inspections. Where government inspections have increased the risk of harm, courts have not been hesitant to impose liability.[221]

However, the third condition, inducing reliance, has proven more troublesome. *Cash v. United States*[222] involved a claim against the Farmers Home Administration (FMHA) for negligently inspecting the construction of a home financed by a FMHA loan. Without resolving the issue of whether this type of inspection is operational or discretionary, the United States District Court of the Northern District of Georgia held that FMHA could not be liable for negligence to the homeowner-borrower. The court based its decision on regulations promulgated by the Secretary of Agriculture. The regulations provided that the borrower is responsible for making inspections to protect the borrower's interest. The regulation further provided that FMHA inspections are not to assure the borrower that the house is built in accordance with plans and specifications. The court reasoned that the regulations precluded the borrower from relying on FMHA inspections. Consequently, the court concluded that the Good Samaritan doctrine was inapplicable.[223]

Under the Good Samaritan doctrine, regulatory disclaimers such as the regulation relied upon in *Cash* could limit government inspection liability to situations where the government inspection increased the risk of harm. However, boilerplate disclaimers create an artificial barrier to liability.[224] While the party with the primary duty to render the service may not be entitled to rely on regulatory inspections, whether other parties relied is a question of fact.[225] Although standard building codes provide that the owner has primary responsibility for code compliance, the public has come to rely on the issuance of a certificate of occupancy as evidence that the building meets minimum standards.

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219. 447 F. Supp. 1160, 1199 (E.D. Pa. 1978).

220. *Id.* at 1194.

221. *See* Hylin v. United States, 715 F.2d 1206, 1213-17 (7th Cir. 1983) (federal mine inspection increased the risk of injury to workers and was thus the proximate cause of miner's death).

222. 571 F. Supp. 513 (N.D. Ga. 1983).

223. *Id.* at 515.

224. *See* Hylin v. United States, 715 F.2d 1206, 1213 (7th Cir. 1983). In *Hylin*, the mining regulation provided, "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such unsafe and unhealthful conditions and practices in such mines." The government claimed that this language precluded either the operators or the miners from relying on government inspections. The court questioned the effectiveness of such disclaimers and found the government liable on other grounds. *Id.*

225. *See* Blessing v. United States, 447 F. Supp. 1160, 1200 n.56 (E.D. Pa. 1978).

B. Other Limits on Liability

As the trend to abrogate sovereign immunity continues and more states reject the public duty doctrine, legislation has begun to limit municipal liability. Some states, including Florida, limit the monetary amount recoverable from a governmental entity.[226] Many states also limit the types of damages recoverable. Florida Statutes section 768.28 allows all types of damages except punitive.[227]

The *Manors* dissent suggested that municipalities should only be liable for injuries resulting from defective construction.[228] Traditionally, courts have been more willing to find a governmental entity liable for negligent inspection when personal injury was involved.[229] This result is justified since the primary purpose of building codes is to protect the health and safety of building occupants, not to protect the monetary interests of individuals.

Modern English law is based on principles similar to those proposed in Judge Anstead's dissent in *Manors*. In England, local authorities may be held liable for negligent building inspection; however, damages are limited to the cost of removing a present or imminent danger.[230] A homeowner cannot recover from the local government merely because the building is less valuable than it should be. Based on statutory interpretation, English courts have held that the duty of the building authorities extends only to ensuring the occupier's safety, not to protecting the building owner's financial interests.[231] This approach focuses the building authorities' concern on safety and leaves quality control to the private sector.

Another method by which municipal liability can be curbed is by placing limitations on contribution claims. An Alabama statute ensures that a government entity will not bear the entire burden of joint tortious conduct.[232] The Alabama statute provides that, in a tort action where a government entity is a defendant, the plaintiff must join others who may be potentially liable. A judgment against the other co-defendants is required before a judgment against the municipality will be allowed. The municipality will only be required to pay what cannot be collected from the other co-defendants.[233] This type of legislation deters plaintiffs from bringing frivolous suits against municipalities. In the construction litigation context, such legislation would reduce the number of cross-

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226. *See supra* note 66. *See, e.g.*, ALA. CODE § 11-93-2 (Supp. 1984) ($100,000 per person in any one occurrence); R.I. GEN. LAWS § 9-31-2 (Supp. 1984) ($100,000 limit, effective Jan. 1, 1985).

227. *See supra* note 65. *Cf.* KY. REV. STAT. ANN. § 44.070(1) (Baldwin 1980) (no recovery for pain and suffering).

228. *See supra* note 121 and accompanying text.

229. *See* Note, *supra* note 18, at 474.

230. *See* Anns v. Merton London Borough Council, [1978] A.C. 728.

231. *Id.* at 758, 759. *See generally* Grubb, *A Case for Recognizing Economic Loss in Defective Building Cases*, 43(1) CAMBRIDGE L.J. 111 (Apr. 1984).

232. ALA. CODE § 11-47-191 (1975).

233. The Alabama Code provides in part:

> (b) When a judgment shall be obtained against a municipality and the other party liable as provided in subsection (a) of this section, execution shall issue against the other defendant or defendants in the ordinary form and shall not be demandable of the city or

claims filed against municipalities and would keep the burden of defective construction on the private sector. However, if the developer or other responsible parties are insolvent, the plaintiff would not be left without a remedy.

Six states which have enacted broad waivers of sovereign immunity have elected to specifically except liability stemming from negligent inspection.[234] Generally, these statutes provide that a public entity is not liable for any injury caused by its failure to make an inspection or due to an inadequate or negligent inspection.[235] Exceptions of this type represent a policy decision to encourage rather than discourage government inspection activities. Additionally, this type of legislation is based on a recognition of the extensive nature of government inspection acitivities and the potential for excessive governmental liability.[236]

VI. Conclusion

While the end result of the Florida Supreme Court's decision in *Trianon* is consistent with public policy in the narrow area of negligent building inspection, the court's departure from previous holdings has made sovereign immunity the rule rather than the exception. Rather than considering new ways to limit municipal liability, the supreme court chose to readopt the public duty doctrine and the governmental-proprietary distinction. These theories have historically proven to be harsh and difficult to apply. Additionally, the *Trianon* decision exacerbated the confusion of municipal liability by adding four categories of government activity; lower courts must now sift through these categories before applying the much criticized four-prong test of *Commercial Carrier.*

The supreme court's reversal of *Trianon* has also prevented Florida municipalities from becoming joint insurers of the quality of construction. Although

> town unless the other defendants are insolvent and the same cannot be made out of their property, and the city or town shall pay only so much of the said judgment as cannot be collected from the other defendants.

Id.

234. Alaska Stat. § 09.65-070(d)(1)(A) (1983) (applies only to incorporated units of local government); Cal. Gov't Code § 818.4 (West 1980); Ind. Code Ann. § 34-4-16.5-3 (Burns Supp. 1982); Nev. Rev. Stat. § 41.033 (1983); N.J. Stat. Ann. § 59:2-6 (West 1982); Utah Code Ann. § 63-30-10(1)(c) (Supp. 1983).

235. N.J. Stat. Ann. § 59:2-6 (West 1982) ("A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property ....").

236. The official comment to New Jersey's provision on negligent inspection states: "This immunity is essential in light of the potential and existing inspection activities engaged in by public entities for the benefit of the public generally. These activities are to be encouraged rather than discouraged ...." *Id. Cf.* Fla. Stat. § 325.29 (1980) ("No inspector or inspection station inspecting a motor vehicle and insuring an inspection certificate of such inspection ... shall be liable in damages for any defect in or failure or improper functioning of any item of equipment on such motor vehicle occurring subsequent to such inspection.") (repealed 1981). *See also* Betancourt v. Metropolitan Dade County, 393 So. 2d 21 (Fla. 3d D.C.A. 1981) (statute exempting car inspection stations from liability for negligent inspection may coexist with statute waiving sovereign immunity); Hensley v. Seminole County, 268 So. 2d 452, 453 (Fla. 4th D.C.A. 1972) ("It would inhibit, if not destroy, the inspection program if each post inspection vehicular defect furnished a predicate for suing the government.").

the construction industry would be precluded from shifting the entire burden of construction defects onto municipalities, but for sovereign immunity, developers and other construction defendants would be able to shift a portion of their loss. However, sovereign immunity is not the only avenue to limit municipal liability.

The proximate cause analysis of the Good Samaritan doctrine, as applied by federal courts, is one such solution. Accordingly, a developer charged with a primary duty to comply with building codes cannot justifiably rely on the city to perform that duty. By applying the Good Samaritan doctrine, the developer could maintain a direct action against the city only if the building inspection increased the risk of harm.

Further limits on liability could be obtained by adoption of an Alabama-type statute which places limits on contribution claims against municipalities. The statute could be limited to apply only to municipal inspection duties where private parties have the primary responsibility for performing the service. Thus, where the municipality's duty is only secondary, the private sector would bear the burden of construction defects.

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