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State Limitations on Tort Liability of Public Transit Operations

A report prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Larry W. Thomas. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

In reauthorizing federal assistance for surface transportation programs through the 1990s, the Intermodal Surface Transportation Efficiency Act calls for the adaptation of new concepts and techniques in planning, funding, constructing, and operating these programs. These changes will affect the institutional framework--laws and administrative processes--as well as engineering and operational elements of these programs. The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limitedscope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and highways, and in some instances, waterways. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they share common interests (and responsibilities) with highway and water transport agencies in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis would be on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

This publication should be useful to attorneys, transit administrators, risk management officials, and other transit officials interested in equitably distributing financial responsibility for injuries caused by transit operations.

Transit providers have historically been held to a high duty of care to provide safe transportation to their passengers. Such a high duty invariably leads to higher tort liability. Presently, the number and amount of personal injury recoveries against public transit operators continue to run higher than can be accommodated within the confines of public budgets and rider fees.

In an ideal model, state tort laws would balance the rider's right to be made whole for the negligence of a public transit operation against the limited resources of public transit systems, and the fiscal concern of taxpayers. In an effort to assist in reaching that objective, this report examines 1) governmental immunity for actions that are discretionary in nature; 2) immunity for governmental functions; 3) expanded duties of transit operators; 4) other limitations on awards; and 5) alternative approaches to remedying the problem of excessive tort liability.

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State Limitations on Tort Liability for Public Transit Operations

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I. INTRODUCTION

A. Overview of Transit Agency Tort Liability

This article discusses the principles applicable to negligence or tort actions against public transit agencies that provide bus or rail service.¹ Public transit operations or systems are owned or subsidized by municipalities, counties, regional authorities, states, or other government agencies that may be sued for negligence, just as other government agencies, authorities, or units. For convenience, they are hereinafter referred to as "transit agencies." Because of their unique nature, public transit agencies are not liable to the same extent as are private corporations providing transportation services.

In recent years, the United States has spent over \$15 billion annually to provide public transit services.² Studies indicate, however, that on the average only about a third of transit operations are financed out of passenger fares.³ State and local governments provide about 60 percent of funding, and the federal government contributes about 5 percent.⁴ Public transit agencies do not operate at a profit; they strive to meet customers' needs and seek new patrons, while working within limited budgets.⁵

It is difficult to obtain any precise data on the number of cases brought annually against public transit agencies nationwide. Containing costs is an important goal of transit agencies, and risk management and tort liability limitations are means to that end.

Settlements and judgments arising out of actions against transit agencies may represent a significant part of agencies' budgets, resulting in agencies having less funds to allocate to providing transit services or upgrading facilities. The problem is exacerbated when a transit agency becomes subject to an unreasonably large tort verdict in jurisdictions where there is no limit on the amount recoverable against the agency.

Some jurisdictions have enacted limits on a claimant's recovery in tort actions against public agencies. As the court held in *Lienhard v. State*,⁶ laws limiting state liability on tort claims are rationally related to the legitimate government objective of ensuring fiscal stability to meet and carry out the manifold responsibilities of government: "[I]t is incumbent upon the legislature to balance myriad competing interests and to allocate the State's resources for the performance of those services important to the health, safety, and welfare of the public."⁷

The substantive and procedural limitations on the tort liability of public transit agencies are discussed in this article, including how statutory laws could be changed to balance a claimant's right to seek damages for negligence with the need to conserve resources so that transit agencies will be able to continue serving the public.

B. Survey Results--Agency Tort Liability

In June 1994, more than 40 transit agencies responded to a questionnaire that sought information on transit agency tort liability, including any specific limitations

or caps on recoveries, prohibitions on punitive damages, and other limitations. Transit agencies from 20 states and the District of Columbia responded, including agencies from California, Illinois, Indiana, Iowa, Ohio, Pennsylvania, Washington, and Wisconsin.

Many of the agencies that responded provided data on the rider fees collected and tort liability claims paid for each of the past 3 years. Although the survey was not a scientific sampling, the responses were fairly consistent, as shown in the accompanying tables. Table 1, for example, lists the average annual rider fees and average tort liability payments for the past 3 years for the 30 agencies providing such data, as well as the relative size of the tort liability payments versus annual rider fees. Most tort liability payments, on an annual basis, ranged from 2 to 8 percent of the rider fees collected. The highest percentage reported was 22.37 percent and the lowest was 1.13 percent; the tort liability average was 5.67 percent.

Seventeen respondents indicated that their agency was subject to a state or local tort liability statute or partial governmental immunity statute.⁸ The highest percentage of tort liability payments, when compared with rider fees, was 12.14 percent, the lowest was 1.45 percent, and the average was 4.65 percent. The results for this group were not very different from those reported for all agencies.

Thirteen agencies stated that, pursuant to statute or judicial decision, they are not liable for tort actions arising out of the exercise of their duties or functions that were discretionary in nature.⁹ A few responded that, in their jurisdictions, a specific or special statutory provision protects the transit agency from tort actions arising out of the plan or design of a public improvement.¹⁰

Thirteen agencies reported they are not subject to a tort liability or partial governmental immunity statute. Table 2 illustrates the average tort liability for agencies reporting that they are not subject to a tort liability or governmental immunity statute. The survey did not consider the differences among the jurisdictions' substantive law applicable to transit agencies. The average tort liability payment for those agencies (Table 2) constitutes 7.01 percent of the rider fees collected--2.36 percent higher than those agencies subject to tort limitations. The range of percentages is more disparate, from a low of 1.13 percent to a high of 22.37 percent of rider fees for tort liability payments.

Eleven agencies from eight states stated that there were statutory maximums or caps applicable in their jurisdictions to tort claims against the transit agency.¹¹ Table 3 illustrates the average tort liability of agencies reporting that they have statutory maximum or caps. The highest percentage reported was 12.14 percent, the lowest was 1.13 percent, and the average was 4.19 percent. Besides statutory caps, 17 agencies, representing 14 states, reported that there were other statutory limitations on damages applicable to tort actions, such as restrictions on the recovery of noneconomic damages or prohibitions on the recovery of punitive damages.¹²

For those agencies with bus-only operations, over the past 3 years, the average percentage of tort liability in relation to rider fees was 5.26 percent, with a high of 17.29 percent and a low of 1.13 percent.

Ten agencies operating in California, Illinois, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, and Washington, D.C. had both bus and rail operations; one Indiana agency reported having only a commuter rail operation. The average tort liability for these agencies with bus and/or rail operations for the same period was 6.85 percent of rider fees; the high was 22.37 percent, and the low was 1.45 percent.

TABLE 1. SURVEY RESPONSES—RIDER FEES AND TORT LIABILITY PAYMENTS

Responding Agency ^a	Rider Fees ^b (\$)	Tort Liability Payments	
		(\$) ^c	% of Rider Fees
2	22,279,961	1,152,377	5.17
3	9,003,184	320,257	3.55
4	1,122,988	32,500	2.89
5	50,983,583	574,516	1.13
6	130,087,487	12,000,000	9.22
7	5,062,494	281,725	5.56
8	353,333	61,100	17.29
9	289,000,000	6,666,666	2.31
10	1,615,786	88,160	5.46
11	3,130,132	100,000	3.19
12	13,701,244	276,742	2.02
13	168,343,391	2,438,702	1.45
14	340,935,650	9,168,690	2.69
15	1,697,435	29,560	1.74
16	475,000	16,440	3.46
20	782,072	35,307	4.51
21	732,000,000	30,519,809	4.17
26	10,778,762	377,941	3.50
27	1,068,184	96,478	9.03
28	323,866,666	39,333,333	12.14
29	64,424,333	3,463,521	5.38
30	2,488,713	53,235	2.14
32	12,491,434	351,849	2.82
33	10,467,018	701,408	6.70
35	6,553,374	530,715	8.10
36	27,757,595	1,215,851	4.38
37	2,352,062	151,526	6.44
38	26,498,204	954,761	3.60
39	236,890,783	52,995,666	22.37
41	800,000	62,452	7.81

^aKeyed to survey response form.

^bFigures are based on average rider fees collected over the past 3 years.

^cFigures are based on average tort liability claims paid over the past 3 years.

NOTE: Highest percentage of tort liability—22.37%; average percentage of tort liability—5.67%; lowest percentage of tort liability—1.13%.

Although the preceding information is based solely on a limited number of survey responses, the data are fairly consistent. Jurisdictions with statutory maximums on tort recoveries or partial governmental immunity appear to have a one-third lower percentage of tort liability, relative to rider fees, than transit agencies that have no such limitations.

II. STATE AND LOCAL IMMUNITY STATUTES IN RELATION TO PUBLIC TRANSIT AGENCIES

About 3 decades ago, the doctrine of sovereign immunity was an insurmountable defense to an injured plaintiffs tort action against a government agency or

TABLE 2. TORT LIABILITY FOR AGENCIES REPORTING THAT THEY ARE NOT SUBJECT TO TORT LIABILITY OR PARTIAL GOVERNMENTAL IMMUNITY STATUTE

Responding Agency ^a	Rider Fees ^b (\$)	Tort Liability Payments	
		(\$) ^c	% of Rider Fees
2	22,279,961	1,152,377	5.17
3	9,003,184	320,257	3.56
4	1,122,988	32,500	2.89
5	50,983,583	574,516	1.13
6	130,087,487	12,000,000	9.22
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39	236,890,783	52,995,666	22.37
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^aKeyed to survey response form.

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^cFigures are based on average tort liability claims paid over the past 3 years.

NOTE: Highest percentage of tort liability—22.37%; average percentage of tort liability—7.01%; lowest percentage of tort liability—1.13%.

its public employees. Before an injured person could seek redress in the courts, the agency had to consent to being sued. The courts also accorded sovereign immunity to municipal corporations and units of local government.¹³

The doctrine of sovereign immunity originated in English common law as an adaptation of the Roman maxim "the King can do no wrong."¹⁴ In recent decades, state supreme courts began to overturn the doctrine entirely.¹⁵ Judicial abrogation of the doctrine was followed in many states by legislative enactments.¹⁶ In general, however, when legislatures reinstated immunity, they did not make immunity absolute.

In the survey cited earlier, 17 transit agencies reported they are subject to a state or local tort liability or partial governmental immunity statute. However, the survey does not reveal the differences among the statutes that may apply to those transit agencies. Indeed, state and local tort claims or immunity statutes vary from jurisdiction to jurisdiction. Moreover, it may be necessary to consult a transit agency's enabling legislation to determine whether the state or local tort claims or immunity statute applies to the transit agency's operations.¹⁷ In general, tort claims acts embrace state-owned-and-operated transit operations. For example, claims against the Rhode Island Public Transit Agency, a state-operated public transportation agency, must be brought in accordance with the Governmental Tort Liability Statute of Rhode Island.¹⁸ Plaintiffs may also sue regional public transit authorities under the aegis of a state tort claims act. In other states, a local governmental immunity statute may apply. In Illinois, for example, actions against mass transit districts are governed by the Illinois Local Governmental and Governmental Employee Tort Immunity Act.¹⁹ The statute does not, however, apply to the Chicago Transit Authority.

Some mass transit agencies serve more than one jurisdiction. For instance, pursuant to an interstate compact, the Washington Metropolitan Area Transit

TABLE 3. TORT LIABILITY FOR AGENCIES REPORTING THAT THEY HAD STATUTORY MAXIMUMS OR CAPS

Responding Agency ^a	Rider Fees ^b (\$)	Tort Liability Payments	
		\$ ^c	% of Rider Fees
3	9,003,184	320,257	3.56
5	50,983,583	574,516	1.13
12	13,701,244	276,742	2.02
13	168,343,391	2,438,702	1.44
15	1,697,435	29,560	1.74
16	475,000	16,440	3.46
20	782,072	35,307	4.51
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28	323,866,666	39,333,333	12.14
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^cFigures are based on average tort liability claims paid over the past 3 years.

NOTE: Highest percentage of tort liability—12.14%; average percentage of tort liability—4.19%; lowest percentage of tort liability—1.13%.

Authority (WMATA) serves Washington, D.C., Maryland, and Virginia.²⁰ A similar arrangement exists for Kansas and Missouri in the Kansas City Area Transportation District Agency compact.²¹ In such situations, the jurisdictions being served may confer some degree of immunity from tort suits on the agency.

State and local tort claims acts vary from jurisdiction to jurisdiction. Some statutes provide greater protection for the transit agency. Even where statutes have identical or very similar provisions, judicial interpretation may emphasize their differences. Nevertheless, because the statutes and decisions have similarities, there is a general body of law that applies to tort actions against transit agencies. The applicable statutes differ initially in their approach to the question of governmental immunity.

Where immunity is the rule and liability the exception, courts usually hold that the waivers are to be construed narrowly, thereby making it more difficult for a plaintiff to hold an agency liable for negligence. For example, the courts have held that the "dangerous condition" exception encompasses only natural, not artificial, conditions. Thus, a transit agency is not liable for injuries sustained because of the presence of a paper bag or ice on a station platform.²²

The more prevalent form of tort claims statute waives immunity, but contains exceptions to the general waiver of immunity. California and New Jersey have comprehensive statutes containing exceptions for an exercise of discretion in general,²³ for the failure to provide traffic control signals or signs,²⁴ or for approval of a plan or design for an improvement to public property.²⁵

III. SUBSTANTIVE LIMITATIONS ON TORT ACTIONS AGAINST PUBLIC TRANSIT AGENCIES

A. Immunity for Actions Discretionary in Nature

The exception in state and local governmental immunity or tort claims statutes that provides for immunity for actions that are discretionary in nature (i.e.,

the "discretionary function exemption") is particularly important. It appears in the Federal Tort Claims Act²⁶ and in many state tort claims acts. Even prior to tort claims acts in jurisdictions where foreign sovereign immunity did not exist, courts recognized that government agencies should not be held liable for their exercise of discretion, which gave rise to tort claims. The tort claims acts incorporate similar law in exempting the exercise of discretionary functions.

Because transit agencies must exercise high-level discretion in fulfilling their mission and operations, the extent to which the discretionary function exemption is applied to their activities is quite important.²⁷ If an agency sued for negligence in the performance of its duties can demonstrate that its action was imbued with sufficient high-level discretion, its alleged negligence is immune from liability. Thus, the exception from immunity for acts that are discretionary in nature is an important substantive limitation on the potential tort liability of the transit agency. It is often difficult to predict where the line will be drawn between actions that are discretionary and those that are not.

The exemption for discretionary actions generally protects agencies from negligence arising out of decisions and activities that involve balancing social, economic, and political policies and objectives.²⁸ Today, immunity is generally not accorded to duties that merely implement policies or to discretion involved in the performance of low-level or ministerial actions. It is generally held that when an agency's employees perform ministerial tasks at the operational level, those undertaking such tasks may exercise very little discretion or judgment. A distinction thus developed early in case law between the exercise of discretion at the planning or policy level of the agency versus the exercise of discretion at the "operational" level of the agency. It does not appear that the courts have applied this planning-level/operational-level test or dichotomy uniformly in construing the discretionary function exemption.

Does the discretionary function exemption apply when an agent or employee of the government agency acts in contravention of a clear directive? In *Berkovitz v. United States*,²⁹ the U.S. Supreme Court held that the discretionary function exemption did not apply where (1) the federal statute, regulation, rule, or policy prescribes a particular course of action for the employee;³⁰ (2) the act or conduct involves no element of judgment; and (3) the employee has no other choice but to comply with the directive.³¹

In 1991, in *United States v. Gaubert*,³² the U.S. Supreme Court held that "if a regulation mandates a particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."³³ Furthermore, "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."³⁴

B. The Discretionary Function Exemption in State Statutes

Wherever possible, a transit agency will argue that an allegedly negligent activity is protected by the applicable discretionary function exemption and that discretion is involved because the decision involved the careful weighing of political, economic, or social objectives. Examples of such high-level or policy-type discretion are decisions concerning the design, planning, and construction of transit facilities.³⁵ The cases noted in the later discussion of the governmental-proprietary test of immunity (Section IV) are relevant here also to immunity for claims arising out of the plan or design of transit facilities. The decisions are examples

of the type of policy or planning decisions that would be protected under the discretionary function exemption. For example, in *McKethan v. WMATA*,³⁶ the court held that Section 80 of the WMATA compact establishes a governmental-proprietary test for deciding which of WMATA's activities may subject it to tort liability.

While the provision of mass transportation by WMATA is in itself a proprietary activity,...we hold that the design and planning of a transportation system are governmental activities because they involve quasi-legislative policy decisions which are discretionary in nature and should not be second-guessed by a jury.³⁷ (citations omitted)

In *Simpson v. Washington Metropolitan Area Transit Authority*,³⁸ the court held that planning decisions are immune from liability. In *Dant v. District of Columbia*,³⁹ the court dismissed a count of the complaint alleging that WMATA negligently designed its farecard system on the ground that the design decision fell within the governmental function exception. In *Nathan v. Washington Metropolitan Area Transit Authority*,⁴⁰ the court stated that planning decisions regarding design, location, and construction of a stairwell at a station involved the exercise of governmental functions and were therefore immune.

On the other hand, in cases involving the discretionary function exemption, it has been held that driving or operating a bus is the exercise of a ministerial function, which is not immunized by the exception.⁴¹ Because every act can be said to involve some degree of "discretion,"⁴² a purely semantic approach may not be used to determine whether an act is discretionary or ministerial. Phrases such as "professional" or "occupational" judgment will not suffice.⁴³

As seen in *Varig*⁴⁴ and other cases, the level where the agent or employee is acting may be probative, but it is not dispositive under the planning-level/operational-level test. For example, in *Lopez v. Southern California Rapid Transit District*,⁴⁵ prior to the actual outbreak of a fight, the bus driver, who had been informed of an escalating situation, failed to take any precautionary measures and continued to operate the bus as before.⁴⁶ The Southern California Rapid Transit District argued that the bus driver's decision whether and in what way to intervene in an altercation involved the exercise of discretion under the discretionary function exemption.⁴⁷ However, the California court held that "§ 820.2 confers immunity only with respect to those basic policy decisions which have been committed to coordinate branches of government, and does not immunize government entities from liability for subsequent ministerial actions taken in the implementation of those basic policy decisions."⁴⁸ Because the legislature had made a basic policy decision through its enactment of Civil Code Section 2100, which imposes upon common carriers a duty of utmost care and diligence to protect passengers from assaults by fellow passengers,⁴⁹ there was no discretion left to the bus driver within the meaning of the statute.

As in the *Berkovitz*⁵⁰ case, the bus driver in *Lopez* had a statutory duty. Nevertheless, although the court considered whether a decision on the form or manner of protection came within the discretionary immunity exception, it held that such action did not involve policy weighing and was not immune. Policy making did not involve decisions on ejecting unruly passengers, issuing warnings, or summoning the police.⁵¹ These were not the kinds of discretionary actions the legislature intended to protect from possible liability for failure to provide for a passenger's safety. As in other cases, the court noted the reliance factor--the public's dependency on the public agency:

[B]us passengers are "sealed in a moving steel cocoon." Large numbers of strangers are forced into very close physical contact with one another under conditions that often are crowded, noisy, and overheated. At the same time, the means of entering and exiting the bus are limited and under the control of the bus driver. Thus, passengers have no control over who is admitted on the bus and, if trouble arises, are *wholly dependent upon the bus driver* to summon help or provide a means of escape.⁵² (emphasis added)

Although the following cases do not necessarily involve a transit agency as a defendant, the kinds of decisions that were at issue in the cases are illustrative and helpful in appreciating the scope of the protection afforded by an exemption for discretionary duties exercised by a transit or other government agency subject to a state or local tort claims or immunity act:

- *Baum v. United States*⁵³ held that the decision concerning the materials to be used in guardrails for a parkway was a planning-level decision relating to the allocation of resources.
- *Dept. of Transp. v. Neilson*⁵⁴ ruled that the decision to change or build a road was a judgmental, planning-level discretion that was immune from suit.
- In *Mayse v. Coos County*,⁵⁵ the court held that the county's failure to post warning signs was an immune discretionary action, as was its failure to eliminate an unsafe feature that was a design component of the road.
- *Bowers by Bowers v. City of Chattanooga*⁵⁶ held that the decision to change a bus route was a planning-level decision.
- In *Jenson v. Scribner*,⁵⁷ the court held that installation of a highway barrier is a planning function, which is immune.
- In *Miller v. United States*,⁵⁸ the court held that where it was alleged that the Department of Transportation was negligent in inspecting, repairing, and maintaining a road, because the statute and regulations at issue provided no fixed or readily ascertainable standards, the department's decisions were protected by the discretionary function exception and were immune.
- In *Flynn v. United States*,⁵⁹ the plaintiff alleged that National Park Service supervisors had been negligent in failing to train employees with regard to certain emergency procedures.⁶⁰ However, the court could find no "fixed or readily ascertainable standards" in the National Park Service's policy manual requiring employees to position their vehicles in a particular manner while at the scene of an accident.⁶¹ Nor did the manual require that the emergency vehicle be operated by a sufficiently trained park ranger.⁶² The court held that 28 U.S.C. Section 2680(a) barred plaintiff's claim as a matter of law.⁶³
- *Nusbaum v. County of Blue Earth*⁶⁴ held, where plaintiff challenged the speed established for a speed zone, that the discretionary function exemption did not extend to professional or scientific judgment where such judgment does not involve a balancing of policy objectives.⁶⁵ The plaintiff was not challenging a policy decision, but the professional judgment of state traffic engineers, who had determined the speed for that area by applying six factors set forth in their policy manual.⁶⁶
- In *Butler v. State*,⁶⁷ the plaintiff challenged the decisions concerning the design and placement of a guardrail and the decision not to update the rail after a number of years.⁶⁸ The court held that such decisions were made at the operational level because they were merely the implementation of a policy decision to construct that portion of the highway.⁶⁹

- In *Morris v. United States*,⁷⁰ the court held that the decisions on the use and placement of earthen berms and the marking of a closed road involved routine operational-level decisions.

- *Dept. of Transp. v. Neilson*⁷¹ held that failure to warn of a known danger was a negligent omission made at the operational level of government and was not immune.

- In *Bowers by Bowers v. City of Chattanooga*,⁷² a bus driver's decision where to stop at a particular intersection was held to be an operational act not protected by the discretionary function exemption.

These cases indicate that a transit agency is less likely to be held liable for negligence when it is engaged in making design and construction decisions; deciding to build or update a structure; changing a route; collecting data; engaged in certain, but not all, inspection and maintenance activities; or, in some situations, providing training for personnel. The agency is more likely to be held liable when it engages in non-policy-level planning or merely implements a previously approved plan, fails to give an adequate warning under the circumstances of a dangerous condition, negligently conducts an inspection, or negligently repairs or maintains property.

In sum, an important substantive legal principle possibly present in an action against a transit agency is whether the alleged negligent action is one that is protected by the discretionary function exemption. Although it may be argued that the planning-level/operational-level test is more of a conclusion than a test, it is, nonetheless, an extremely important limitation of any defense against tort actions against public transit agencies.

C. Special Provisions Relating to Plan or Design Immunity

In addition to the discretionary function exemption in state and local tort claims legislation, some legislatures have enacted design immunity statutes to ensure that the design of public facilities is immune from liability.⁷³ A few transit agencies responding to the questionnaire noted that their jurisdictions had a special statute protecting them from liability for alleged negligent plan or design. The New Jersey plan or design immunity statute provides for seemingly perpetual protection for design decisions.⁷⁴ California's governmental immunity act also has a provision for design immunity, which nonetheless allows for some inquiry into the reasonableness of the approval of a plan or design.⁷⁵

In the area of plan or design immunity, cases and statutes have addressed the issue of what happens when the circumstances upon which the plan or design was approved have changed. Presumably, when a public transit agency develops a plan or design, constructs a transit station, or even locates a bus stop, the agency attempts to comply with prevailing regulations or standards governing the design, specification, and type or nature of construction materials required. However, circumstances may change, such as increased use beyond the intended limits of the plan or design, resulting in a dangerous condition. *Technology* may change, or there may be physical changes at the site. The plan or design may no longer satisfy the most recent standards. Is the initial immunity for an original plan or design perpetual, or may the immunity dissipate over time?

In *Weiss v. Fote*,⁷⁶ which involved the clearance interval at a signalized intersection, the court ruled that after the state has planned an intersection, it is under a continuing duty to review the plan in light of its actual operation.⁷⁷ In such

a situation, the court may consider evidence of the physical change in conditions or frequency of accidents at the location after the change in conditions.

The California Supreme Court followed the *Weiss* case in the leading case of *Baldwin v. State*.⁷⁸ *Baldwin* contended that the intersection where the accident occurred had become dangerous because of an increase in the volume of traffic since the intersection's construction in 1942 and that the state should have constructed a special turning lane. The state argued that the design was based on traffic conditions prevailing at the time the design was prepared and that the conditions then did not require the construction of a special lane. The court held, regardless of the fact that initial immunity had attached to the design, that design immunity continues only if conditions have not changed:

[H]aving approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.⁷⁹

The court held that allowing a jury to decide whether the design immunity was perpetual would not infringe governmental discretionary decision making. The jury would not be reweighing the same technical data and policy criteria that a jury would have if it had been allowed to consider the reasonableness of the original plan or design.⁸⁰

Some jurisdictions hold that the issue of changed circumstances is beyond the court's province. In its statute, New Jersey specifically rejected the *Baldwin* approach to design immunity: "[i]t is intended that the plan or design immunity provided in this section be perpetual. That is, once the immunity attaches no subsequent event or change of condition shall render a public entity liable on the theory that the existing plan or design of public property constitutes a dangerous condition."⁸¹

Where design immunity is not perpetual, suits may challenge a wide variety of decisions involving public facilities. For example, changed circumstances resulting from the passage of time occur not only after implementation of the plan, but also between the time of the plan's approval and its implementation.

In *Weiss v. New Jersey Transit*, the plaintiffs decedent was killed when her car was struck by a train as she crossed the railroad tracks.⁸² Although a plan for the installation of a traffic signal had been approved nearly 8 years prior to the accident, there was still no signal where the accident occurred.⁸³ The defendants, however, maintained that there was a specific statutory immunity for failure to provide traffic signals. *Weiss* did not challenge the decisions of whether and what type of signal to install; rather, the plaintiff argued that "delay in implementing the policy-level decision of the commissioner erases immunization for failure to post a traffic signal."⁸⁴ Nevertheless, the court rejected the attempt to separate the policy-level decision from its implementation. Stating that the statute may protect even low-level administrative decisions, the court, relying on the drafter's comment to the immunity design statute, rejected the reasoning in *Baldwin* and held that there was immunity.⁸⁵

There are other cases dealing with the issue of design immunity and whether it is lost as a result of changed circumstances. In *Leliefeld v. Johnson*,⁸⁶ which involved a collision on a bridge built in 1937, the plaintiff challenged the design of the bridge by arguing that it was too narrow for modern-day use. The court held that design immunity was perpetual and evidence concerning subsequent design standards was therefore inadmissible at trial.⁸⁷ The court did, however, note that

the state was not immune from liability with respect to failure to warn properly of a known, dangerous condition on a public highway that it maintains.⁸⁸

In *Manna v. State*,⁸⁹ the plaintiff argued that the state should have installed some device, such as metal studs, on the bridge where the accident occurred, because the installation of such studs is a maintenance activity that would have recreated the traction lost over the years.⁹⁰ Disagreeing, the court decided that any installment of such devices would be a fundamental change in the design of the bridge and would thus constitute a new and improved design. Such decisions were protected by the immunity statute.⁹¹ In *Compton v. City of Santee*,⁹² the court noted that although design immunity is not perpetual because of the rule in *Baldwin*, certain predicates must be present before immunity may be lost: changed conditions and notice to the governmental entity thereof.⁹³ Because both of these predicates were not met, the city was still protected by the design immunity statute.

Design immunity is a subset of the broader immunity for the general exercise of discretionary functions. It appears, moreover, that at least one legislature has chosen to designate the approval of plans or designs as one area where there is no doubt that immunity attaches to the agency's decision. However, a transit agency must be particularly vigilant in a jurisdiction lacking a statute or judicial decision, providing that plan or design immunity is perpetual. Moreover, if the statutory or decisional law adopts the "changed conditions" approach to plan or design immunity, the transit or other agency must be cognizant that the number of situations that could give rise to tort liability may increase substantially. Particular care must be taken if the transit agency has notice of a dangerous condition.

IV. DISCUSSION OF THE GOVERNMENTAL-PROPRIETARY TEST OF IMMUNITY

A. Origin of the Doctrine in the Law of Municipal Corporations

Another basis for immunity from tort liability is the governmental-proprietary test or dichotomy, which still exists today in some jurisdictions. The governmental-proprietary doctrine originated in the law of municipal corporations, which have many of the rights and responsibilities of any unit of government.⁹⁴ However, in some ways, municipal corporations operate no differently from private corporations.⁹⁵ Because of these similarities, the courts developed the governmental-proprietary test of immunity to tort actions against municipal corporations, which were held liable for their actions that were "proprietary" in nature but were insulated from liability for activities "governmental" in nature.⁹⁶ Although it is a simple doctrine, judges and commentators have sometimes said that the test defies easy application:⁹⁷

[P]owers and functions considered governmental or public in one jurisdiction are often viewed as proprietary or private in another, making it impossible to state a rule sufficiently exact to be of much practical value in applying the test, as courts have noted frequently in their decisions abandoning, or abrogating the governmental/proprietary test as a measure of state or local tort immunity or liability....⁹⁸

Although the governmental-proprietary rule may be difficult to articulate or apply, the distinction has survived in some jurisdictions. Thus, it is necessary to consider it in relation to the tort liability of transit agencies.

B. Applying the Governmental-Proprietary Test to Transit Agencies

As common carriers, public transit agencies exercise both governmental and proprietary functions. Providing mass transportation has been labeled proprietary.⁹⁹ Thus, in *Dant v. District of Columbia*, the court held that sovereign immunity would not protect a transit agency for negligently operating and maintaining its farecard system.¹⁰⁰ Similarly, the maintenance of traffic controls is a proprietary function generally precluding a transit agency from claiming immunity.¹⁰¹

Policy decisions made at a high level concerning the design of equipment and facilities generally appear to be protected from liability. Such decisions, which involve legislative, administrative, or regulatory decisions, are purely governmental in nature. For example, where a commuter fell because the heel of her shoe lodged in the tread of an escalator at a Metro station,¹⁰² the court held that the design of the escalator and the decision determining the width of the slots in the escalator treads were governmental functions cloaked with sovereign immunity.¹⁰³ Similarly, the distance of the gap between a train and a subway platform is a "discretionary decision" immune from suit by a passenger who is injured after falling into the gap.¹⁰⁴

As seen in the discussion on plan or design immunity, one court has held that a transit agency does not lose its immunity under the governmental-proprietary test where there have been changed conditions. In *McKethean v. Washington Metropolitan Area Transit Agency*,¹⁰⁵ prospective passengers who were struck by an automobile while waiting at a bus stop brought suit against the transit agency for, *inter alia*, failing to relocate the bus stop following the widening of the street fronting it. In holding that sovereign immunity applied, the court stated: "[a] decision to relocate or not to relocate the bus stop after 1967 would involve safety planning, not implementation or operation of a safety plan."¹⁰⁶ Thus, even where changed circumstances arguably created a greater risk to the traveling public, the court held that a design decision not to remedy the condition was a quasilegislative decision that a jury should not be allowed to second guess.

Another area possibly immune from tort liability under the governmental-proprietary test involves the maintenance and operation of a police force.¹⁰⁷ It has been held that a public transit agency, alleged to have negligently and intentionally failed to supervise its police force, was protected under the governmental-proprietary test and hence was immune.¹⁰⁸ Where a commuter stepped from a crowded subway car into a gap between the car and the platform, a transit agency was not liable for its alleged failure to control crowds adequately at the subway station. Crowd control is a police function and governmental in nature.¹⁰⁹

Although a transit agency may be immune in connection with providing and operating its police force, it still has a duty to take reasonable precautions for the safety and protection of its passengers. In its role as a common carrier and in the exercise of its proprietary functions, the transit agency may have some duty. In *Crosland v. New York City Transit Authority*,¹¹⁰ a passenger who was assaulted on a subway station platform alleged that transit employees had seen the assault, yet failed to summon the police. The court held that plaintiffs' allegations did not involve solely the agency's allocation of police resources or action taken in its capacity of providing police protection. Moreover, the failure to summon the police was related to the agency's ownership and operation of the station and was not the exercise of immune policy-level activity.¹¹¹ Issues that touch upon the security of patrons may be considered proprietary. For example, a cause of action alleging inadequate lighting, poor placement of an exit gate, and failure to eliminate

hiding places for criminals in the operation of a parking lot has been held to involve the unprotected exercise of proprietary functions.¹¹² A New York case, however, illustrates the difficulty of articulating a clear rule. The New York City Transit Authority was held not liable for its failure to lock a subway platform gate, a governmental function, thereby allowing the plaintiffs assailant to enter a secluded area and rape her.¹¹³

Although the discretionary function exemption and the governmental-proprietary tests are supposedly conceptually distinct,¹¹⁴ high-level policy decisions are protected under either approach. If so, a transit agency does not necessarily benefit any more from one approach than the other.¹¹⁵

V. DUTY AND DEGREE OF CARE OWED TO THE TRAVELING PUBLIC

A. Duties of the Transit Agency

The absence of sovereign immunity does not mean a public transit agency is automatically liable for an alleged injury. As in any other negligence case, the plaintiff must establish the agency's liability, which means that the plaintiff must show that the agency had a duty to the plaintiff under the circumstances. Once the duty is established, the agency is responsible, as would be any other common carrier, business invitor, or landlord, depending on the capacity in which it is acting at the time of the alleged injury.

There are situations in which the agency has no duty to the plaintiff, even if there is an injury caused by the agency's alleged negligence. In the design and construction of support facilities, such as stations, platforms, and parking lots, a transit agency has no duty to design and build facilities that are accident-proof, nor is the agency required to improve its systems by incorporating every new safety device that might become available.¹¹⁶ It is sufficient that the property comply with the prevailing applicable safety standards. If there is a defect in the property, the agency has no duty to provide a warning, unless the condition is unreasonably dangerous or the nature of the danger is not sufficiently apparent or obvious. Even then, if the agency does not have actual or constructive notice of the dangerous condition and a reasonable time within which to correct or give warning of the condition, then it will not be held liable.¹¹⁷

An exhaustive review of the fairly well-developed law of common carriers is beyond the scope of this article. It should be noted, however, that during its operation of a conveyance, a transit agency must fulfill the same duties imposed on other common carriers. Although a transit agency has a duty as a common carrier, its duty does not relieve a passenger of his or her duty of exercising ordinary care.¹¹⁸ Passengers have to observe their surroundings and take reasonable precautions to protect themselves from risks and hazards that ordinarily accompany the conveyance being used.¹¹⁹ Passengers know that conveyances may begin with a sudden jerk or lunge. A bus driver may start the bus without waiting for everyone to be seated. There are, however, exceptions for those with disabilities and others requiring assistance.¹²⁰

Crimes can occur in the vicinity of public transit facilities. Most courts agree that a transit agency owes some duty to protect passengers from assaults by fellow passengers while aboard the conveyance.¹²¹ How far a transit agency must go to fulfill its duty depends on the degree of care owed to the passenger under the circumstances. If the courts imposed the highest degree of care, which courts are reluctant to do,¹²² the agency would have to do everything reasonable to protect a passenger's safety.

It is very difficult to state a rule on how much a transit agency must do to protect a passenger. A transit agency generally does not have to provide police or security protection, unless required by statute,¹²³ but other protective or precautionary measures may have to be taken depending on the facts. A California Supreme Court decision enumerated several actions a carrier could take, both before and during a hostile situation. A transit agency could warn and, if necessary, eject unruly passengers¹²⁴ or summon police.¹²⁵ The agency could provide radio communication between the driver and the local police, or vehicles, particularly buses, could be equipped with alarm lights.¹²⁶ The agency could provide adequate training to enable employees to handle volatile situations, especially along routes with a history of violent incidents.¹²⁷

Although this article generally concerns the duty owed to the traveling public, on some occasions an injury will occur to someone not lawfully on the agency's property (e.g., a trespasser). The general rule is that a landowner owes only the duty to refrain from willfully or wantonly injuring a trespasser. In *Lee v. Chicago Transit Authority*, plaintiffs decedent was electrocuted while attempting to urinate near the Chicago Transit Authority's (CTA's) railroad tracks.¹²⁸ The decedent was a Korean immigrant, who was unable to read English and whose blood alcohol level was three times the legal limit for intoxication under the motor vehicle code. The decedent was electrocuted by a third rail, which supplies power to the electric trains.¹²⁹ The third rail was situated approximately 6.5 feet from the sidewalk. At the point of entry to the tracks, signs reading "DANGER," "KEEP OUT," and "ELECTRIC CURRENT" were posted on a utility shed and sawhorses.¹³⁰ In addition, CTA had laid sharp, triangular boards called "jaws" or "cattle boards" along the tracks, making it difficult for anyone to walk up to the railroad tracks. Nevertheless, plaintiffs decedent maneuvered his way to the tracks.

The court held that CTA owed a duty of ordinary care to the decedent in this instance,¹³¹ that CTA had reason to believe that "a trespasser would not discover the third rail," and that the posted signs were insufficient. The court stressed that nothing indicated the location of the electric rail or that the rail was electrified.¹³² In warning of hidden, artificial dangers, the transit agency should specifically mark the dangerous condition, indicating both the nature of the danger and the consequences of ignoring the warnings. As the *Lee* case demonstrates, warnings that are too general may not suffice: although CTA had erected numerous signs and installed cattle boards, the signs and other precautions were still insufficient. If there are dangerous conditions, transit agencies have a duty to give adequate warning, which includes clearly and specifically communicating the location and nature of the condition.

B. Degree of Care Owed to the Traveling Public

A common carrier is not an insurer of a passenger's safety; however, it owes a duty of reasonable care to its passengers.¹³³ Moreover, because passengers have very little control over the operation of the conveyance and must rely on the reason, judgment, and skill of the operator, some decisions state that a common carrier is held to a higher degree of care than the "reasonably prudent person."¹³⁴ In general, a common carrier must accord passengers on a conveyance a higher standard of care than nonpassengers.

Generally, once a passenger is afforded the opportunity to alight from the transportation unit in a reasonably safe manner and in a reasonably safe place, the passenger-carrier relationship is terminated. The relationship may terminate

even when the passenger (now pedestrian) is merely transferring from one form of conveyance to another (e.g., from one bus to another or from a bus to a train), when the passenger's journey is a continuous one. Although the passenger may believe that an immediate transfer from one form of conveyance to another is an inseparable part of the journey, the law does not and hence does not impose upon the agency the same high degree of care at the intermediate points of the journey. As the court stated in *Mitchell v. City of Chicago*.¹³⁵

[W]hen the carrier discharges the passenger at an intermediate point or at the end of the journey, be it in a public place or otherwise, the duty to exercise the highest degree of care is suspended and... is resumed when the passenger presents himself to the conveyance of the carrier within the time and at the place fixed by the contract.¹³⁶

Thus, the duty imposed on the carrier was only that of ordinary care under the circumstances. The Authority had not violated its standard of care, because it had no duty to protect its passengers from obvious street dangers.¹³⁷

The passenger-carrier relationship is much more likely to exist when the traveler is waiting on the transit agency's property to board the conveyance. Facilities, such as escalators, elevators,¹³⁸ terminals, platforms, and stations, are common areas where a traveler may be injured while waiting to board a train or bus. At stations maintained for the use of passengers, the transit agency as a common carrier must exercise the highest degree of care in relation to those passengers.¹³⁹

The high degree of care required of carriers applies only to transportation of people. A lesser standard applies to approaches, station platforms, or halls and stairways under the agency's control.¹⁴⁰ In those instances, the transit agency must exercise ordinary care under the circumstances to make the property reasonably safe for its intended use.¹⁴¹

The existence of "transition areas," such as stations, terminals, and galleries, raises further questions concerning the standard of care applicable to injuries sustained on the premises. For example, there may be an issue of whether a transit agency is required to exercise the highest degree of care when acting as a connecting carrier, even one owned and operated by the agency. Another issue that may arise is whether the agency is acting as a landlord or business inviter in such instances. Although such structures may serve as integral parts of the transit system, they have unique qualities that distinguish them from other transit facilities.

An example of such a multifunctional facility is the Port Authority of New York and New Jersey bus terminal in New York City. When a traveler in the Port Authority bus terminal was assaulted and robbed, the applicable duty of care was not the highest one that arises out of the passenger-carrier relationship, even though the train system controlled by the Authority was a common carrier.¹⁴²

In *Lieberman*, the plaintiff attempted to extend the Authority's duty of care by arguing that "even if the Port Authority itself is not a common carrier, it performs the role of connecting carrier and thus should be subject to the same high duty of care in protecting its passengers."¹⁴³ Nevertheless, the court focused on whether the Port Authority was a common carrier.¹⁴⁴ Although the Port Authority Trans-Hudson train system, which was controlled by the Authority, was a common carrier, the Port Authority bus terminal did not meet the definition of a common carrier.¹⁴⁵ Therefore, the higher duty of care was not applicable to plaintiffs situation.

In sum, the reason a transit agency has a higher standard of care when acting as a common carrier is that the passenger must rely on the professional skill and

judgment of the carrier. On the other hand, when a prospective passenger is walking in a terminal or even on a subway platform and slips and falls, there is no reason for holding the public transit agency to a standard of the highest degree of care. The reliance factor is not nearly as significant, because the traveler has to exercise responsibility and common sense in the situation. On the platform, the agency's degree of care is that of a business inviter to an invitee.

There have been numerous attempts to expand the transit agency's duties in the areas of security and police protection. Plaintiffs frequently seek, usually unsuccessfully, to expand the agency's duty in protecting against criminal and tortious acts by third parties.¹⁴⁶ In some jurisdictions, providing or not providing police services is covered by statute.¹⁴⁷ In jurisdictions where the courts continue to apply the governmental-proprietary test of immunity, the decision whether to provide police protection is held to be the exercise of a governmental function and immune from liability.¹⁴⁸

Nevertheless, plaintiffs continually seek compensation for attacks by third parties. One strategy plaintiffs often employ is to label the cause of action as something other than a suit for failure to provide police protection. The reason is that some courts have recognized an exception to immunity under general negligence principles for injuries caused by foreseeable acts of third persons and have held agencies liable.¹⁴⁹

In *Lieberman*, the plaintiff was attacked on the Port Authority's premises by a third party. In considering whether the plaintiff could bring suit, the New Jersey Supreme Court discussed the Authority's dual character. In operating a bus depot and facilitating travel between the two states, the Authority performs a governmental function. On the other hand, in leasing space to stores, businesses, restaurants, and private transportation companies, the Authority operates as a landlord.¹⁵⁰

Because the issue of whether the plaintiff has a cause of action depends on the activity in question,¹⁵¹ the court must examine at a minimum "the injury alleged, the remedy requested, and the role (either governmental or as a landlord) that the Port Authority played at the time of the alleged injury."¹⁵² The court indicated that providing better lighting and signs is closer to a landlord's responsibility and hence is proprietary. Providing security cameras, closing off deserted areas, and providing measures for crowd control are closer to traditional governmental functions, which are immune from liability.¹⁵³

VI. PROCEDURAL LIMITATIONS ON ACTIONS OR RECOVERIES IN TORT AGAINST PUBLIC TRANSIT AGENCIES

A. Procedural Requirements

If a potential plaintiff has an action, there may be conditions for the plaintiff to satisfy prior to filing the claim against the transit agency. For reasons of public policy and because of limited resources, the transit agency must have sufficient opportunity to conduct an investigation of the alleged claim. A common requirement or condition prior to a suit is providing written notice to the transit agency within a specified time.¹⁵⁴ If this is not done, the right of action will be lost. There also may be a special statute of limitations applicable to claims against the transit agency.¹⁵⁵

B. Limitations on Monetary Recoveries

If the transit agency is subject to a suit, it may not necessarily be liable for damages to the same extent as would a private entity. This is because some legislatures have enacted statutory maximums or caps on the amount and/or type of damages that may be recoverable against a governmental defendant. Although the statutes vary from state to state, they reflect public concerns about the effect of recoveries in tort against transit and other public agencies that may seriously deplete public resources.

The type and scope of statutory caps may vary. In some instances, the jurisdiction may only enact a cap on recovery for each plaintiff. In others, a cap on damages per plaintiff arising from the same cause of action or occurrence may be combined with an aggregate limit.¹⁵⁶ Sometimes, the statutes provide that the court may not award prejudgment interest.¹⁵⁷

However, in *Griffin v. Tri-County Metropolitan Transp. Dist. of Oregon*,¹⁵⁸ the court held that attorney's fees were recoverable because Oregon Revised Statutes Section 30.260(8) does not include attorneys fees and costs within the definition of a tort claim. Thus, attorney's fees and costs were not intended to be included within the liability limit in the Oregon Tort Claims Act. The court held that the evidence supported an award of attorney's fees at the rate of \$270 per hour.

The constitutionality of statutory maximums, provisions for requiring notice, and statutes of limitations have been challenged in several jurisdictions. Their constitutionality generally has been upheld, usually for the same reasons. In Minnesota, the court held that, because the \$100,000 statutory cap on tort judgments against the state agency did not unfairly discriminate between governmental tortfeasors and private tortfeasors, the statute did not violate the Equal Protection Clause. The court held that the state's classification was rationally related to its legitimate governmental interest in protecting public funds and aiding budgetary planning.¹⁵⁹

A different result was reached in *Gladon v. Greater Cleveland Regional Transit Authority*.¹⁶⁰ In this case, the issues were whether Ohio Rev. Code Section 2744.05(c)(1) eliminated the jury's authority to decide the value of plaintiffs noneconomic harm and whether the statute was constitutional because Section 5, Article I, of the Ohio Constitution guaranteed the right to a jury trial. The Regional Transit Authority (RTA) challenged a jury verdict in favor of plaintiff Gladon and, more specifically, the court's failure to reduce the pain and suffering award to \$250,000 pursuant to Ohio Rev. Code Section 2744.05(c)(1).

The plaintiff had been attacked by two pickpockets and left on the train tracks; plaintiffs legs were severely injured when an RTA train was unable to stop and ran over him. The jury rendered a verdict for Gladon of over \$2.7 million, which was reduced for other reasons to \$2.5 million. RTA moved the trial court to reduce the \$2.5 million award to the legislative predetermined limit of \$250,000. The appeals court noted that "[t]he trial court refused to reduce the jury's finding of non-economic damages from \$2.5 million to \$250,000 and held as a matter of law that § 2744.059(c)(1) (the \$250,000 cap on recovery statute) was unconstitutional."¹⁶¹ The court affirmed:

In view of the court's holding and the arguments of both parties, this court, too, finds that R.C. 2744.05(c)(1) is constitutionally invalid. It is invalid because it violates Section 5, Article I of the Ohio Constitution's mandate that the jury trial right shall be inviolate. It impairs the fundamental jury trial right and as such it fails because there is no showing that its legislative objective cannot be achieved in a less burdensome way and that its legislative objectives are compelling. Finally, it fails because it is unreasonable

and arbitrary, and under *Morris v. Savoy*, a statute is unreasonable and arbitrary if there is no real and substantial reason for the statute, which in this case is the restriction to \$250,000 for non-economic damages.¹⁶²

Besides finding that the statute "chillingly" impaired the plaintiffs right to a jury trial, the appeals court held that the statute was unconstitutional because it created an improper classification between "non-wrongful death tort sufferers and wrongful death tort sufferers," thus violating "the equal protection standard."¹⁶³

In the second assignment of error, RTA argued that the trial court erred in instructing the jury that Gladon was an invitee and was owed a duty of ordinary care. RTA reasoned that Gladon was a trespasser, and its duty was limited to refraining from willful and wanton activity.¹⁶⁴ The court disagreed with RTA, holding that "once the owner of the premises discovers a trespasser or a licensee in a perilous situation, he owes a duty to exercise ordinary care."¹⁶⁵

The court held that it was for the jury to decide whether the agency had used reasonable or ordinary care, because the "evidence reveals that RTA's operator did not attempt to stop the train until she confirmed that there was a person on the tracks, rather than when she first saw a tennis shoe in the middle of the track."¹⁶⁶

Even where the maximum on damages is held to be constitutional, it may be difficult to apply the statutory limit in specific situations. For example, in *Tulewicz v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,¹⁶⁷ the Pennsylvania Supreme Court narrowly interpreted that state's statutory cap on damages. In *Tulewicz*, multiple claims for damages resulted after a SEPTA bus killed plaintiffs decedent.¹⁶⁸ After the actions were consolidated for trial, a jury awarded plaintiff as a relative and as decedent's personal representative \$2.5 million under the Wrongful Death Act and \$250,000 under the Survival Act.¹⁶⁹ SEPTA argued that the two claims and verdicts arose out of the same occurrence and, therefore, had to be aggregated to avoid exceeding the statutory limitation of \$250,000 per plaintiff.¹⁷⁰

The court rejected the agency's argument and reasoned that the two actions were designed to compensate two different categories of plaintiffs: on one hand, the spouse and members of the family for their loss, and on the other, the decedent through her legal representative.¹⁷¹ Even though there was only one plaintiff, the case was brought on behalf of two distinct plaintiffs.¹⁷² Thus, the statutory \$250,000 limitation applied to the respective claims, but not in the aggregate.

C. Limitations Applicable to Punitive Damages

As seen, the dual nature of the transit agency, having both business and governmental characteristics, has led, in some jurisdictions, to the agency's immunity for the performance of some activities altogether. Insofar as punitive damages are concerned, statutes in some jurisdictions may exempt transit agencies from such damages.¹⁷³ In fact, numerous agencies responding to the survey mentioned earlier stated that the agency was not subject to punitive damage awards. If such legislation does not exist, then the courts must decide the issue. The trend seems to favor denying punitive damages in successful suits against transit agencies.¹⁷⁴

The issue of whether punitive damages should be allowed depends on considerations of public policy. In *MARTA v. Boswell*, a passenger who was injured

during a criminal attack at a transit agency's station sued for compensatory and punitive damages.¹⁷⁵ The court disallowed punitive damages.

In general, courts [have] viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised... [A]n award of punitive damages against a [governmental entity] "punishes" only the taxpayers, who took no part in the commission of the tort.¹⁷⁶

In the spectrum of transit functions, the courts often rule that the functions involved are governmental in nature and immune. Where the issue is the availability of punitive damages, governmental or public interest predominates over any private party characteristics of the transit agency. A further reason for denying punitive damages in the transit case, as opposed to a case against a privately owned corporation, is the taxpayers' inability to remove the management of a transit agency.¹⁷⁷ In contrast to taxpayers, shareholders in a private corporation have a certain degree of direct control because of their power to vote their shares.¹⁷⁸

In any event, many hold to the view that the financial and other costs to society outweigh whatever benefits that may follow from unlimited governmental liability in tort. The issue is whether a transit agency that provides service free from competition will be more efficient or careful as a result of exposure to unlimited tort liability and punitive damages. In the *Boswell* case, the sole dissenting justice wrote: "[T]he public scrutinizes MARTA just as shareholders scrutinize a corporation. An award of punitive damages deters MARTA officers in the same way as such an award deters corporate officers."

The issue of whether a transit agency is liable for punitive damages may be a matter of interpretation of the agency's enabling legislation, the relationship of such legislation and any governmental immunity or tort liability statutes, and any public policy concerns, such as are articulated in the *Boswell* and *George* cases.¹⁷⁹

VII. OTHER MATTERS OF INTEREST TO PUBLIC TRANSIT AGENCIES

A. Transit Agency's Compliance with Federal and State Laws and Regulations

If there is a mandatory duty imposed on transit agency employees, then there is usually no room to exercise discretion protected by that exemption. The same holds true at the policy-making level: Where there is a preexisting legal duty, then there is no discretion to exercise. For example, where federal or state law requires a certain course of action, then a transit agency cannot claim immunity when it fails to abide by that mandate.

In *Nola v. New York City Transit Agency*, the agency could not claim that its decision not to install safety glass on a bus was a governmental decision. The duty to install safety glass was already established by existing federal and state law.¹⁸⁰ Clearly, it is important for any transit or other public agency to comply with applicable federal and state laws, including but not limited to those laws mandating standards or requirements in the design, construction, or maintenance of facilities and equipment.

B. Significance of Insurance Coverage in Tort Actions

A transit agency may be self-insured or it may purchase private insurance covering claims to persons or property.¹⁸¹ In some states, obtaining insurance

coverage does not result in any waiver by the agency of its defense of sovereign immunity or of any statutory cap that may apply.¹⁸² Courts have held that the legislature does not abrogate a monetary limitation in a tort claims act when it authorizes government entities to purchase insurance.¹⁸³ Some courts have reached the opposite conclusion, holding that the procurement of insurance coverage amounts to a waiver of immunity.¹⁸⁴ In general, it is a matter of statutory interpretation, which may differ from state to state.

VIII. CHANGES IN THE LAW THAT WOULD REDUCE TORT LIABILITY

A. Procedural Amendments or Enactments

The preceding sections are based on a survey of current federal, state, and local statutory and decisional law from all jurisdictions relevant to the principles of tort liability of transit agencies. This section will assess some of the possible strategies from a statutory viewpoint for limiting an agency's exposure to tort liability. Unless the agency has an opportunity to remodel or completely revamp the existing tort law in its jurisdiction, it may need to seek reasonable statutory amendments to existing law. The following are suggestions these agencies may consider:

- In the procedural area, there clearly are methods that have passed constitutional muster for limiting exposure to claims or reducing ultimate tort liability of the agency. These approaches may include requiring claimants to give written notice to the agency. Notice may be required to be given by certified mail as proof of receipt of notice by the agency. Notice may be required to be given within a certain period of time after the accident; otherwise, the claimant would be unable to bring a legal action later. If notice is not given in accordance with the statute, the claim is lost because the giving of the notice is a jurisdictional requirement. The notice requirement is reasonable because it allows the agency an opportunity to investigate and possibly settle the claim. In addition, a specific statute of limitations may be added, possibly one of a shorter duration than the usual limitations period for negligence claims.

- Another approach may be to establish statutory maximums on recoveries, possibly setting an aggregate limit for claims arising out of one accident or incident. A rule prohibiting punitive damages could be added to an existing statute. Although it may be challenged on constitutional or other grounds, a statute might be added or amended to exclude certain noneconomic damages, such as pain and suffering, loss of consortium, or loss of society.

- Other procedures worth considering are the inclusion of pretrial mediation or arbitration of certain claims, for example, claims involving sums below a certain dollar amount. Administratively, the agency may establish an internal review board to hear claims with the authority to recommend awards and to compromise and settle claims. Such an approach may appeal to claimants as well, because a fairly administered, appropriate procedure could result in a system providing more expeditious and less costly disposition of claims for injured riders or other claimants. For purposes of the review board's procedures, strict legal rules on evidence or procedure might be relaxed as a further means of encouraging the prompt resolution of claims instead of resorting to judicial proceedings. A statute permitting the establishment of a review board or panel could also include a provision requiring that the agency's administrative remedies, such as the review board's initial determination of the claim, had to be exhausted before a judicial proceeding against the agency could be initiated. In other words, the

requirement of proceeding first before the review board would be jurisdictional; failure to follow or exhaust that remedy would preclude a judicial action.

- As seen, there are many activities that are immune because they come within the meaning of the discretionary function exemption of a tort claims statute. However, once the involved decision that gives rise to a claim is determined to be below the planning level of the agency, there may be difficulty in showing that the action involved required the kind of planning or policy-level discretion needed for immunity to attach. Immunity does not usually attach to negligence in the implementation of the high-level decision. To reverse this trend, a legislative enactment, perhaps along the lines of the specific plan or design immunity statutes, probably would be required. There are actions involving discretion (e.g., deciding whether to modify a facility, the training of personnel, the placement of signs, signals, or structures) that are not necessarily committed to the "cabinet" level of the agency; however, to broaden the scope of the discretionary duties of the agency, it would be necessary to add specific provisions to the statute designating areas that are to be regarded as discretionary functions. At the moment, the courts are left to determine whether the action alleged to have been negligent is one that is discretionary. It may be prudent to define discretion to include also actions implementing the decision. More statutory definition may be helpful in delineating more clearly the areas that are considered to be the exercise of discretionary and, therefore, immune governmental actions.

- If the jurisdiction does not have plan or design immunity, either by statute or judicial decision, this is another area the agency may wish to pursue. Only a few transit agencies reported that they had a specific statute covering plan or design immunity. There is precedent in New Jersey, California, and elsewhere for such a specific exemption; moreover, to alleviate any doubt, the provision should indicate whether the immunity is perpetual. Including a specific provision on plan or design immunity as a complement to an existing statute may be less difficult than redefining the discretionary function exemption, because a few states have a provision for plan or design immunity, and the provision is a subset of the existing exemption for the exercise of discretionary duties.

- If there is any doubt, in the particular jurisdiction or jurisdictions where the transit agency operates, about the agency's duty in regard to providing police protection, this is an area that might benefit from statutory clarification. Furthermore, if a statute imposes certain duties on the agency (e.g., to conduct a study, to make designations, to follow certain standards), the statute should also state whether the transit agency may be held liable for any deviation from the statutory mandates. As seen, a discretionary function exemption, even if the negligence occurs at a high level, may not necessarily protect the agency if there is a violation of a specific statutory mandate or policy. Although not a legislative matter, if the transit agency adopts a policy or manual governing procedures, it may want to consider including provisions indicating that the agency has the discretion not to adhere strictly to the policy or manual in every situation, that the policy or manual is not intended to apply to every conceivable situation that may arise.

- Although it may be difficult or controversial to alter the general duty of the agency as a common carrier, during any statutory revision, drafters should consider addressing the issues of liability to trespassers, liability to passengers by virtue of incidents caused by third parties in or near a transit facility, the standards applicable to giving notice of a dangerous condition either to users or to

others, and the standard of care owed to persons who are using transit facilities but who are not actually passengers on a conveyance at the time of an injury.

Based on the foregoing research, although there appears to be some recent authority to the contrary, the procedural approaches mentioned here are likely to be upheld if challenged on constitutional grounds.

IX. CONCLUSION

Transit operations have not escaped the trend toward expanded governmental responsibility for the negligence of public agencies. Even where immunity exists by statute or judicial decision, generally a transit agency is protected in the exercise of planning or other high-level decision making. The transit agency is more likely to be held liable for claims arising out of the operation and maintenance of bus or rail services or facilities.

The transit agency has the utmost standard of care to meet when it is acting in the capacity of common carrier. Usually, the agency only has to act with ordinary care in areas where the passenger-carrier relationship has not yet formed, has been interrupted, or has terminated, such as at transit stations or on platforms.

Statutes may require that notice of a claim be given within a certain period of time after the accident or incident. It is possible that a special statute of limitations may apply to a negligence action against a transit agency. Statutes may protect transit agencies to some extent by imposing statutory maximums on tort recoveries against agencies when sued for negligence. Either statutes or judicial decisions may protect agencies from punitive damage awards. In all cases, the applicable law of the particular jurisdiction must be consulted.

The literature does not seem to address whether the public is willing to accept certain trade-offs, such as limits on tort recoveries, because of budgetary constraints on transit or other public agencies. However, the law as it exists today certainly recognizes that there are both substantive and procedural limitations, most arising out of the interpretation of application of tort claims or related legislation, including statutory caps on damages or limits on other damages, such as punitive damages.

There are important areas of decision making vested in transit agencies for which they are not liable. In defending legal actions it is important to stress the discretion vested in the agency and that the discretion is exercised at a high level and in the performance of traditional government functions.

ENDNOTES

¹Federal subsidies to the transit industry have increased over the past 20 years. See Neil W. Hamilton, *The Governance of Publicly Owned Mass Transit-A Proposed Model Act and Comments*, 32 WASH. U. J. URB. & CONTEMP. L. 3 (Summer 1987) (stating that federal spending was \$34 billion per year between 1980 and 1986).

²AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 1622 (1992).

³*Id.* at 15.

⁴*Id.* There has been a steady increase in services provided since 1987. See Federal TRANSIT ADMINISTRATION, U.S. DOT, NATIONAL TRANSIT SUMMARIES AND TRENDS FOR THE 1990 SECTION 15 REPORT YEAR 20, 21 (1992) (indicating that the services provided since 1987 have increased steadily with total miles traveled in 1990 approximately 7 percent higher than in 1987).

⁵*Id.* at 38.

⁶431 N.W.2d 861 (Minn. 1988). In *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 437 N.E.2d 1104 (N.Y. 1982), which held that the waiver of sovereign immunity effected by § 8 of the N.Y. Court of Claims Act did not permit punitive damages to be assessed against the state or its political subdivisions, the court stated that the state's "policy [was] that public funds not be available, directly or indirectly, for the payment of damages beyond those actually suffered...." *Id.* at 1107.

⁷*Lienhard*, 431 N.W.2d at 867.

⁸See, e.g., CAL. GOVT CODE § 810 *et seq.* (Deering 1982); 745 ILL. ANN. STAT. 10/2-101(b) (Smith-Hurd 1993); IOWA CODE ANN. § 670.1 *et seq.* (West Supp. 1994); NEB. REV. STAT. § 13-901 *et seq.* (1991 & Supp. 1993); N.J. STAT. ANN. § 59:1-1 *et seq.* (West 1992 & Supp. 1994); OHIO REV. CODE ANN. §

2744.01 *et seq.* (Anderson 1992 & Supp. 1993); OKLA. STAT. ANN. 51, § 151 *et seq.* (West 1988 & Supp. 1994); OR. REV. STAT. §§ 30.260-30.300 (1993); WIS. STAT. ANN. § 893.80 (4) (West 1983).

⁹See, e.g., N.J. STAT. ANN. § 59:23(a) (West 1992); OR. REV. STAT. § 30.265(3)(c)(1993); and 745 ILL. ANN. STAT. 10/2-102 and 10/2-201 (Smith-Hurd 1993).

¹⁰See, e.g., N.J. STAT. ANN. § 59:4-6 (West 1992); 745 ILL. ANN. STAT. 10/3103 (Smith-Hurd 1993).

¹¹See, e.g., NEB. REV. STAT. § 13926 (\$1 million per person; \$5 million for all claims arising out of a single occurrence); OR. REV. STAT. § 30.270 (\$50,000 to any claimant for property damage, \$200,000 maximum on general and special damages for any claimant for all claims, and \$500,000 for any number of claims arising out of a single accident or occurrence); OKLA. STAT. ANN. 51, § 154A (\$100,000 per person, \$25,000 for property damage, and \$1 million for any number of claims arising out of a single occurrence or accident); WIS. STAT. ANN. §§ 893.80 (3) and 345.05 (\$250,000 for vehicle accidents and \$50,000 per claim for all other tort actions other than civil rights actions). *But see* Gladon v. Greater Cleveland Regional Transit Auth., No. 64029, 1994 Ohio Ct. App. LEXIS 902 (Mar. 10, 1994) (ruling that the cap in § 2744.05(c)(1) was unconstitutional).

¹²A limitation most often reported was that because of a statute or judicial decision, the agency was not subject to punitive damages. See, e.g., N.J. STAT. ANN. § 59:9-2(c) (West 1992); OKLA. STAT. ANN. 51, § 154B; OR. REV. STAT. § 30.270(2) (West 1988 & Supp. 1994). Also, in Oregon, attorney's fees and cost may not be awarded to the extent the total judgment would exceed the statutory cap. *Griffin v. Tri-County Metropolitan*

Transportation Dist. of Oregon, 870 P.2d 808 (Or. 1994).

¹³Sovereign immunity was first applied to a local government in the United States in *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812), cited in 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02.10 (3d ed. rev. vol. 1993) [hereinafter MCQUILLIN].

¹⁴*Id.*

¹⁵*Id.* (citing *Stone v. State Highway Comm'n*, 381 P.2d 107 (Ariz. 1963); *Parish v. Pitts*, 429 S.W.2d 45 (Ark. 1968); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961); *Hargrove v. Town of Cocoa Beach*, 96, So.2d 130 (Fla. 1957); *Molitor v. Kaneland Community Unit Dist. No. 302*, 163 N.E.2d 89 (Ill. 1959); *Campbell v. State*, 284 N.E.2d 733 (Ind. 1972); *Haney v. Lexington*, 386 S.W.2d 738 (Ky. 1964); *Williams v. Detroit*, 111 N.W.2d 1 (Mich. 1961); *Spanel v. Mounds View School Dist.*, 118 N.W.2d 795 (Minn. 1962); *Pruett v. Rosedale*, 421 So.2d 1046 (Miss. 1982); *Hicks v. State*, 544 P.2d 1153 (N.M. 1976); *Haverlack v. Portage Homes, Inc.*, 442 N.E.2d 749 (Ohio 1982); *Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983); *Ayala v. Philadelphia Bd. of Pub. Educ.*, 305 A.2d 877 (Pa. 1973); *Taylor v. Murphy*, 360 S.E.2d 314 (S.C. 1987); *Long v. Weirton*, 214 S.E.2d 832 (W.Va. 1975); *Holytz v. Milwaukee*, 115 N.W.2d 618 (1962).

¹⁶These states include Alaska, California, Illinois, New Jersey, Minnesota, Tennessee, and Texas.

¹⁷See, e.g., *Transport of New Jersey v. Matos*, 495 A.2d 503 (N.J. Super Law Div. 1985), which held that a public transit corporation was a "public entity" for purposes of the Public Transportation Act, N.J. STAT. ANN. § 27:25-4(a) (West Supp. 1994) and, thus, was subject to the Tort Claims Act, N.J. STAT. ANN. § 59:1-1, *et seq.*

¹⁸See R.I. GEN. LAWS § 9-31-1 *et seq.* (Michie 1985). Note that Rhode Island has waived immunity for tort suits and places limits on damage recoveries for liability arising from the performance of governmental functions. *Id.* at § 9-31-2.

¹⁹See *LeSanche v. North Suburban Mass Transit District*, 491 N.E.2d 1170, 1171 (Ill. App. Ct. 1986).

²⁰D.C. CODE ANN. § 1-2411 *et seq.* (1981 ed.)

²¹See KAN. STAT. ANN. § 12-2524 (1991) and MO. ANN. STAT. § 238.010 (Vernon 1990). The Kansas City Area Transportation Authority is considered a subdivision of the states who are parties to the compact. See Div. 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 485 F. Supp. 856 (W.D. Mo. 1980).

²²See *Wellons v. SEPTA*, 596 A.2d 1169 (Pa. Commw. Ct. 1991) (paper bag); *Bowles v. SEPTA*, 581 A.2d 700 (Pa. Commw. Ct. 1990) (ice and frost).

²³CAL. GOVT CODE § 820.2 (Deering 1982); N.J. STAT. ANN. § 59:2-3 (West 1992).

²⁴CAL. GOVT CODE § 830.4; N.J. STAT. ANN. § 59:4-5

²⁵CAL. GOVT CODE § 830.6; N.J. STAT. ANN. § 59:4-6.

²⁶According to the Federal Tort Claims Act, the government may not be held liable for "[a]ny 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 the federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1988).

²⁷In *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953), the Court held that "determinations made by executives or administrators in establishing

plans, specifications or schedules of operations" were discretionary and that "where there is room for policy judgment and decision there is discretion." The Supreme Court's decision in *Dalehite* established the policy versus operational-level test of evaluating discretion exercised by a government agency. The broad area of protected discretion established in the *Dalehite* case has been narrowed by later decisions. The Court's decision in *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955) limited the potential area of discretion existing in the planning versus operational test established in the *Dalehite* case. In *Indian Towing*, the Court stated that when the government decides to undertake a public service or project, it is not exercising protected discretion when it is negligent in implementing the decision to provide the service or operate and maintain the project. Once a service or program is in operation, the public is entitled to rely on its safe operation. In *United States v. S.A. Empresa De Viacao Aerea Rio Grandense* (Varig Airlines), 467 U.S. 797 (1984) [hereinafter *Varig*], the court held that agencies and their employees exercising discretion are protected under the discretionary function exemption. The Supreme Court held, first, that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case"; "[t]he basic inquiry...is whether the challenged acts of a government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability." *Varig*, 467 U.S. at 813--14.

²⁸See, e.g., *Wainscott v. State*, 642 P.2d 1355 (Alaska 1982) (stating that immunity exception to state liability attaches when a decision entails governmental planning or policy formulation); *Lopez v. Southern California*

Rapid Transit Dist., 710 P.2d 907 (Cal. 1985) (describing such immunity as attaching to basic policy decisions committed to coordinate branches of government); *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713 (Minn. 1988) (describing the critical inquiry as involving the balancing of policy objectives).

²⁹486 U.S. 531 (1988).

³⁰*Id.* at 536.

³¹*Id.*

³²499 U.S. 315 (1991).

³³*Id.* at 324.

³⁴*Id.*

³⁵See discussion, *infra*, in part IV of this article.

³⁶588 A.2d 708, 712 (D.C. 1991).

³⁷*Id.* at 713-14.

³⁸688 F. Supp. 765, 767 (D.D.C. 1988).

³⁹829 F.2d 69, 74 (D.C. Cir. 1987).

⁴⁰653 F. Supp. 247, 249 (D.D.C. 1986).

⁴¹See, e.g., *Garza v. Salvatierra*, 846 S.W.2d 17, 22 (Tex. Ct. App. 1992).

⁴²See *Lopez*, 710 P.2d 907 (Cal. 1985)

⁴³*Garza*, 846 S.W.2d 17, 22 (Tex. Ct. App. 1992).

⁴⁴*Varig*, 467 U.S. 797.

⁴⁵710 P.2d at 908.

⁴⁶*Id.*

⁴⁷*Id.* at 915 (discussing the discretionary function exception to immunity contained in CAL. GOVT CODE § 820.2 (Deering 1994)).

⁴⁸*Lopez*, 710 P.2d at 915.

⁴⁹*Id.*

⁵⁰*Berkovitz*, 486 U.S. 531.

⁵¹*Lopez*, 710 P.2d at 915.

⁵²*Id.* at 912.

⁵³986 F.2d 722 (4th Cir. 1993).

⁵⁴419 So.2d 1071, 1077 (Fla. 1982).

⁵⁵583 P.2d 7 (Or. Ct. App. 1978).

⁵⁶826 S.W.2d 427, 429 (Tenn. 1992).

⁵⁷789 P.2d 306, 307-308 (Wash. Ct. App. 1990).

⁵⁸710 F.2d 656, 657 (10th Cir. 1983), *cert. denied*, 464 U.S. 939 (1983).

⁵⁹681 F. Supp. 1500, 1502-1503 (D. Utah 1988), *modified on other grounds*, 902 F.2d 1524 (10th Cir. 1990).

⁶⁰*Id.* at 1508.

⁶¹*Id.* at 1509.

⁶²*Id.*

⁶³*Id.*

⁶⁴422 N.W.2d 713 (Minn. 1988).

⁶⁵*Id.* at 722.

⁶⁶*Id.* at 723.

⁶⁷336 N.W.2d 416 (Iowa 1983).

⁶⁸*Id.* at 418.

⁶⁹*Id.* at 420.

⁷⁰585 F. Supp. 1543 (W.D. Mo. 1984).

⁷¹*Neilson*, 419 So.2d 1071 (Fla. 1982).

⁷²*Bowers*, 826 S.W.2d 427, 432 (Tenn. 1992).

⁷³See also, *Japan Air Lines Co., Ltd. v. State*, 628 P.2d 934, 936 (Alaska 1981) (When an airplane slid off a runway, which had been covered with frozen rain, the court held that the design of the taxiway was not within the discretionary function exception).

⁷⁴N.J. STAT. ANN. § 59:4-6.

⁷⁵CAL. GOVT CODE § 830.6. Illinois also invites liability after adoption of a plan or design where it appears from its use that the plan or design has created a condition that is unreasonably unsafe. 745 ILL. ANN. STAT. 10/3-103 (West 1993).

⁷⁶167 N.E.2d, 63, 64 (N.Y. App. Div. 1960).

⁷⁷*Id.* at 67 (citing *Eastman v. State of New York*, 103 N.E.2d 56 (N.Y. 1951)).

⁷⁸491 P.2d 1121. (Cal. 1972).

⁷⁹*Id.* at 1127.

⁸⁰*Id.* at 1128.

⁸¹N.J. STAT. ANN. § 59:4-6 Task Force Comt.

⁸²608 A.2d 254 (N.J. 1992).

⁸³*Id.* at 256.

⁸⁴*Id.* at 258.

⁸⁵*Id.* at 258-59.

⁸⁶659 P.2d 111 (Idaho 1983).

⁸⁷*Id.* at 123.

⁸⁸*Id.* at 116.

⁸⁹609 A.2d 757 (N.J. 1992).

⁹⁰*Id.* at 765.

⁹¹*Id.* at 764.

⁹²15 CAL. RPTR. 2d 660 (Cal. Ct. App. 1993).

⁹³*Id.* at 663.

⁹⁴McQUILLIN, *supra* note 13.

⁹⁵See *id.*

⁹⁶1A CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW § 11.40 (1993).

⁹⁷*Id.* and cases cited therein.

⁹⁸57 AM. JUR. 2d., *Municipal County, School and State Tort Liability*, § 94, p. 112 (1988).

⁹⁹See *McKethean v. Washington Metropolitan Area Transit Authority*, 588 A.2d 708, 713 (D.C. 1991); *Lepore v. Rhode Island Public Transit Authority*, 524 A.2d 574, 575 (R.I. 1987).

¹⁰⁰829 F.2d 69, 75 (D.C. Cir. 1987).

¹⁰¹*Nathan v. Washington Metropolitan Area Transit Authority*, 653 F. Supp. 247, 248 (D.D.C. 1986).

¹⁰²*Jones v. Washington Metropolitan Area Transit Authority*, 742 F. Supp. 24 (D.D.C. 1990).

¹⁰³*Id.* at 25.

¹⁰⁴*Simpson*, 688 F. Supp. 765, 767 (D.D.C. 1988). The D.C. courts have consistently found such planning decisions immune from liability. See *Dant*, 829 F.2d 69, 74 (D.C. Cir. 1987) (dismissing count alleging that WMATA negligently designed its farecard system on the grounds that design decision fell within governmental function exception); *Nathan*, 653 F. Supp. 247, 249 (D.D.C. 1986) (stating that planning decisions regarding design, location, and construction of stairwell at metropolitan station implicated transit authority's governmental function and were, therefore, subject to sovereign immunity).

¹⁰⁵*McKethan*, 588 A.2d 708, 711 (D.C. 1991).

¹⁰⁶*Id.* at 714.

¹⁰⁷*Heffez v. Washington Metropolitan Area Transit Authority*, 569 F. Supp. 1551 (D.D.C. 1983), *aff'd*, 786 F.2d 431 (D.C. Cir. 1986).

¹⁰⁸*Strange v. Chumas*, 580 F. Supp. 160 (D.D.C. 1983).

¹⁰⁹*Simpson*, 688 F. Supp. at 765. *See also* *Keenan v. Washington Metropolitan Area Transit Authority*, 643 F. Supp. 324 (D.D.C. 1986) (explaining that action by a transit officer taken to collect a fare is governmental rather than proprietary because the officer is performing the governmental function of enforcing the law).

¹¹⁰493 N.Y.S.2d 474, 476, 480 (N.Y. App. Div. 1985), *aff'd per curiam*, 498 N.E.2d 143 (N.Y. 1986).

¹¹¹*Id.*

¹¹²*Gillot v. Washington Metropolitan Area Transit Authority*, 507 F. Supp. 454 (D.D.C. 1981).

¹¹³*Calero v. New York City Transit Authority*, 563 N.Y.S.2d 109, 110 (App. Div. 1990). *See also* *Estate of Crichlow v. New York City Transit Authority*, 585 N.Y.S. 2d 371 (App. Div. 1992) (holding that failure to lock control tower implicates a governmental function).

¹¹⁴*Sanders v. Washington Metropolitan Area Transit Authority*, 819 F.2d 1151, 1155 n.9 (D.C. Cir. 1987), *cited in* *McKethan*, 588 A.2d 708, 713 n.4 (D.C. 1991).

¹¹⁵*See, e.g., Lieberman v. Port Authority of New York and New Jersey*, 622 A.2d 1295, 1300 (N.J. 1993).

¹¹⁶*Jones*, 742 F. Supp. 24, 26 (D.D.C. 1990) (citing lack of such duties within the context of a subway system).

¹¹⁷*Id.* at 27; *Lewis v. Metropolitan Transportation Authority*, 472 N.Y.S.2d 368, 371 (App. Div. 1984).

¹¹⁸*E.g., White v. Metropolitan Gov't of Nashville and Davidson County*, 860 S.W.2d 49 (Tenn. Ct. App. 1993).

¹¹⁹*Id.* at 52.

¹²⁰*E.g., Alexander v. New Orleans Public Service*, 411 So.2d 641, 643 (La. Ct. App. 1982); *White*, 860 S.W.2d at 52.

¹²¹*See Lopez*, 710 P.2d 907, 910 (Cal. 1985); *McCoy v. Chicago Transit Authority*, 371 N.E.2d 625, 627-28 (Ill. 1977); *Rodriguez v. New Orleans Public Service, Inc.*, 400 So.2d 884 (La. 1981); *Mangini v. Southeastern Pennsylvania Transportation Authority*, 344 A.2d 621 (Pa. Super. Ct. 1975).

¹²²*E.g., Lopez*, 710 P.2d, at 911; *McCoy, id.* at 628; *Mangini, id.* at 624. *But see Rodriguez, id.* at 887 (holding that the hazards generally associated with transportation do not implicate the high degree of care).

¹²³In *Eagan v. Chicago Transit Authority*, No. 75176, 1994 Ill. LEXIS 60 (Apr. 21 1994), Eagan was a passenger on a Chicago Transit Authority (CTA) train, observed a pickpocket in action, and attempted to intervene. The pickpocket attacked Eagan and cut him with a razor. Eagan sued CTA for damages, alleging that CTA knew of prior incidents of pickpocketing and of attacks on passengers and that the agency had a duty to provide some form of preventive measures for its passengers. The court agreed with CTA that Eagan's claims were barred by the immunity granted to CTA in § 27 of the Metropolitan Transit Authority Act. 70 ILL. ANN. STAT. 3605/27 (West 1993).

¹²⁴*Lopez*, 710 P.2d at 911.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸605 N.E.2d 493, 497 (Ill. 1992).

¹²⁹*Id.* at 512 (Heiple, J., dissenting).

¹³⁰*Id.* at 497.

¹³¹*Id.* at 498.

¹³²*Id.* at 501.

¹³³*E.g., McKethan*, 588 A.2d 708, 712 (D.C. 1991).

¹³⁴*Rodriguez*, 400 So.2d 884 (La. 1981). ("One who is in the business of providing transportation for a fee should be a more professional transporter than the 'reasonably prudent' driver with respect to hazards associated with the transportation of passengers."); *White v. Metropolitan Government of Nashville and Davidson County*, 860 S.W. 2d 49, 52 (Tenn. Ct. App. 1993).

¹³⁵583 N.E.2d 60 (Ill. App. Ct. 1991).

¹³⁶*Id.* at 62 (quoting *Rotheli v. Chicago Transit Authority*, 130 N.E.2d 172, 175 (1955)).

¹³⁷*Id.* at 62.

¹³⁸A transit authority likely assumes the role of carrier in an authority-controlled station in relation to people riding on escalators or elevators. Such conveyances have also long been considered as sufficient to create a carrier-passenger relationship and its concomitant heightened standard of care due. *See Smith v. Munger*, 532 P.2d 1202, 1205 (Okla. Ct. App. 1974) (holding that owner of passenger elevator owed highest degree of care for the inspection, maintenance, and repair of elevator).

¹³⁹*See Sexton v. Key System Transit Lines*, 301 P.2d 612 (Cal. Dist. Ct. App. 1956) (discussing injury sustained by plaintiff at interurban electric train station).

¹⁴⁰*Lewis v. Metropolitan Transit Authority*, 472 N.Y.S.2d 368, 370 (App. Div. 1984).

¹⁴¹*Id.*

¹⁴²*Lieberman*, 622 A.2d 1295 (N.J. 1993).

¹⁴³*Id.* at 1300.

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*E.g., Lieberman*, 622 A.2d 1295 (N.J. 1993); *Crosland v. New York City Transit Authority*, 493 N.Y.S.2d 474, *aff'd*, 498 N.E.2d 143 (N.Y. 1986); *Drexler v. Greater Cleveland Regional Transit Authority*, 609 N.E.2d 231

(Ohio Ct. App. 1992); *Shelton v. Greater Cleveland Regional Transit Authority*, 584 N.E.2d 1323 (Ohio Ct. App. 1989).

¹⁴⁷*E.g., 70 ILL. ANN. STAT. 3605/27* (Smith-Hurd 1993); OHIO REV. CODE ANN. § 2744.01(C)(2)(a) (Anderson 1992) (stating that the provision or nonprovision of police services is a governmental function).

¹⁴⁸*See, e.g., Simpson*, 688 F. Supp. 765 (D.D.C. 1988) (holding that crowd control falls squarely within the functions of the WMATA police force and therefore is a governmental function exempt from liability).

¹⁴⁹*E.g., cases cited at* 622 A.2d at 1302.

¹⁵⁰*Id.* at 1303-4.

¹⁵¹*Id.* at 1304.

¹⁵²*Id.*

¹⁵³*Id.* To illustrate the lack of predictability in this area of the law, the New York Supreme Court, Appellate Division, has held that lack of illumination at a subway exit was not an issue of proprietary maintenance, but one that involved passenger security and, consequently, invoked the authority's governmental functions. *Rivera v. New York City Transit Authority*, 585 N.Y.S.2d 367 (N.Y. App. Div. 1992).

¹⁵⁴*E.g., 70 ILL. ANN. STAT. 3605/41* (Smith-Hurd 1993) (6-month notice provision); KAN. STAT. ANN. § 12-2836 (1991) (1-year notice provision); *cf. FLA. STAT. ANN. § 768.28(6)(a)* (1986) (requiring that claim be submitted in writing to the Dept. of Insurance within 3 years after claim arises).

¹⁵⁵*E.g., 70 ILL. ANN. STAT. 3605/41* (1 year); KAN. STAT. ANN. § 12-2836 (2 years from date of injury or accrual of cause of action for actions against the Metropolitan Transit Authority).

¹⁵⁶FLA. STAT. ANN. § 768.28 (1986 & Supp. 1993) (\$100,000 limit per person and \$200,000 limit for claims in the aggregate); 42 PA. CONS. STAT. ANN. § 8528(b) (limiting damages

arising from a single or related cause of action to \$250,000 per plaintiff and \$1 million in the aggregate); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a) (for state entities, \$250,000 per person and \$500,000 per occurrence).

¹⁵⁷FLA. STAT. ANN. § 768.28 (5) (West 1986 & Supp. 1993).

¹⁵⁸12 Or. App. 575, 831 P.2d 42 (1992).

¹⁵⁹Lienhard v. State, 417 N.W.2d 119 (Minn. Ct. App. 1987); cf. Lyles v. Commonwealth, Dept. of Transp., 516 A.2d 701 (Pa. 1986) (holding that provision of Pennsylvania Sovereign Immunity Act limiting tort liability of Commonwealth party to \$250,000 did not violate the equal protection provisions of the federal or Pennsylvania constitutions); cf. Schuman v. Chicago Transit Authority, 95 N.E.2d 447 (Ill. 1950) (rejecting a constitutional challenge to the notice of claim requirement and the reduced statute of limitations for personal injury suits against CTA).

¹⁶⁰No. 64029, Ohio Ct. App., LEXIS 902 (Mar. 10, 1994). See note 11.

¹⁶¹*Id.*, slip op. at 5

¹⁶²*Id.*, slip op. at 6-7.

¹⁶³*Id.*, slip op. at 11-12.

¹⁶⁴*Id.*, slip op. at 13.

¹⁶⁵*Id.*, slip op. at 14.

¹⁶⁶*Id.*, slip op. at 16.

¹⁶⁷606 A.2d 427 (Pa. 1992).

¹⁶⁸*Id.* at 428.

¹⁶⁹*Id.*

¹⁷⁰*Id.* at 430.

¹⁷¹*Id.* at 431.

¹⁷²*Id.*

¹⁷³*E.g.*, CAL. GOVT CODE § 818 (West 1980) (no exemplary damages); FLA. STAT. ANN. § 768.28 (5) (West 1986) (no punitive damages); TEX. GOVT CODE ANN. § 101.024 (West 1986) (same); 42 PA. CONS. STAT. § 8521(c) (West 1982) (omitting punitive damages from categories of recoverable damages).

¹⁷⁴*E.g.*, Teart v. Washington Metropolitan Area Transit Authority, 686

F. Supp. 12, 14 (D.D.C. 1988) (refusing to grant punitive damages in the absence of an express statutory grant); Metropolitan Atlanta Rapid Transit Authority v. Boswell, 405 S.E.2d 869 (Ga. 1991); George v. Chicago Transit Authority, 374 N.E.2d 679 (Ill. App. Ct. 1978). *But see* Magaw v Massachusetts Bay Transp. Auth., 485 N.E.2d 695 (Mass. Ct. App. 1985) (stating that any limitation on the transportation authority's tort liability is for the legislature). *See also* Boyles v. Greater Peoria Mass Transit District, 113 Ill.2d 545, 101 Ill. Dec. 847, 499 N.E.2d 435 (1986) (former employee of mass transit district was precluded from recovering punitive damages under local governmental and Governmental Employee Tort Immunity Act. *But see* Rogers v. Saylor, 306 Or. 267, 760 P.2d 232 (1988) (limitation on compensatory damages and the prohibition against recovery of punitive damages in the Oregon Tort Claims Act did not apply to an action under the federal civil rights act, 42 U.S.C. § 1983).

¹⁷⁵*Boswell*, 405 S.E.2d at 869.

¹⁷⁶*Id.* at 870 (citations omitted) (brackets in original) (emphasis in original) (*quoting* City of Newport v. Fact Concerts, 453 U.S. 247 (1981)); *accord*: *George*, 374 N.E.2d at 680 (reasoning that punitive damages assessed against the Chicago Transit Authority would be borne by the taxpayers and fare-paying passengers).

¹⁷⁷*George*, 374 N.E.2d at 680. ¹⁷⁸*Id.* at 680.

¹⁷⁹Although the majority in *Boswell* viewed the question as one of pure public policy, the dissent was not so inclined. In examining the "express language and the policy of the Legislature as plainly stated in the MARTA Act," the dissent argued that punitive damages were allowed. *See Boswell*, 405 S.E.2d 870-73 (Smith, P. J., dissenting).

¹⁸⁰495 N.Y.S.2d 697 (N.Y. App. Div. 1985).

¹⁸¹*E.g.*, D.C. CODE ANN. § 1-2431, § 72 (1992).

¹⁸²FLA. STAT. ANN. § 768.28 (5) (West 1986 & Supp. 1993).

¹⁸³*See* Espinosa v. Southern Pacific Transp. Co., 624 P.2d 162 (Or. Ct. App. 1981) (*en banc*).

¹⁸⁴*See, e.g.*, Corbin v. City and County of Denver, 735 P.2d 214 (Colo. 1987); Brockman v. Burnette, 360 S.E.2d 655 (Ga. 1987); Gonzales v. City of Franklin, 403 N.W.2d 747 (Wis. 1987).

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