Dept. of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982); Ingham v. Dept. of Transp., 419 So. 2d 1081 (Fla. 1982); City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982)

Kenneth McLaughlin

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INTRODUCTION

The Florida Constitution provides in Article X, section 13, that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." In 1973, the legislature elected to exercise this power by enacting a statute waiving the sovereign immunity of the state, its agencies and subdivisions from liability for tortious acts of their employees or agents. This provision became codified as section 768.28, Florida Statutes.

Despite the seemingly broad waiver effected by section 768.28, the Florida Supreme Court held in 1979 in Commercial Carrier Corp. v. Indian River County that certain otherwise tortious activities of governmental bodies could not provide the bases upon which suit could be made. The court characterized those immune activities as "discretionary" or "planning-level" functions undertaken by the government. The activities for which liability would lie were characterized as "operational-level" functions.

Since the Commercial Carrier decision in 1979, Florida courts have wrestled extensively with the question of what activities remain actionable under section 768.28. The results have been confusing and oftentimes conflicting, with few general rules of characterization being uniformly applied among the five appellate districts. Recognizing this conflict and confusion, the Florida Supreme Court once again entertained the issue of sovereign immunity in three cases handed down simultaneously in September, 1982. The court's decisions, made in an effort to "clarify the application of certain legal principles set forth in Commercial Carrier," substantially failed to achieve that much needed goal.

The purpose of this comment is to examine the "clarifications”
SOVEREIGN IMMUNITY

and changes wrought by the court's trilogy of opinions. This will be accomplished through an analysis designed to provide the reader not only with a working knowledge of the trilogy but also with a basic understanding of the doctrinal, constitutional, statutory, and decisional law which underlie the cases. An examination of the strengths and weaknesses of the rules of the trilogy will be undertaken, followed by some suggested modifications which hopefully would clarify further the question of which negligent acts of the sovereign are, or should be, actionable.

I. THE FOUNDATION

A. DOCTRINAL AND CONSTITUTIONAL BASIS OF SOVEREIGN IMMUNITY

As early as 1888, the courts of Florida recognized that suits, either at law or in equity, could not be maintained against the state unless it has consented to be sued. In 1930, Justice Brown, writing for a unanimous supreme court in State ex rel. Davis v. Love, noted:

The legal doctrine that a sovereign state is immune from suit is an ancient one. While it probably had its origin in the old theory that sovereignty was inherent in the crown, and that the king could do no wrong, and hence could not be sued... this doctrine was quite jealously preserved in this country... It was, whether wisely or not, deemed that certain practical considerations warranted continued adherence to this ancient rule that a sovereign state was immune from suit, even when brought by one of its own citizens. Thus it had been said by many of our courts that inconvenience and perhaps danger might result from its abrogation; that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.

The same sentiment was echoed, though perhaps better supported, forty-nine years later in Commercial Carrier. Justice Sunberg, writing for the court, made clear that sovereign immunity as

7. For purposes of clarity, this examination will be limited to the area of negligence by the sovereign and will not be concerned with instances of alleged intentional torts.
9. 126 So. 374 (Fla. 1930).
10. Id. at 377-78 (citations omitted).
it exists today is "not predicated simply upon the premise that the sovereign can do no wrong." 11 Rather, the doctrine rests firmly on the constitutionally-mandated concept of separation of powers found in Article II, section 3 of the Florida Constitution. 12 The concept of the separation of the judicial, legislative, and executive powers of the state will not, Justice Sundberg noted, "permit the substitution of the decision by a judge or jury for the decision of a governmental body as to the reasonableness of planning activity conducted by that body." 13 Justice Sundberg's analysis of the constitutional underpinnings of sovereign immunity provides a reasoned, theoretically valid explanation for the continued vitality of the doctrine. The constitutional provision which mandates the separation of governmental powers, however, also provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." 14 The mechanism by which suit against the sovereign is made constitutionally permissible without violating the mandate of article II, section 3, is found in article X, section 13 of the Florida Constitution which provides that "[p]rovision may be made by general law for bringing suit against the state . . . ." It is under this authority that the legislature adopted section 768.28, Florida Statutes, in 1973. 15

Prior to this statutory waiver of sovereign immunity, the general rule regarding suit against the state was clear. No suit could be maintained against the state, its agencies, or the counties for damages resulting from negligence on the part of those governmental entities or their employees who were acting within the scope of their governmental duties. 16 The only exception to this bar arose when the allegedly negligent entity had chosen to exercise its statutorily granted power to purchase liability insurance. 17 In those cases, immunity from liability for money damages was waived, but

11. 371 So. 2d at 1018 (analyzing two lines of case authority addressed by the Court of Appeals of New York in Weiss v. Fote, 200 N.Y.S.2d 409 (1960)).
12. Id. at 1020 (suggesting that the court in Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), recognized "a principle of law apart from the ancient doctrine of immunity as a simple aspect of sovereignty . . . [one] alluded to . . . in Weiss v. Fote . . . which makes not actionable in tort certain judgmental decisions of governmental authorities which are inherent in the act of governing").
13. Id. at 1018.
16. See, e.g., State Rd. Dept. v. Tharp, 1 So. 2d 868, 869 (Fla. 1941).
17. See Davis v. Watson, 318 So. 2d 169, 170 (Fla. 4th DCA 1975).
only to the extent of the policy limits.\textsuperscript{18}

While the state and counties enjoyed virtually absolute immunity, municipalities benefited from only partial protection. Immunity for municipalities attached only when the allegedly tortious activity was "governmental" in nature and when such tort was committed against one with whom the municipality was not in privity.\textsuperscript{19} For those activities deemed "proprietary" in nature, the cities remained liable in tort.\textsuperscript{20} Although the supreme court attempted to abrogate this distinction in City of Lakeland v. State,\textsuperscript{21} the principle was reinstated in Modlin v. City of Miami Beach,\textsuperscript{22} and it remained in effect until the Commercial Carrier decision in 1979.

With the enactment of section 768.28 in 1973, the legislature exercised the power granted it by article X, section 13 of the Constitution to alter radically the concept of sovereign immunity not only for the state and the counties, but also for the state's municipalities.\textsuperscript{23}

\textbf{B. Section 768.28 - The Statutory Waiver}

Section 768.28, Florida Statutes, enacted in 1973, provides in pertinent part:

\begin{quote}
768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent speci-
\end{quote}

\textsuperscript{18} See id.

\textsuperscript{19} See Gordon v. City of West Palm Beach, 321 So. 2d 78 (Fla. 4th DCA 1975).

\textsuperscript{20} See id.

\textsuperscript{21} 197 So. 470 (Fla. 1940).

\textsuperscript{22} 201 So. 2d 70 (Fla. 1967).

\textsuperscript{23} Note that § 768.28 was not the legislature's first attempt at waiving the sovereign immunity of the state in tort. In 1967, the legislature enacted a statute whereby persons sued by the state in tort could counterclaim in kind. 1967 Fla. Laws Ex. Sess. 2204, § 1 (codified at FLA. STAT. § 768.14).

In 1969, the legislature enacted a statute similar to § 768.28. 1969 Fla. Laws 116, §§ 1-5. The act was then repealed effective one year later. 1969 Fla. Laws 357, § 1.

Interestingly, the 1969 Tort Claims Act contained an express "discretionary function" exception. This fact was seemingly ignored by the supreme court in Commercial Carrier when it held that "although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain 'discretionary, governmental functions remain immune from tort liability.'" 371 So. 2d at 1022. See infra notes 128-34 and accompanying text.
fied in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.  

Characterized by commentators at the time as "a damaging blow to the doctrine of sovereign immunity," the act nonetheless contained some significant limitations. As enacted, the act limited the liability of the state and its subdivisions (counties and municipalities) to $50,000 per claimant and $100,000 per incident while prohibiting the award of punitive damages. However, if the governmental entity chose to carry liability insurance which provided for coverage in excess of these amounts, then the liability limitation was coextensive with that coverage. Although the liability limits were raised in 1981 to $100,000 per claimant and $200,000 per incident, this remains a significant limitation on those seeking redress from the state.

What was considered at the time to be a more important limitation on the waiver effected by section 768.28 is found implicitly in the wording of the statute. The act provides for liability on the part of the state "if a private person,. . . would be liable to the claimant in accordance with the general laws of this state. . . ." By limiting governmental liability to instances where a private person would be liable, the legislature effectively retained immunity for legislative, quasi-legislative, judicial, and quasi-judicial functions of government since, under Florida common law, a private individual could not be held liable for the exercise of these functions.

29. Kovolick, supra note 25, at 395.
31. Allen v. Secor, 196 So. 2d 586 (Fla. 2d DCA 1967); Hough v. Amato, 260 So. 2d 537 (Fla. 1st DCA 1972).
Despite these limitations, section 768.28 was, under any reading, a revolutionary law. For the first time, victims of torts committed by the state, its agencies or subdivisions were presented with a real opportunity for judicial redress of their injuries. It remained for the Florida Supreme Court to define the parameters of this newly established liability.

II. Commercial Carrier

Despite the seemingly broad waiver of sovereign immunity effected by the enactment of section 768.28 in 1973, the Florida Supreme Court nevertheless held six years later in Commercial Carrier Corp. v. Indian River County that certain discretionary functions of government may not be used as the bases for tort liability against the state and its subdivisions. The characterization of a governmental function as either “discretionary”, and hence immune, or “operational,” and hence actionable, has perplexed lower courts throughout the state.

Commercial Carrier involved two decisions of the Third District Court of Appeal which were consolidated on writ of certiorari to the Florida Supreme Court. In Commercial Carrier Corp. v. Indian River County, the county and the Florida Department of Transportation (DOT) were named as third-party defendants in a wrongful death action arising out of a traffic accident. Third-party plaintiff Commercial Carrier and its liability insurer sought contribution and indemnity from the county and DOT on the grounds that the third-party defendants had failed in their duty to maintain a stop sign at the intersection where the accident occurred. The trial court dismissed the third-party claim, and the dismissal was affirmed by the Third District Court of Appeal. In the second of the consolidated cases, Cheney v. Dade County, the county was sued for alleged negligence in its failure to properly maintain a traffic signal. Reviewing an order dismissing this claim with prejudice, the Third District again affirmed, this time on the basis of the “general duty/special duty” dichotomy: since the duty to maintain the traffic signal was owed to the public at large, rather

32. 371 So. 2d 1010 (Fla. 1979).
33. Id. at 1012.
34. 342 So. 2d 1047 (Fla. 3d DCA 1977), quashed, 371 So. 2d 1010 (Fla. 1979).
35. Id. at 1048.
36. Id.
37. 353 So. 2d 623 (Fla. 3d DCA 1977), quashed, 371 So. 2d 1010 (Fla. 1979).
38. Id. Again, this action took the form of a third-party complaint against the D.O.T.
than to the particular plaintiff, no liability would lie.\textsuperscript{39}

On appeal to the Supreme Court, both decisions of the Third District were quashed.\textsuperscript{40} Justice Sundberg, writing for the majority, rejected the concept borrowed from \textit{Modlin} of "general duty/special duty."\textsuperscript{41} This done, the central issue remaining for the court was the scope of waiver contemplated by section 768.28.

The respondent governmental agencies asserted that, in light of the language fixing tort liability "in the same manner and to the same extent as a private individual under like circumstances,"\textsuperscript{42} there could be no waiver where a governmental function was involved since private persons do not perform such a function. The court pointed out, however, that a similar argument was rejected by the United States Supreme Court in \textit{Indian Towing Co. v. United States}\textsuperscript{43} when that Court was called upon to construe almost identical language in the Federal Torts Claims Act.\textsuperscript{44}

Despite rejecting both the \textit{Modlin} doctrine and the "immune governmental function" doctrine, the court was unwilling to abrogate sovereign immunity to the extent section 768.28 seemed to imply.\textsuperscript{45} To this end, the court chose to read into section 768.28 a broad "discretionary function" exception.\textsuperscript{46} This decision was based squarely on the constitutional mandate that "certain func-

\begin{itemize}
\item \textsuperscript{39} See \textit{Modlin v. City of Miami Beach}, 201 So. 2d 70 (Fla. 1967). As Justice Sundberg pointed out in \textit{Commercial Carrier}, this theory effectively "results in a duty to none where there is a duty to all." 371 So. 2d at 1015.
\item \textsuperscript{40} 371 So. 2d at 1023.
\item \textsuperscript{41} \textit{Id.} at 1016.
\item \textsuperscript{42} \textit{FLA. STAT. §} 768.28(5) (1974).
\item \textsuperscript{43} 350 U.S. 61 (1955) (failure to maintain a coastal lighthouse actionable despite being an activity which private persons do not generally perform).
\item \textsuperscript{44} 28 U.S.C. \textsuperscript{\textsection} 1346(b) (1976).
\item \textsuperscript{45} \textit{Cf.} 371 So. 2d at 1015 ("While we are not prepared to embrace the notion that all acts or omissions by governmental authorities will subject them to liability in tort under the statute, nevertheless we conclude that the district court has ascribed much too narrow a field of operation to section 768.28.").
\item \textsuperscript{46} 371 So. 2d at 1020.
\end{itemize}

In response to the "discretionary function" exception argued by the governmental agencies, petitioners pointed out that the Federal Tort Claims Act contained a similar \textit{express} provision. Implying that the Florida Legislature could have employed this language as well (as they did in fact in the 1969 Act), the petitioners argued that no such exception could now be read into the statute. The supreme court, however, noted that "[t]he absence of a 'discretionary exception' in [other states'] waiver statute[s] has not precluded several jurisdictions from holding that certain areas of governmental conduct remain immune. . . ." \textit{Id.} at 1017.

For discussion of federal court interpretation of the "discretionary function" exception found in the FTCA, see \textit{Note}, \textit{The Discretionary-Function Exception to the Federal Tort Claims Act}, 42 ALB. L. REV. 721, 725-27 (1978).
tions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance."

What, then, is a "discretionary function"? The court ostensibly "eschew[ed]" the temptation "to fall back on semantic labels for ease of application and seeming certainty," recognizing that the decision of what was "discretionary" or "planning-level" would require case-by-case analysis. It therefore adopted and commended for use the preliminary test of a 1965 Washington case, *Evangelical United Brethren Church v. State:*

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

If these questions can be "clearly and unequivocally" answered in the affirmative, then, concluded the Washington court, "the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom." If, however, even one of the questions suggests a negative reply, then "further inquiry may well become necessary, depending upon the facts and circumstances involved." Applying these criteria to the claims at issue in *Commercial Carrier* and *Cheney,* the court held that the

47. *Id.* at 1022.
48. *Id.* at 1020. The court borrowed the planning/operational distinction from *Johnson v. State,* 73 Cal. Rptr. 240 (1968). In *Johnson,* a foster parent brought an assault action against the state for injuries arising out of an attack upon her by a youth placed in her home. The California Supreme Court held that the failure of the youth's parole officer to warn the foster parent of the potential danger was not a "discretionary" decision and was, therefore, actionable under California's tort claims act.
49. 371 So. 2d at 1022.
51. 371 So. 2d at 1019.
52. *Id.*
53. *Id.*
failure to maintain an existing traffic control device was an "operational level" function and, hence, was actionable.\textsuperscript{54}

As one commentator noted, "in the wake of Commercial Carrier, courts construing section 768.28 must be able to identify policy decisions: those decisions which involve a conscious balancing of risks and advantages."\textsuperscript{55} This task of identifying "planning level"/"discretionary"/"policy" decisions has proven difficult for the lower courts to whom the task was delegated. This difficulty and inconsistency prompted the court to revisit the Commercial Carrier doctrine in the 1982 trilogy.

\section*{III. Post-Commercial Carrier Conflict and the Supreme Court's Attempted Resolution}

Perhaps the most effective method for demonstrating the difficulty encountered by the various district courts of appeal in attempting to apply the Commercial Carrier doctrine is to examine the holdings reviewed by the supreme court in the trilogy. Although the cases were factually similar, the results were in direct conflict.\textsuperscript{56}

In \textit{Collom v. City of St. Petersburg},\textsuperscript{57} the plaintiff brought an action for the wrongful death of his wife and daughter, alleging that the defendant city had negligently designed, installed, and maintained the sewer system into which the decedents were swept and drowned.\textsuperscript{58} The circuit court granted summary judgment for the city, finding that the design, installation, and maintenance decisions were "planning-level" functions which remained immune from suit.\textsuperscript{59} On appeal, the Second District reversed. Writing for a unanimous panel, Judge Ott supported the court's decision with the following reasoning: "[I]mmunity of a government for negligently performing an act no longer exists. . . . In other words . . . once a government decides to act, whether out of obligation of (sic)

\begin{itemize}
  \item \textsuperscript{54}. \textit{Id.} at 1022.
  \item \textsuperscript{55}. Note, 8 \textit{Fla. St. U.L. Rev.} 377, 381 (1980).
  \item \textsuperscript{56}. The supreme court's jurisdiction over the trilogy was founded on the conflicts jurisdiction of \textit{Fla. Const. Art. V, § 3(b)(3)}. 419 So. 2d at 1073, 1082, 1083.
  \item The Supreme Court found that the Second District's decisions in \textit{Collom, Mathews and Neilson} conflicted not only with the decision of the First District in \textit{Ingham}, but also with a number of other cases, including Romine v. Metropolitan Dade County, 401 So. 2d at 882 (Fla. 3d DCA 1981), \textit{review denied}, 412 So. 2d 469 (Fla. 1982); Payne v. Palm Beach County, 395 So. 2d 1267 (Fla. 4th DCA 1981); Banta v. Rozier, 399 So. 2d 444 (Fla. 5th DCA 1981).
  \item \textsuperscript{57}. 400 So. 2d 507 (Fla. 2d DCA 1981).
  \item \textsuperscript{58}. \textit{Id.} at 508.
  \item \textsuperscript{59}. \textit{Id.}
\end{itemize}
free choice, it must act responsibly and reasonably under the existing circumstances, and in accordance with acceptable standards of care and common sense.\textsuperscript{60}

Under this reasoning, the decision whether to take action to alleviate the drainage problem was deemed "discretionary."\textsuperscript{61} Similarly, the determination of \textit{how} to alleviate the problem was also "discretionary."\textsuperscript{62} However, "[o]nce those truly discretionary decisions were made . . . [the city] could not negligently design, construct or maintain a facility with impunity."\textsuperscript{63}

Sixteen days after \textit{Collom} was decided, the Second District again was faced with the "discretionary" function determination in \textit{Neilson v. City of Tampa}.\textsuperscript{64} In \textit{Neilson}, plaintiffs brought suit against the city, Hillsborough County, and the Department of Transportation for injuries suffered in an intersection collision. The Neilsons alleged that the three governmental entities negligently "designed, maintained and constructed the intersection and failed to conform with the State Uniform Traffic Control Ordinances and Regulations."\textsuperscript{65} The circuit court dismissed the complaint, and the Second District reversed, citing its decision in \textit{Collom}.\textsuperscript{66}

Twenty-two days after \textit{Neilson}, the Second District reaffirmed the \textit{Collom} doctrine in \textit{Mathews v. City of St. Petersburg}.\textsuperscript{67} The \textit{Mathews} plaintiff sought review of a circuit court order dismissing her wrongful death action.\textsuperscript{68} The case arose when plaintiff's daughter suffered fatal injuries from a fall into an unfenced concrete creek encasement.\textsuperscript{69} Again, the Second District reversed the lower court on the basis of the \textit{Collom} rationale: "While the city had the discretion to decide whether to alter the natural state of Booker Creek, once it decided to do so, the alterations had to be designed and performed in a reasonable manner."\textsuperscript{70}

Contrast the reasoning in these three cases with that employed by the First District in \textit{Ingham v. Department of Transporta-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 508-09.
\item Id. at 509.
\item 400 So. 2d 799 (Fla. 2d DCA 1981).
\item Id. at 800.
\item Id. It is interesting to note that both \textit{Collom} and \textit{Neilson} were unanimous decisions of the Second District made by two panels with no common members.
\item 400 So. 2d 841 (Fla. 2d DCA 1981).
\item Id.
\item Id.
\item Id. at 842 (citing \textit{Collom}).
\end{enumerate}
\end{footnotesize}
In *Ingham*, plaintiff alleged that the defendant state agency was negligent in constructing, designing, signaling, and maintaining a certain state road located in Hillsborough County. The circuit court dismissed the action against the Department, including the allegation of negligent maintenance. The First District affirmed on the basis of *Commercial Carrier* and *Ferla v. Metropolitan Dade County*, a Third District case holding that the negligent design and construction of a median strip was not a "discretionary" function but that the setting of speed limits did constitute such a function.

Had the First District followed the "policy v. execution of policy" distinction of *Collom*, it seems clear that the decision of the circuit court would have been reversed. By declining to adopt the *Collom* rationale, however, the First District set the stage for the supreme court's attempt at clarifying the doctrine of *Commercial Carrier*.

On appeal to the Florida Supreme Court, *Collom*, *Mathews*, *Neilson*, and *Ingham* were consolidated for oral argument. The decisions which the majority asserts "have clarified the application of certain legal principles set forth in *Commercial Carrier*" are summarized below.

**Collom and Mathews**

In *Collom* and *Mathews*, the Second District Court of Appeal found that the negligent design of the city's water drainage system was an "operational" function for which tort liability would lie. On appeal to the Florida Supreme Court, both decisions were consolidated for review, and the court affirmed the results reached by the Second District.

Despite affirming the results of the district court, Justice Overton, writing for a four-member majority, rejected the broad lan-

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71. 399 So. 2d 1028 (Fla. 1st DCA 1981).
72. Id. at 1029.
73. Id. Although this is unclear from the order entered by the circuit court, the allegation of negligent maintenance was dismissed along with the other allegations. This seems on its face to directly conflict with the holding in *Commercial Carrier*. See supra note 54 and accompanying text.
74. 374 So. 2d 64 (Fla. 3d DCA 1979).
75. Id. at 66-67.
76. *Collom*, 419 So. 2d at 1083.
77. *Neilson*, 419 So. 2d at 1079.
78. See supra notes 57-66 and accompanying text.
79. 419 So. 2d 1082, 1087.
guage of governmental liability enunciated by the lower court in Collom, and followed in Mathews, "because this language implies governmental liability for defects inherent in plans for improvements as approved by governmental entities." Overton based the rejection of this theory of liability directly on the concept of separation of power, finding that adoption of "the district court's reasoning would permit the judicial branch to substantially interfere with the functioning of the legislative and executive branches of government."

Rather than relying on the broad language of the district court opinions in Collom and Mathews, the supreme court based its affirmance on the principle that "when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger."

When comparison is made, the difference between the treatment of Collom and Mathews by the Second District and that afforded by the supreme court is clear. Whereas the Second District maintained that the governmental entity would be liable for a breach of the duty to "act responsibly and reasonably under the existing circumstances," the supreme court held that liability would lie only if the entity failed to warn the public of this breach, and only then if the breach was known to the governmental entity.

Neilson

In Neilson, the supreme court quashed the decision of the Second District Court of Appeal holding that the failure to adequately design or signalize a multi-street intersection was an "operational-level" function of government. Again, Justice Overton wrote for a four-member majority which held that "such activities are basic capital improvements and are judgmental, planning-level functions."

Despite once again rejecting the broad language of the Second District, Justice Overton was quick both to limit the scope of the Neilson rule and to borrow from the rationale of his opinion in

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80. Id. at 1085.
81. Id.
82. Id. at 1083 (emphasis in original).
83. 400 So. 2d at 508.
84. 419 So. 2d 1071, 1073.
85. Id. at 1077.
Collom:

This is not to say, however, that a governmental entity may not be liable for an engineering design defect not inherent in the overall plan for a project it has directed to be built, or for an inherent defect which creates a known dangerous condition. To illustrate a situation in which liability may arise in the former instance, a highway could be constructed with a bridge spanning a waterway. If the bridge supports are negligently designed and give way, causing injury, an action could be maintained because there is an engineering design defect not inherent in the overall plan approved by the governmental entity. If, however, the alleged defect is one that results from the overall plan itself, it is not actionable unless a known dangerous condition is established.86

The court provided several illustrations of inherent defects: "the construction of a two-lane highway where traffic use indicates four-laning is necessary," and "the construction of a curved road where a straight road would be more appropriate."87 It concluded that "[s]uch decisions as the location and alignment of roads, the width and number of lanes, and the placing of traffic control devices are not actionable because the defects are inherent in the overall project itself."88

The Neilson decision, like the one in Collom, was ostensibly based directly on the concept of separation of power. Quoting from the Washington Supreme Court decision in Evangelical United Brethren Church, a case earlier relied upon in Commercial Carrier, Justice Overton observed:

Liability cannot be imposed when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives.89

86. Id. at 1077-78.
87. Id. at 1078.
88. Id.
89. Id. at 1075 (quote originally taken from Peck, The Federal Tort Claims Act, 31 WASH. L. REV. 207 (1956)).
**Ingham**

Basing its decision on Neilson, the same four-member majority which decided Collom and Neilson affirmed the decision of the First District Court of Appeal in Ingham v. Department of Transportation. In a very brief opinion, the court simply held that "alleged negligence of a governmental entity in constructing a road with a curve, in determining the position, shape and size of a median, and in failing to provide adequate traffic signals" implicates "defects inherent in the overall plan of the road." Thus, under Neilson, this negligence arose at the "judgmental, planning-level" with absolute immunity attaching to these activities.

**IV. AN ANALYSIS OF THE RULES OF THE TRILOGY**

Although the determination of what constitutes actionable negligence under section 768.28 is concededly a difficult one, the court's opinions in the 1982 trilogy do little to clarify this issue. As Justice Sundberg points out in his dissent in Neilson, "the majority has simply exchanged one set of result-descriptive labels for another. Hence, the irreconcilable results among the several district courts of appeal are not harmonized, but rather the confusion is compounded. The enigma is now shrouded in mystery." Without suggesting that the individual preconceptions of the seven members of the court should, or indeed do, influence the court's decisions, it is helpful to compare the stances taken by the members of the court in the trilogy. Justice Sundberg, author of the guidepost decision in Commercial Carrier, dissents from each of the trilogy opinions. Justice Adkins, who concurred in the majority opinion in Commercial Carrier, joins Justice Sundberg in dissent. Conversely, each of the trilogy opinions is authored by Justice Overton who, joined by Justice Boyd, dissented in Commercial Carrier.

Despite the apparent inconsistency resulting when the author of the Commercial Carrier doctrine dissents from a subsequent attempt to "clarify" it, certain rules are discernible from the more

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90. 419 So. 2d 1081, 1082.
91. Id. at 1082.
92. Id.
93. 419 So. 2d at 1079 (Sundberg, J., dissenting).
94. 371 So. 2d at 1023 (Overton, J., dissenting). Chief Justice Alderman, the only remaining member of the Commercial Carrier court, originally joined Justice Sundberg in that opinion. However, in the trilogy, the two part ways, with Chief Justice Alderman joining Justice Overton's majority opinion.
recent opinions:
1. Defects which are inherent in the overall plan of a capital improvement project are not actionable under section 768.28;95
2. However, defects not inherent in the overall plan of such a project are actionable;96
3. Additionally, regardless of whether the defect is inherent in the overall plan, if it creates a danger known to the governmental entity, an actionable duty arises to warn of or protect from the danger.97

Although these rules can be simply stated, problems arise, as Justice Sundberg intimates, in both their application and justification.98

Justice Sundberg's dissatisfaction with the majority's exchange of "one set of result descriptive labels for another"99 is well-founded. The avowed intent of the court in Commercial Carrier was to avoid the pigeonholing of various functions of government into "actionable" and "non-actionable" classes.100 Despite this intent, the lower courts continued to base decisions on the class of activity engaged in rather than on the level of policy decision made.101 The majority opinion serves only to change the focus from the type of activity engaged in to the type of defect which inhered in that activity.

It is imperative to note that the Commercial Carrier doctrine applies only to certain "discretionary" governmental functions. The inquiry mandated by Commercial Carrier is, therefore, only in part whether the function is "discretionary." However, all too often, the courts base their decisions solely upon this determination without inquiring into whether the function is one of the "certain" few which merit sovereign immunity despite the waiver effected by section 768.28. As Justice Sundberg points out in his dissent in Neilson, "a finding of immunity is the exception rather than the rule."102 Further, because Commercial Carrier dealt only with certain discretionary functions, "[t]he judicial gloss supplied by [the] Court should be narrowly rather than expansively in-

95. Neilson, 419 So. 2d at 1077.
96. Id.
97. Collom, 419 So. 2d at 1083.
98. Neilson, 419 So. 2d at 1079 (Sundber, J., dissenting).
99. Id.
100. 371 So. 2d at 1021.
101. Witness the cases cited by Justice Overton to support his conclusion that the activity of placing traffic signals is "discretionary." 419 So. 2d at 1076.
102. 419 So. 2d at 1079 (Sundberg, J., dissenting) (footnote omitted).
voked." Implicit in this statement is that the "inherent in the overall plan" test is not only too vague, it is overinclusive.

In Commercial Carrier, the court adopted the analysis of Johnson v. State, a 1968 California case which sought to identify the means for isolating those "certain" discretionary functions which constitutionally require immunity from liability. As Justice Sundberg points out in Neilson:

That analysis is not a mechanistic one, but rather looks to the reasons for granting immunity to the governmental entity. It requires the Court "to find and isolate those areas of quasi-legislative policymaking which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision."

As Justice Sundberg indicates, the application of the Johnson criteria by other jurisdictions has consistently resulted in holdings that dangerous conditions created by a governmental entity in the design of a highway, whether known to the entity or not, will give rise to tort liability. In one such case, the Oregon Supreme Court noted that "[t]hese decisions involve the use of 'discretion' in the sense that a choice must be made but they do not involve the use of 'discretion' in the sense that a policy decision is required." Further, another court confronted with the problem held that "[e]ven though the decision to resurface may have involved policy, after that decision failure to safely execute the plan was an operational deficiency."

Aside from requiring that the challenged governmental act or omission be one in the nature of basic policy formulation, Justice Sundberg also advocates the requirement that the governmental entity "demonstrate that a 'considered' decision was undertaken." This requirement, borrowed from Johnson v. State

103. Id.
104. Neilson, 419 So. 2d at 1077; Ingham, 419 So. 2d at 1082; Collom, 419 So. 2d at 1085.
105. 73 Cal. Rptr. 240 (1968).
106. 371 So. 2d at 1021.
107. 419 So. 2d at 1079-80 (Sundberg, J., dissenting) (citation omitted).
110. 419 So. 2d at 1080 (Sundberg, J., dissenting) (citing Costas v. Josey, 415 A.2d 337 (N.J. 1980)).
111. Id.
and previously applied by the First District in *Bellavance v. State*, 113 mandates that the challenged decision be one which consciously balances the risks and advantages of the various alternatives. 114

As Justice Sundberg notes in his dissent, there was no showing by the city in *Neilson* of any such balancing. 116 Neilson alleged in his complaint that the condition of the subject intersection was dangerous and hazardous at the time of the accident and was known or should have been known by the governmental entities to be so. 118 Assuming for purposes of the motion to dismiss that these allegations are true, it could not be asserted seriously that the city made a “considered” decision to keep it that way. 117 Further, this assumed knowledge would impose the actionable duty to warn recognized by the court in *Collom*. 118

Although Justice Sundberg takes issue with both the analysis and the result reached by the majority, he stops short of deciding whether defective highway design without notice of the defect will give rise to liability. 119 This decision is consistent with his position in *Commercial Carrier*, 120 but, like the majority opinions, fails to clarify what should be a central issue.

An issue not raised by the dissent, but one which is perhaps more troubling than those expressly dealt with therein is the court’s treatment of the claim in *Neilson* that the governmental entities failed to comply with the design, construction, and maintenance standards established by sections 335.075 and 316.131, Florida Statutes. Those statutes provide for the adoption of uniform regulations regarding traffic signals and devices, 121 as well as minimum standards for the design, construction, and maintenance of streets, roads, highways, and bridges. 122 Justice Overton, writing for the court, dismisses the contention that the failure to comply with these standards will give rise to an “operational” failure by pointing out that these statutory provisions are directory rather

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112. 73 Cal. Rptr. at 249 n.8.
113. 390 So. 2d 422 (Fla. 1st DCA 1980), *cert. denied*, 399 So. 2d 1145 (Fla. 1981).
114. 390 So. 2d at 425.
115. 419 So. 2d at 1081 (Sundberg, J., dissenting).
116. *Id.* at 1081 n.3.
117. *Id.* at 1081.
118. *Id.*
119. *Id.* at 1081 n.4.
120. 371 So. 2d at 1022-23.
121. FLA. STAT. § 316.131 (1975).
122. FLA. STAT. § 335.075 (1975).
than mandatory.\textsuperscript{123}

Although it is true that the statute relating to road design, construction, and maintenance does not by its terms impose a duty to comply, the statute establishing standards for uniform traffic control devices provides that "[a]ll official traffic control . . . devices . . . shall conform with the manual and specifications published by the department of transportation pursuant to [this statute]."\textsuperscript{124} It seems difficult to imagine how the alleged breach of a statutorily-imposed duty\textsuperscript{125} could be a "discretionary" function. At the very least, this allegation raises a question of fact which was not suitable for determination on the motion to dismiss affirmed by the high court.

**CONCLUSION**

As the challenges mounted by Justice Sundberg in dissent indicate, the rules enunciated by the majority in the 1982 trilogy fall far short of their goal of "clarifying" the doctrine of *Commercial Carrier*. The basic difficulties with these decisions lie in two areas. First, they fail to adequately instruct the lower courts regarding which activities are actionable. The court merely added to the admittedly amorphous "planning level/operational level" distinction the equally unclear "inherent defect" standard.

Secondly, and more importantly, the court has apparently treated the exception as the rule and the rule as the exception. As the California Supreme Court said in *Johnson*, "[W]hen there is negligence, the rule is liability, immunity is the exception."\textsuperscript{126} As the legislative enactment of section 768.28 makes clear, the waiver of tort immunity was intended to be broad. The exceptions read into that statute by the Florida Supreme Court in *Commercial Carrier* should be construed, as Justice Sundberg recognizes, as narrow, limited ones.\textsuperscript{127}

The contention that the legislature intended any implicit statutory exceptions to be narrowly construed is well supported by the history of the legislative attempts to waive sovereign immunity of the state in tort. Whereas the 1969 waiver contained an explicit

\textsuperscript{123} 419 So. 2d at 1078.

\textsuperscript{124} FLA. STAT. § 316.131(3)(1975) (emphasis added).

\textsuperscript{125} Neilson specifically alleged a failure to provide adequate traffic control devices. 419 So. 2d at 1074.

\textsuperscript{126} 73 Cal. Rptr. 240, 251 (1968) (quoting Muskopf v. Corning Hosp. Dist., 11 Cal. Rptr. 89, 94 (1961)).

\textsuperscript{127} Neilson, 419 So. 2d at 1079 (Sundberg, J., dissenting).
exception for "discretionary functions," the 1973 enactment construed by the high court in Commercial Carrier contained no such explicit exception. Insofar as any statute purporting to waive sovereign immunity must be clear and unequivocal, this absence would seem to indicate that the legislature consciously intended that no such exception be applied.

Of course, it can be argued that legislative inaction since Commercial Carrier indicates an acquiescence in that holding. However, it does not represent acquiescence in any subsequent broadening of the exception enunciated in that case. Furthermore, the acceptance of the Commercial Carrier exception for "certain discretionary functions" does not confer upon the court authority to disregard the limited nature of the exception. Such a course of action not only flies in the face of well-established case law, but also arguably entails constitutionally impermissible judicial action. Certainly some form of a "discretionary function" exception is necessary in order to shield the state from liability for basic policy decisions. The question then becomes the point at which the line should be drawn between immune and actionable governmental conduct. In an effort to better balance the state's interest in protecting its basic policy decisions with the public's interest in securing an available means for redress of their injuries, the following general principles are proffered:

First, the courts should, in making this determination, presume

129. FLA. STAT. § 768.28 (1981).
131. Cf. Capella v. City of Gainesville, 377 So. 2d 658 (Fla. 1979) (when the legislature in amending a statute omits words appearing in the previous version, a presumption attaches that the legislature intended that the statute convey a different meaning).
132. See, e.g., Johnson v. State, 91 So. 2d 185 (Fla. 1956).
133. See, e.g., Spangler, supra, note 130, wherein the court stated that the required waiver of immunity "will not be reached as a product of inference or implication. . . ." Id. at 424. See also Manatee County v. Town of LongBoat Key, 365 So. 2d 143 (Fla. 1978). In LongBoat Key, decided one year prior to Commercial Carrier, the Florida Supreme Court held that the Constitution "requires specific, clear, and unambiguous language in a statute to constitute a waiver of sovereign immunity." Id. at 147.
134. FLA. CONST. art. X, § 13 provides that "[p]rovision may be made by general law for bringing suit against the state. . . ." (emphasis added). Insofar as the power to enact general law lies solely with the legislature, attempts by the judiciary to redefine the legislative intention may raise some interesting constitutional questions. For example, although the constitutional provision makes clear that the courts are not empowered to waive sovereign immunity, does the provision conversely limit the courts authority to restrict a right granted by the legislature pursuant to the provision?
that the challenged activity *does* come within the coverage of section 768.28 and, consequently, *is* actionable.\(^{135}\)

Secondly, for the activity to come within the narrow exception introduced by the court in *Commercial Carrier*, the governmental entity must convincingly demonstrate that the activity is directly related to a basic policy decision by a coordinate branch of government.\(^{136}\)

Third, failure of the governmental entity to conform with statutorily-mandated standards of conduct will result in a determination that liability lies for that failure.\(^{137}\)

Fourth, no immunity should lie for failure in the implementation of a policy-level decision.\(^{138}\)

Finally, should an activity of the government entity result in a condition which the entity knows or should know to be hazardous to the public, an actionable duty arises to warn of or protect from that danger.\(^{139}\)

In summary, the exception engrafted onto section 768.28 by the *Commercial Carrier* decision is a needed and justifiable one. However, abuse and overuse of the exception creates more problems than are rectified by its proper application. Consequently, the supreme court must strive to adopt guidelines which will insure that the "discretionary function" exception of *Commercial Carrier* is applied only in those circumstances in which the practical and constitutional concerns underlying the exception warrant such application.\(^{140}\) Such an approach necessarily prohibits the use of mechanistic rules and tests such as those advocated by the majority in the trilogy. The court must recognize that aside from providing for the separation of governmental power, the Florida Constitution also provides the people with a right of free and unfettered access.

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\(^{135}\) See, e.g., Neilson, 419 So. 2d at 1079, which states, "a finding of immunity is the exception rather than the rule".

\(^{136}\) See, e.g., 371 So. 2d at 1021.

\(^{137}\) See, e.g., Neilson, 400 So. 2d 799 (Fla. 2d DCA 1981). For a well-reasoned application of this principle, see City of Jacksonville v. DeRay, 418 So. 2d 1035 (Fla. 1st DCA 1982). In that case, the First District held that insofar as the city failed to comply with mandatory provisions of the manual on Uniform Traffic Control Devices which the city had adopted, liability would lie.

\(^{138}\) Id. See also Mathews, 400 So. 2d 841 (Fla. 2d DCA 1981); supra notes 106-108 and accompanying text.

\(^{139}\) See, e.g., Collom, 419 So. 2d at 1083.

\(^{140}\) For a similar argument made in the context of the FTCA, see Comment, *Federal Tort Claims: A Critique of the Planning Level—Operational Level Test*, 11 U.S.F.L. Rev. 170, 190-97 (1976).
to the courts.\textsuperscript{141} As the law presently stands, the court is protecting the former at the expense of the latter.

\textit{Kenneth McLaughlin}

\textsuperscript{141} \textsc{Fla. Const. art. I, § 21.}