



Sovereign Immunity

**General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
Harrisburg, Pennsylvania
May 1978**

The Joint State Government Commission was created by Act of 1937, July 1, P.L. 2460, as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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Sovereign Immunity

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**GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
JOINT STATE GOVERNMENT COMMISSION**

**ROOM 450 - CAPITOL BUILDING
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May 22, 1978

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present this report of the recommendations of the Task Force on Sovereign Immunity, under the knowledgeable leadership of Representative Norman S. Berson.

The Commission acknowledges with appreciation the contributions of the members of the task force and advisory committee composed of public officials and citizens who provided helpful information and suggestions.

Respectfully submitted,

A handwritten signature in cursive script that reads "Fred J. Shupnik".

Fred J. Shupnik
Chairman

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Introduction

The Commonwealth as sovereign has always been immune from suits by private parties claiming damages except where the General Assembly pursuant to Article I, Section 11, of the Pennsylvania Constitution has waived that bar to litigation:

Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Although the General Assembly has statutorily waived immunity for certain contract cases and equitable-type claims, sovereign immunity has never been waived for claims arising out of tortious actions.

A proposal by the General Assembly to waive sovereign immunity in personal injury cases, contained in 1969 House Bill 274, Printer's No. 314, was vetoed on July 24, 1970 (Veto No. 5) by Governor Raymond P. Shafer, who found the proposal "defective in so many respects that it would create more problems than it would solve," although he did not disagree with the "general proposition that the Commonwealth should be liable to suit in cases involving negligence of its employes."

In subsequent sessions of the General Assembly, similar legislation was introduced but not enacted: 1974 House Bill 1183, Printer's No. 2602; 1975 House Bill 688, Printer's No. 776; and 1977 House Bill 203, Printer's No. 223.

The Supreme Court expressly has suggested that the General Assembly provide for waiver of sovereign immunity. In Commonwealth v. Brown, 453 Pa. 566 (1973), the court, speaking through [then] Chief Justice Benjamin R. Jones, said:

Whether the doctrine of sovereign immunity should be modified in this Commonwealth is a legislative question. We could not base a contrary holding upon our impatience with the Legislature's failure to act as speedily and comprehensively as we believe it should (at 572).

House Resolution No. 226 of 1974 directed the Joint State Government Commission to establish a task force to "conduct a thorough review and analysis of the benefits and costs accruing from a statutory revision or abolition of the sovereign immunity defense." Pursuant to that resolution, the Task Force on Sovereign Immunity has reviewed the current status of the law with the assistance of an advisory committee composed of representatives of the judiciary; the Departments of Justice, Transportation, General Services and Insurance; trial attorneys; and the citizenry. The task force completed its work by proposing legislation making specific limited waivers. Its findings and recommendations to the General Assembly are set forth below.

The sovereign's immunity from suit existed prior to the establishment of the Commonwealth. White, in his seminal treatise, Constitution of Pennsylvania (1907) at 161, predicates the doctrine upon the rationale that:

It is self-evident that a sovereign, from the very nature of things, cannot be sued. The idea of a suit involves compulsion, and a supreme power cannot be compelled. In this sense the states, as well as the United States, are recognized to be sovereign.

Sovereigns ordinarily consent to waive their prerogative in certain cases, and permit themselves to be sued, particularly by their own subjects, who may have equitable claims against the government which ought to be adjusted. The earliest Constitution of Pennsylvania was silent on this subject, but it was provided in the Constitution of 1790 that "Suits may be brought against the commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." The same provision is retained in the Constitution of 1873, and under it the Legislature may provide for the adjudication of claims against the state. [Citations omitted. Emphasis supplied.]

The constitutional provision quoted above obviously enables the General Assembly to waive the Commonwealth's recognized immunity from suit. The doctrine of sovereign immunity, developed in England before the American

Revolution,¹ was an implicit assumption in the earliest constitutions, including the Pennsylvania Constitution of 1776 and the U.S. Constitution, though neither had an explicit provision. The exception to the doctrine--that the sovereign could waive its immunity and consent to be sued--had been exercised by the Assembly in Pennsylvania by the statute passed September 2, 1778, P.L. 146.

The question occurs whether or not the immunity that has been recognized continuously in Pennsylvania from at least 1792 to date is a common law doctrine subject to abrogation by the Supreme Court or a "constitutional" doctrine which only the General Assembly, pursuant to its indisputable constitutional enabling authority, may waive in whole or in part.

The rationale for constitutional sovereign immunity includes the obvious response that if sovereign immunity were created as common law, it could have been modified by the Legislature without the constitutional authority implanted in Article I, Section 11. A less obvious argument concerns federal constitutional history and, in particular, the adoption of the Eleventh Amendment to the U.S. Constitution, which all commentators and courts agree was to reverse the U.S. Supreme Court's holding in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). The Eleventh Amendment, purporting only to prohibit federal judicial jurisdiction over suits by a citizen of one state against another state, has been repeatedly cited as providing federal constitutional protection for sovereign immunity for states against suits by its own citizens. See generally,

1. This doctrine developed in England upon the basis that the king, as sovereign, was ascribed "not only large powers and emoluments . . . but likewise certain attributes of a great and transcendent nature." As a consequence "no suit or action can be brought against the king even in civil matters, because no court can have jurisdiction over him." However, any person with a proper claim relating to property could petition the king "in his court of chancery, where his chancellor will administer right as a matter of grace though not upon compulsion. . . . For the end of such action is not to compel . . . but to persuade." 1 W. Blackstone, Commentaries, *241-*243. Thus, the sovereign was not subject to suit in his own courts except where his consent was given.

Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One," 126 U. Pa. L. Rev. 515 (1977).

In Hans v. Louisiana, 134 U.S. 1 (1890), the U.S. Supreme Court reviewed the federal constitutional provisions--particularly Article III and the Eleventh Amendment--and noted:

The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. . . .

The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in Chisholm v. Georgia; and it has been conceded in every case since, where the question has, in any way, been presented, . . . In Briscoe v. Bank, 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court, said: "What means of enforcing payment from the state had the holder of a bill of credit? It is said by the counsel for the plaintiff that he could have sued the state. But was a state liable to be sued? . . . No sovereign state is liable to be sued without her consent. . . ." "It may be accepted as a point of departure unquestioned," said Mr. Justice Miller in Cunningham v. Railroad Co., 109 U.S. 446, 451, 3 Sup. Ct. Rep. 292, "that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on this court by the constitution."

Chief Justice Taney, delivering the opinion of the court, [in Beers v. Arkansas, 61 U.S. 527 (1857)] said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper,

waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And, as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . ." [Emphasis supplied.]

The language used by the court in Hans requires the conclusion that sovereign immunity is implicit in the fundamentals of government and while "acknowledged" by the courts, is not common law created by them so as to authorize their abrogating it.

The constitutional rationale of the Pennsylvania Supreme Court has been set forth by Justice Henry X. O'Brien in Biello v. Pa. Liquor Control Board, 454 Pa. 179, 182, 183 (1973):

The doctrine of sovereign immunity arrived in Pennsylvania in Respublica v. Sparhawk, 1 Dallas 357 (1778). That case was a suit to recover the value of flour relocated by the Pennsylvania War Board pursuant to a legislative directive to prevent British capture of supplies should they occupy Philadelphia.

The plaintiff in Sparhawk did not contend "that, generally speaking, citizens may sue the State; but only that every Government, which is not absolutely despotic, has provided some means (in England, for instance, by petition in Chancery) to obtain a redress of injuries from the sovereign," 1 Dallas at 361. . . .

Sparhawk was extended in John Black v. Rempublicam, 1 Yeates 140 (1792), a case in which Pennsylvania galley captains had seized private provisions while fleeing from the British across the Delaware River. The captains used the provisions to feed their own troops and promised the landowner compensation. The court held that since the captains had no authority to contract, there could be no recovery in contract, and, further that Sparhawk precluded recovery in tort.

Were sovereign immunity a creature of pure common law, we might be disposed to a consideration of the abrogation of that much criticized doctrine. However, Article I, Section 11 of the Pennsylvania Constitution provides, inter alia: "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." This language consistently has been interpreted to mean that no suit may be maintained against the state in tort until the legislature specifically has provided for such an action. Meagher v. Commonwealth, 439 Pa. 532, 266 A. 2d 684 (1970); Bannard v. N.Y.S. Nat. Gas Corp., 404 Pa. 269, 172 A.2d 306 (1961); Brewer v. Commonwealth, 345 Pa. 144, 27 A.2d 53 (1942); Bell Telephone Co. v. Lewis, 313 Pa. 374, 169 A. 571 (1934); Collins v. Commonwealth, 262 Pa. 572, 106 A. 229 (1919); Fitler v. Commonwealth, 31 Pa. 406 (1858). Pennsylvania is thus consistent with the majority of the states of this nation who have refused to treat similar constitutional provisions as being self-executing. The rationale seems to have been that such a constitutional provision must be strictly construed since it is in derogation of the states' inherent exemption from suit. [Emphasis supplied. Footnotes omitted.]

Pending cases were rearqued on January 18, 1978 on the issue of the authority of the Pennsylvania Supreme Court to abolish the doctrine of sovereign immunity. The decisions have not as yet been handed down.

Proposed Legislation

The recommendations of the Joint State Government Commission Task Force on Sovereign Immunity have been introduced in the House of Representatives as House Bill 2437, Printer's No. 3135, sponsored by task force members, Representatives Berson (chairman), Dorr, Caputo, Morris, Ruggiero, Brandt, Levi, Scheaffer, W. D. Hutchinson, Moehlmann and Stapleton, as well as Representatives Scirica, Yohn, Irvis, Manderino, Brunner and Spencer. This bill affects two titles of the Pennsylvania Consolidated Statutes. It adds a provision to Title 1 and amends Title 42, adding provisions of the Judicial Code as amended by the Judiciary Act Repealer Act, April 28, 1978, No. 53. The legislation--with page numbers changed to conform with the pagination of this report--is presented in full, pp. 29-40.

REAFFIRMATION OF CONSTITUTIONAL SOVEREIGN IMMUNITY AND AREAS OF WAIVER

Reaffirmation

After reviewing summaries of the status of sovereign immunity in the other states, the District of Columbia and the Federal Government, the task force and advisory committee resolved to retain sovereign immunity but allow for specific limited waivers. The legislatures of more than half of the 52 jurisdictions reviewed have either retained sovereign immunity generally, waived it only in specified cases or waived it to the extent of requiring insurance coverage for certain activities. In the remaining jurisdictions which have either waived the defense generally or waived it generally with specific exceptions, more than one-third of the legislatures have retained other limitations.

An immediate concern of the task force was the cost of a general waiver to the taxpayers of the Commonwealth stemming from the number and amounts of claims as well as the investigation, administration and defense of suits.

A questionnaire sent to each state attempted to obtain cost estimates for the use of the task force in determining whether a general waiver or limited waiver was preferable and in evaluating each area of potential waiver. The information supplied by the respondents did not make meaningful cost comparisons possible. There is no predominant method of funding either the successful claims or the administrative costs.

The policy of the task force is clearly set forth in House Bill 2437, proposed Section 2310, p. 30, to be added to Title 1 of the Pennsylvania Consolidated Statutes, to read:

Sovereign immunity reaffirmed; specific waiver.--

Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) unless otherwise specifically authorized by statute.

As will be noted, retention of sovereign immunity assures that the Commonwealth will not be required to process and defend various litigation brought against it in areas where risk management is totally uncertain at this time--e.g., radiation exposure--or strong public policy suggests that a continuation of the sovereign immunity bar to litigation be continued--e.g., claims arising out of adverse possession against the Commonwealth, improper assessment of taxes, licensing procedures, etc.

It was agreed that as the Commonwealth's experience with costs of claims and administrative expenses accumulates, limited waivers in other areas of possible liability may be added in the future.

Areas of Specific Waiver

Section 5110(a) of House Bill 2437, p. 33, added to Title 42 of the Pennsylvania Consolidated Statutes, provides the basic elements underlying liability and the areas of the Commonwealth's activity in which suit may be brought. The introductory clause to Section 5110(a) authorizes the waiver in each of the eight enumerated areas when:

- The action is against "Commonwealth agencies, and their officials and employees." "Commonwealth agency" is defined in the Judicial Code (Section 102) to mean "any executive or independent agency."²
- The action against the Commonwealth agencies and their officials and employees arises when the latter are "acting within the scope of their duties." Obviously, a tortious act performed outside the employees' duties would create liability against the individual privately, but should impose no liability upon the Commonwealth as employer nor upon the person as an employee.
- The damages arise "out of a negligent act or omission," a basis for tort liability.³
- The "damages would be recoverable under the common law or a statute creating a cause of action if caused by a person not having available the defense of sovereign immunity." The intention here is to prohibit the creation of any new causes of action and merely to remove the bar from suit where the cause of action already exists in the enumerated areas.

2. 42 Pa.C.S. § 102 further defines "executive agency" as "the Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth government, but the term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, or any independent agency"; and "independent agency" is defined as "boards, commissions, authorities and other agencies and officers of the Commonwealth government which are not subject to the policy supervision and control of the Governor, but the term does not include any court or other officer or agency of the unified judicial system or the General Assembly and its officers and agencies." The latter term would include the Pennsylvania Turnpike Commission. See Spector v. Commonwealth, 462 Pa. 474 (1975).

3. The task force specifically rejected waiving sovereign immunity for "intentional torts" such as libel, slander, false imprisonment, assault, battery. See discussion, infra, at 15.

The foregoing elements--reflecting existing law--must be present in addition to all other elements which would be applicable to any of the eight enumerated areas of waiver peculiar to that type of cause of action. For example, in a slip-and-fall case, brought under Section 5110(a)(4), p. 34, the plaintiff would have to show that the Commonwealth had notice of the dangerous condition and an opportunity to correct it as well as meet the issues of comparative negligence, assumption of risk, etc.

Keeping in mind the previous discussion of the general basis for tort liability, the task force recommends the waiver of sovereign immunity in eight specific areas of liability. Each is set forth below with a brief discussion.

(1) Vehicle Liability--"Damages caused by the operation of any motor vehicle," a term defined as "any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air." The definition chosen differs slightly from two other statutory definitions of motor vehicles: see 75 Pa.C.S. § 102, "A vehicle which is self-propelled except one which is propelled solely by human power or by electric power obtained from overhead trolley wires, but not operated upon rails"; and 1 Pa.C.S. § 1991, "Any self-propelled device in, upon or by which any person or property is or may be transported or drawn upon a public highway, except tractors, power shovels, road machinery, agricultural machinery, and vehicles which move upon or are guided by a track or trolley." At the present time the Commonwealth insures 29,000 vehicles at an estimated annual premium of \$1.7 million.⁴ For the last policy year there were approximately 2,200 claims with an estimated total cost in excess of \$1.6 million. The insurance in force limits recovery to \$300,000 per accident, and under the policy the insurer reserves the right to raise the sovereign immunity defense with the consent of the Department of General Services.

4. Pursuant to The Administrative Code of 1929, § 2404(b), as amended, July 20, 1968, P.L. 457, No. 215. In Brown v. Commonwealth, 453 Pa. 566 (1973), the Supreme Court in a 4-3 decision held that the authority to purchase liability insurance was not an implicit waiver of sovereign immunity.

(2) Medical-Professional Liability--"Damages caused by Commonwealth health care employees of medical facilities or institutions or by a doctor, dentist, nurse and related health care personnel." A statutory definition of health care providers is suggested by Section 103 of the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, No. 111. Commonwealth-employed health care providers are included within the act. See Section 701(c), as amended, July 15, 1976, P.L. 1028, No. 207. The Commonwealth is currently self-insured with the limits of \$100,000 per occurrence and \$300,000 annual aggregate as set forth in the act.

(3) Negligent Care, Custody or Control of Personal Property--This area of waiver includes such examples as negligent custody of personal property seized or confiscated by employees or the negligent use of Commonwealth-owned personalty. Specifically excepted from this waiver are claims "arising out of . . . the use of nuclear and other radioactive equipment, devices and materials." The basis for the exception is the inability to institute risk-loss management at the present time for such activities as the storage and transportation of radioactive materials used for experimental or similar purposes.

(4) Commonwealth Real Estate, Highways and Sidewalks--"Damages caused by a dangerous condition of Commonwealth real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of the Commonwealth and Commonwealth real property leased to private persons, and designated highways except as limited in paragraph (5)." As noted in the foregoing, potholes, sinkholes and other similar conditions created by natural elements are treated differently under the next area of waiver. As to real property generally, this area of waiver is intended to impose liability as it would exist if the owner or lessee were a private person. Accordingly, the lease agreement may shift the insurance responsibility from the Commonwealth as lessor to the private lessee or require a private lessor to insure against such liability when the Commonwealth is the lessee, according to the terms of the agreement.

(5) Potholes and Other Dangerous Conditions--In the case of "potholes or sinkholes or other similar [dangerous] conditions created by natural elements," it was determined not

to waive sovereign immunity for property damages (such as broken axles) and to limit damages for personal injuries (see Section 5110(a)(5), p. 34) to cases where the Commonwealth agency had "actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition."

While the foregoing may appear unduly restrictive, the task force was cognizant of the potential liability exposure arising out of the difficulty in maintaining the 45,000 miles of designated Commonwealth highways, particularly in light of weather conditions usually existing in the Commonwealth during winter and early spring. At the present time, pothole patching can be accomplished only during favorable weather conditions, even if the dangerous condition is known. The task force was aware of the problems experienced by New York City where, as reported in the New York Times,⁵ 5,000 claims had been submitted annually resulting in payments of \$61.2 million over a seven-year period ending June 30, 1976. Of this amount approximately \$17 million was for "pothole" claims. New York City does not have a "prior written notice" rule applicable to its 6,200 miles of highways.

(6) Care, Custody or Control of Animals--This provision waives immunity for damages caused by animals in the care, custody or control of Commonwealth agencies but does not waive immunity for damages caused by wild animals. However, the authority contained in The Game Law, June 3, 1937, P.L. 1225, No. 316, would continue--Section 1301, requiring purchase of deer-proof fences where necessary and Sections 1303 and 1304 authorizing payment for damage caused by bears.

(7) Dram Shop Liability--This area of waiver would make liquor store employees liable for the wrongful sale of alcoholic beverages to the same extent as private licensees. For example, under the Liquor Code, April 12, 1951, P.L. 90, No. 21, Section 493(1), a licensee may not furnish liquor "to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits." See Smith v. Clark, 411 Pa. 142 (1963), which held that violation of this provision constitutes

5. Sunday, January 29, 1978, p. 36.

negligence per se , with liability attaching if proximate cause is proven; also see Section 497 of the Liquor Code for applicable limitations.

(8) National Guard Activities--This area of waiver acknowledges present provisions of the Military Code, August 1, 1975, P.L. 233, No. 92, 51 Pa.C.S. § 4108, with which it should be read in pari materia. That section provides that

The Commonwealth of Pennsylvania shall be responsible for the payment of all judgments and costs secured against a member of the Pennsylvania Military Forces on State duty who was acting under lawful orders or who in good faith relied on an order which a reasonable person would consider to be unlawful under the circumstances.⁶

Areas of Liability not Waived

In developing the eight previously discussed areas of liability in which waiver of sovereign immunity is proposed, the task force considered other areas of potential waiver and determined to retain sovereign immunity. In evaluating the areas rejected, the task force reviewed among other materials the statutory exceptions provided in other jurisdictions.

The task force specifically rejected waiving sovereign immunity for claims arising out of:

- (1) Intentional torts such as assault and battery, false imprisonment, false arrest, malicious prosecution, abuse of privacy, libel and slander, misrepresentation, deceit, interference with contract rights, fraud and invasion of privacy.
- (2) The improper assessment of taxes.
- (3) Seizure and detention of personal property.
- (4) Product liability.
- (5) Civil rights and constitutional violations.

6. For a definition of Pennsylvania Military Forces, see 51 Pa.C.S. § 102.

- (6) Quarantine restrictions.
- (7) Adverse possession against the Commonwealth.
- (8) Negligence of private independent contractors.
- (9) Improper licensing or delay in granting of licenses, permits, etc.
- (10) Failure to inspect or improper inspection.

The task force considered at length and rejected a proposal to waive sovereign immunity for acts or omissions which could be covered under a standard "errors and omissions" insurance policy. In this connection, see 1976 Attorney General's Opinion No. 25, at 78, where the Department of General Services was advised that it could establish an employees' liability self-insurance fund pursuant to the authority of Section 2404(b) of The Administrative Code of 1929. The opinion notes, and the Department of General Services confirms, that it was unable to procure such insurance because of the potential exposure and the uncertainty of the risk management function.

The task force in rejecting a general "errors and omissions liability" at this time, noted that such a waiver would in effect result in a general waiver rather than a retention of sovereign immunity with specified limited waiver. California, which adopted the same approach, explained its rationale for listing exceptions to immunity: "This will provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability."⁷

Defenses Retained

The correlative common law "official immunity" defense has been specifically retained by the proposed legislation, 5110(b)(1), p.35. In addition, the proposed legislation expressly retains defenses developed by case law or specified by statute for employees and officials acting pursuant to a duty required by statute or regulation or acting within the bounds of discretion granted by a statute or regulation, § 5110(b)(2), (3), pp. 35-36.

7. California Law Revision Commission, Sovereign Immunity, 1963, p. 811.

The defense of "official immunity" was specifically recognized by the Pennsylvania Supreme Court in Matson v. Margiotti, 371 Pa. 188 (1952). In that case the attorney general was sued individually for acts which the court found to be within the protective scope of his office. Quoting from Spaulding v. Vilas, 161 U.S. 483 (1896), the court held:

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and actions having [a legitimate or proper] connection with the general matters committed by law to his control or supervision. . . . In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. [at 195]

When a police officer was sued, the Pennsylvania Superior Court distinguished between absolute immunity such as found in Matson for a "high" public official and conditional immunity for actions committed within a "low" public official's scope of duties. In the latter case, the court required an "intent to injure the plaintiff": Ammlung v. Pratt, 224 Pa. Superior Ct. 47 (1973).

Official immunity has been recently reviewed by the Supreme Court in Freach v. Commonwealth, 471 Pa. 558 (1977). The court held at 568 that Section 603⁸ of the Mental Health and Mental Retardation Act of 1966⁸ superseded common law official immunity to the extent that suits could be brought against officials if they "acted . . . falsely, corruptly, maliciously or without reasonable cause" or if they are charged with "gross negligence or incompetence."

Similarly, a duty required by statute, a statutorily authorized regulation or an exercise of discretion by a proper official should not result in liability of the individual or the Commonwealth as respondeat superior. To permit this result would transfer legislative (or quasi-judicial) authority to courts and juries and render each exercise of official authority subject to subsequent evaluation by a fact finder. As Judge Robert Lee Jacobs noted in Ammlung v. Pratt, supra, at 57, the purpose of the immunity rule for public officers and employees "is to prevent over-caution, inimical to the public interest, on the part of public employees charged with the exercise of their judgment."

Paragraphs (2) and (3) of Section 5110(b) incorporate into the statutory law the above two defenses. Specifically, paragraph (2) provides that the former is available when "the employee was acting pursuant to a duty required by a statute or statutorily authorized regulation." An example of this defense is the case of a Commonwealth-employed physician required to report an injury created by a firearm under 18 Pa.C.S. § 5106 or a suspected abused child under Section 4 of the Child Protective Services Law.⁹ Similar reports by medical personnel are required of "disorders and disabilities defined by the Medical Advisory Board," under 75 Pa.C.S. § 1518, an authorized regulation which could furnish a basis for the assertion of the defense.

The exercise of a discretionary function would bring into play the defense codified in Section 5110(b)(3), quasi-judicial personnel or legislatively designated fact finders as a mental health review officer: see Section 114 of the Mental Health Procedures Act, 1976, July 8, P.L. 817, No. 143.

8. October 20, Spec. Sess. No. 3, P.L. 96, No. 6.
9. November 26, 1975, P.L. 438, No. 124.

The three defenses discussed above are retained and expressly made available to the individual defendant-official or employee as well as to the Commonwealth to assert on the former's behalf to prevent recovery against an individual for acts which are done pursuant to the official's office. For a more exhaustive discussion of the various defenses available, see Local Government Commission, "Municipal Tort Law in Pennsylvania: Analysis and Recommendations," May 1977, pp. 4-18.

LIMITATIONS

Maximum Recoveries

The task force recommends that the maximum recovery for any plaintiff be \$250,000 and that the maximum liability exposure for the Commonwealth be limited to \$1 million for any single event or occurrence (or series of events or occurrences). As with other limitations contained in the statutory recommendations, the task force was aware of the Pennsylvania constitutional provision contained in Section 18, Article III, which provides in relevant part:

. . . but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.

After careful consideration of the various public policies involved, it was concluded that the foregoing provision must be read in the light of the "constitutional" prohibition of suits against the Commonwealth. Therefore, the Legislature, under its specific constitutional authority to waive the prohibition "in such manner, in such courts and in such cases," may affix any limitations it chooses to its waiver.

In addition to the constitutional authority,¹⁰ strong public policy dictates this conclusion. In the case of a suit against an individual or a corporation, recovery in most instances is effectively limited by the insurance coverage of the defendant; where the ultimate recovery exceeds insurance coverage, a further practical limitation exists to the extent of any defendant's resources. In the case of a sovereign with public taxing powers, the absence of a statutory limitation on recovery would make the liability exposure in each individual case theoretically unlimited. While it could be argued that the court's power to reduce excessive verdicts would act as a restraint, the effect of relying upon judicial oversight would be to transfer the exclusive authority over the public purse from the Legislature to the judiciary.

Other states have enacted limitations on recoveries.¹¹ Some have authorized recovery only to the extent that the sovereign had purchased insurance. As was noted, present insurance limits obtain in the Commonwealth for automobile liability and medical malpractice. The task force recommends that uniform maximums of recovery should be adopted at this time. Experience under these limits will be beneficial in future legislative consideration of limitations.

Types of Damages Recoverable

The task force determined to specifically set forth the types of damages recoverable against the Commonwealth. Only damages for loss of past, present and future income and earning capacity, pain and suffering, medical and dental expenses and loss of consortium are recoverable for personal injuries. Other possible damages such as punitive and

10. Statutory waiver in contract cases contains threshold limitation of \$300; this threshold appears to have never been challenged since the creation of the Board of Arbitration of Claims in 1937.

11. The limits vary from state to state, ranging from \$10,000 per claimant to \$300,000 for injury or death of one person and \$5 million for injury and death in the aggregate. Another group of states has waived sovereign immunity in areas in which the state has purchased insurance; the majority of these states explicitly provide that liability is limited to the amount of coverage involved. Some of these states limit the amount of insurance coverage purchased, either specifying minimum amounts which must be purchased or maximum limitations up to which the state may insure, although the amounts may differ depending on the type of injury.

awards of attorneys' fees were specifically rejected. In the case of property losses, all property losses are recoverable except those incurred under conditions described in Section 5110(a)(5), pp. 34-35, relating to potholes, sinkholes and other dangerous conditions caused by natural elements. As explained, *supra*, pp. 13-14, it was determined that in this instance, the funds necessary to reimburse for property damage would be better spent in highway repair work.

Nothing in this enumeration of recoverable damages was intended to exclude the assessment of costs against the Commonwealth in a proper case nor to prevent recovery of a defendant's attorneys' fees in certain specified cases, see Section 5110(c), p. 36

PROCEDURES

Original Jurisdiction

After considering the alternatives of providing for original trial jurisdiction in an administrative or quasi-judicial administrative agency or in the Commonwealth Court under existing statutory jurisdictional provisions,¹² the task force chose to place original jurisdiction in the courts of common pleas. In addition to the specific authority of Article I, Section 11, the task force was aware of its exclusive prerogatives over court jurisdiction contained in Article V, Section 10(c), of the Pennsylvania Constitution.¹³

This grant of jurisdiction was intended neither to remove original jurisdiction from the Commonwealth Court for suits brought against Commonwealth agencies, officials or employees for causes of action other than tort nor to affect the jurisdiction of the Board of Arbitration of Claims over contract cases.

12. The latter was the result reached by the Supreme Court in Freach v. Commonwealth, 471 Pa. 558 (1977).

13. Also see Pa. Const. Sch. §§ 4, 16 and 17.

Venue

The proposed legislation would establish venue for actions against the Commonwealth, its officials and employees in any of the following counties: (1) where the principal office of the involved Commonwealth agency is located; (2) where the local office of the involved Commonwealth agency is located; or (3) where the cause of action arose. See Section 931(c), p. 32.

The venue proposed is similar to that provided for trespass actions under Pa.R.C.P. No. 1042 (incorporating by reference the venue provisions for assumpsit actions under Pa.R.C.P. No. 1006), except that the statutory venue provision clarifies the relevant situs for agencies to include both the principal and local office of the involved Commonwealth agency. The relevant rule defining corporate offices provides that they are located in "the county where its registered office or principal place of business is located; or a county where it regularly conducts business."¹⁴

However, if suit is brought in Dauphin County only because the principal office of the involved Commonwealth agency is located there, the court is afforded the option to remove the suit to any other appropriate judicial district.

The proposed venue provision affords a great deal of discretion to plaintiffs to determine where suit will be filed. Under these provisions, no resident of the Commonwealth should be required to initiate suit against the Commonwealth in a distant, inconvenient county. Nevertheless, it was the intent that the courts retain their traditional judicial discretion in such matters, under the doctrine of forum nonconveniens. See Pa.R.C.P. No. 1006(d).

Again, these venue limitations, normally within the purview of the Supreme Court's rulemaking powers under Article V, Section 10(c), are specifically authorized pursuant to Article I, Section 11, insofar as it provides that for legislative determination of the "manner" and "court" in which such suits are brought. Accordingly, Article I, Section 11, constitutes a specific constitutional exception to the general authority of Article V, Section 10(c), vesting

14. Pa.R.C.P. No. 2179(a). Other rules further define venue for various business entities; see Pa.R.C.P. No. 1006(b) for pertinent references.

in the Supreme Court the power to establish "general rules governing practice"; the latter power being specifically limited to the promulgation of such rules as "are consistent with this Constitution."

Service of process under the suggested legislation would be required to be made at either the principal or local office of the involved Commonwealth agency and the office of the attorney general. This dual service is consistent with the rationale for the requirement that notice be given to the attorney general in addition to the Commonwealth agency involved. See Section 5522(a), pp. 37-38.

The power granted to the attorney general to promulgate reasonable regulations pursuant to this act is particularly important in this context. Such regulations could define the situs of "a local office," thereby preventing plaintiffs from attempting to effectuate service of process upon local installations such as a highway shed or repair station.

Counterclaim

Under the proposed legislation any individual who brings suit against the Commonwealth will be subject to such claims as the Commonwealth shall have against him. This is consistent with present practice,¹⁵ and the policy that once two parties are before a court that body should adjudicate all claims between the parties in one proceeding.¹⁶

Appeal to Commonwealth Court

Appeals from the decisions of the courts of common pleas under the proposed legislation will be taken initially to Commonwealth Court and then to the Supreme Court, consistent with other appeals. The Commonwealth Court was chosen as the forum for appeals to assure utilization of that court's expertise concerning governmental matters.

Notice of Claims

Consistent with the present provisions of 42 Pa.C.S. § 5522, potential plaintiffs will be required to notify

15. Pa.R.C.P. No. 1031.

16. Also see § 1004 of The Fiscal Code, supra.

Commonwealth agencies within six months of the time any injury is sustained or cause of action has accrued. The current law is amended to require that notice be given to the attorney general in addition to the Commonwealth agency involved. In this manner the litigating office of the Commonwealth government as well as the affected Commonwealth agency will be assured timely notification of pending action.

Previously this provision required notification for claims concerning personal injuries only. However, the proposed legislation will expand the required notification to include all claims against government units as defined under 42 Pa.C.S. § 102, thereby affecting local government units. The task force decided it inadvisable to bifurcate the section, since that would create unnecessary confusion in the law. Notification to the attorney general is not required for suits concerning local government units.

Five states require that a claim or notice of the claim be filed within a shortened period of time compared with the general statutes of limitation.¹⁷

States with Special Notice Requirements
for Tort Claims

State	Notice due after cause of action	With whom filed
California	100 days	State Board of Control
Colorado	90 days	Attorney General
Idaho	120 days	Secretary of State
Indiana	180 days	Attorney General
South Carolina	3 months	Governmental entity

17. Similar provisions in Michigan and Nevada have been declared by state courts to be violative of the equal protection clause of both the state and federal constitutions: In Reich v. State Highway Department, 386 Mich. 617, 194 N.W. 2d 700 (1972) (sixty-day requirement), and Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973), cert. den. 414 U.S. 1079 (1974) (six-month requirement).

ADMINISTRATION

Legal Assistance

Commonwealth officials and employees who are sued are, under specified circumstances, to be afforded legal assistance by the attorney general under Section 5110(c), p. 36. The attorney general is authorized under Section 3 of the bill, p. 38, to define "the basis for undertaking and continuing the legal defense of claims."

Other Duties of Attorney General

Section 3, pp. 38-39, of the proposed legislation grants to the attorney general certain powers and imposes duties concerning the administration of the act. The attorney general is required to report to the Speaker of the House of Representatives and the President pro tempore of the Senate concerning the disposition and administration of claims against the Commonwealth.

The attorney general is granted the authority to promulgate reasonable rules and regulations not inconsistent with the proposed act on such matters as the procedures for settlement of claims, the designation of local and principal offices for Commonwealth agencies, the basis for undertaking and continuing the legal defense of claims and procedures for the payment of judgments. Before any regulations adopted pursuant to this act become effective, the requirements of the Commonwealth Documents Law¹⁸ must be complied with and 30 days must expire.

Repeals

Section 4 of this bill repeals all acts and parts of acts which could be construed to waive sovereign immunity inconsistent with the act. In the case of the provisions of Section 603 of the Mental Health and Mental Retardation Act of 1966, construed in Freach v. Commonwealth, supra, to provide a limited waiver of "official immunity," the inclusion of Section 5110(a)(2), p. 34, would waive sovereign immunity for negligent acts while retaining the official's immunity defense if the court found his acts either to be within the scope of his duties, required by statute or authorized regulation or within his statutorily authorized discretion.

18. 45 Pa.C.S. §§ 501, et seq.

The intent is to consolidate all waivers of sovereign immunity in Section 5110(a), pp. 33-35, except for the three instances of explicit or implied waivers authorizing claims to be heard by the "judicial" Board of Claims, the Board of Arbitration of Claims and the "Property Board" established under existing law.

Effective Date

The effective date of the proposed legislation is delayed until July 1, 1979. The delay was decided upon in order to permit the Commonwealth sufficient time to prepare for administration of the act. In particular, this delay will give the executive department time to budget for its fiscal impact. This approach is similar to that taken by the Missouri Supreme Court in Jones v. State Highway Commission, 557 S.W.2d 225 (1977), where the effect of a decision abrogating sovereign immunity was postponed for about one year. Also see recommendations of the California Law Revision Commission, Sovereign Immunity (1963).

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2437

Session of 1978

INTRODUCED BY MESSRS. BERSON, DORR, CAPUTO, MORRIS, RUGGIERO, BRANDT, LEVI, SCHEAFFER, W. D. HUTCHINSON, MOEHLMANN, STAPLETON, SCIRICA, YOHN, IRVIS, MANDERINO, BRUNNER AND SPENCER, APRIL 19, 1978

REFERRED TO COMMITTEE ON JUDICIARY, APRIL 19, 1978

AN ACT

1 Amending Titles 1 (General Provisions) and 42 (Judiciary and
2 Judicial Procedure) of the Pennsylvania Consolidated
3 Statutes, reaffirming sovereign immunity as provided in
4 section 11 of Article I of the Constitution of Pennsylvania,
5 preserving sovereign immunity as a bar to claims brought
6 against Commonwealth agencies and their officials and
7 employees; specifically waiving sovereign immunity as
8 provided by the Constitution in certain limited cases;
9 granting jurisdiction to certain courts over claims brought
10 against Commonwealth agencies; providing for limitations upon
11 and the procedures relating to said claims; authorizing rules
12 and regulations; and repealing certain laws.

13 The General Assembly of the Commonwealth of Pennsylvania
14 hereby enacts as follows:

15 Section 1. Title 1, act of November 25, 1970 (P.L.707,
16 No.230), known as the Pennsylvania Consolidated Statutes, is
17 amended by adding a part to read:

18 PART VI

19 IMPLEMENTATION OF CONSTITUTIONAL PROVISIONS

20 Chapter

21 23. Implementation of Constitutional Provisions

22 CHAPTER 23

23 IMPLEMENTATION OF CONSTITUTIONAL PROVISIONS

1 Sec.

2 2310. Sovereign immunity reaffirmed; specific waiver.

3 § 2310. Sovereign immunity reaffirmed; specific waiver.

4 Pursuant to section 11 of Article I of the Constitution of
5 Pennsylvania, it is hereby declared to be the intent of the
6 General Assembly that the Commonwealth, and its officials and
7 employees acting within the scope of their duties, shall
8 continue to enjoy sovereign and official immunity and remain
9 immune from suit except as the General Assembly shall
10 specifically waive the immunity. When the General Assembly
11 specifically waives sovereign immunity, a claim against the
12 Commonwealth and its officials and employees shall be brought
13 only in such manner and in such courts and in such cases as
14 directed by the provisions of Title 42 (relating to judiciary
15 and judicial procedure) unless otherwise specifically authorized
16 by statute.

17 Section 2. Sections 761(a) and (c), 762(a) (1), 931(a) and
18 (c), 5101(b), 5110, 5111 and 5522(a) of Title 42 are amended or
19 added to read:

20 § 761. Original jurisdiction.

21 (a) General rule.--The Commonwealth Court shall have
22 original jurisdiction of all civil actions or proceedings:

23 (1) Against the Commonwealth government, including any
24 officer thereof, acting in his official capacity, except:

25 (i) actions or proceedings in the nature of
26 applications for a writ of habeas corpus or
27 post-conviction relief not ancillary to proceedings
28 within the appellate jurisdiction of the court; [and]

29 (ii) eminent domain proceedings; and

30 (iii) actions on claims in which sovereign immunity

1 has been waived pursuant to section 5110 (relating to
2 limited waiver of sovereign immunity) and pursuant to the
3 act of May 20, 1937 (P.L.728, No.193), referred to as the
4 Board of Arbitration of Claims Act.

5 (2) By the Commonwealth government, including any
6 officer thereof, acting in his official capacity, except
7 eminent domain proceedings.

8 (3) Original jurisdiction of which is vested in the
9 Commonwealth Court by any statute hereafter enacted.

10 * * *

11 (c) No waiver of sovereign immunity.--The provisions of
12 subsection (a) (1) relating to actions or proceedings against the
13 Commonwealth shall not be construed as a waiver by the
14 Commonwealth of immunity to suit except as specifically waived
15 pursuant to section 5110 (relating to limited waiver of
16 sovereign immunity) or pursuant to the act of May 20, 1937
17 (P.L.728, No.193), referred to as the Board of Arbitration of
18 Claims Act.

19 * * *

20 § 762. Appeals from courts of common pleas.

21 (a) General rule.--Except as provided in subsection (b), the
22 Commonwealth Court shall have exclusive jurisdiction of appeals
23 from final orders of the courts of common pleas in any of the
24 following cases:

25 (1) Commonwealth civil cases.--All civil actions or
26 proceedings to which the Commonwealth or any officer or
27 employee thereof, acting in his official capacity or within
28 the scope of his duties, is a party, including actions or
29 claims in which sovereign immunity has been waived pursuant
30 to section 5110 (relating to limited waiver of sovereign

1 immunity, except actions or proceedings in the nature of
2 applications for a writ of habeas corpus or post-conviction
3 relief not ancillary to proceedings within the appellate
4 jurisdiction of the court.

5 * * *

6 § 931. Original jurisdiction and venue.

7 (a) General rule.--Except where exclusive original
8 jurisdiction of an action or proceeding is by statute or by
9 general rule adopted pursuant to section 503 (relating to
10 reassignment of matters) vested in another court of this
11 Commonwealth, the courts of common pleas shall have unlimited
12 original jurisdiction of all actions and proceedings, including
13 all actions and proceedings heretofore cognizable by law or
14 usage in the courts of common pleas and actions pursuant to
15 section 5110 (relating to limited waiver of sovereign immunity).

16 * * *

17 (c) Venue [and process.--The] .--Except for the manner in
18 which actions against a Commonwealth agency, its officials and
19 employees may be brought, the venue of a court of common pleas
20 concerning matters over which jurisdiction is conferred by this
21 section shall be as prescribed by general rule. Actions for
22 claims against a Commonwealth agency, its officials and
23 employees, may be brought in and only in a county in which the
24 principal or local office of the Commonwealth agency is located
25 or in which the cause of action arose or where the transaction
26 or occurrence took place out of which the cause of action arose.
27 If venue is obtained in the Twelfth Judicial District (Dauphin
28 County) solely because the principal office of the Commonwealth
29 agency is located within it, any judge of the Court of Common
30 Pleas of the Twelfth Judicial District (Dauphin County) shall

1 have the power to remove the action to any appropriate court
2 where venue would otherwise lie.

3 (d) Process.--Service of process in the case of an action
4 against the Commonwealth shall be made at the principal or local
5 office of the Commonwealth agency that is being sued and at the
6 office of the Attorney General. The process of the court shall
7 extend beyond the territorial limits of the judicial district to
8 the extent prescribed by general rule. Except as otherwise
9 prescribed by general rule, in a proceeding to enforce an order
10 of a government agency the process of the court shall extend
11 throughout this Commonwealth.

12 § 5101. Remedy to exist for legal injury.

13 * * *

14 (b) No waiver of sovereign immunity.--The provisions of
15 subsection (a) shall not be construed as a waiver by the
16 Commonwealth of immunity to suit except for actions pursuant to
17 section 5110 (relating to limited waiver of sovereign immunity).
18 § 5110. Limited waiver of sovereign immunity.

19 (a) General rule.--The General Assembly, pursuant to section
20 11 of Article I of the Constitution of Pennsylvania, does hereby
21 wave, in the following instances only and only to the extent
22 set forth in this section and within the limits set forth in
23 section 5111 (relating to limited waiver of sovereign immunity),
24 sovereign immunity as a bar to an action against Commonwealth
25 agencies, and their officials and employees acting within the
26 scope of their duties, for damages arising out of a negligent
27 act or omission where the damages would be recoverable under the
28 common law or a statute creating a cause of action if caused by
29 a person not having available the defense of sovereign immunity.
30 An action shall not be barred and the defense of sovereign

1 immunity shall not be raised to claims for:

2 (1) Vehicle liability.--Damages caused by the operation
3 of any motor vehicle. As used in this paragraph "motor
4 vehicle" means any vehicle which is self-propelled and any
5 attachment thereto, including vehicles operated by rail,
6 through water or in the air.

7 (2) Medical-professional liability.--Damages caused by
8 Commonwealth health care employees of medical facilities or
9 institutions or by a doctor, dentist, nurse and related
10 health care personnel.

11 (3) Care, custody or control of personal
12 property.--Damages caused by the care, custody or control of
13 personal property in the possession of Commonwealth agencies,
14 including Commonwealth-owned property and property of persons
15 held by the Commonwealth, except that the sovereign immunity
16 of the Commonwealth is retained as a bar to actions on claims
17 arising out of Commonwealth activities involving the use of
18 nuclear and other radioactive equipment, devices and
19 materials.

20 (4) Commonwealth real estate, highways and
21 sidewalks.--Damages caused by a dangerous condition of
22 Commonwealth real estate and sidewalks, including
23 Commonwealth-owned real property, leaseholds in the
24 possession of the Commonwealth and Commonwealth real property
25 leased to private persons, and designated highways except as
26 limited in paragraph (5).

27 (5) Potholes and other dangerous conditions.--Damages,
28 other than property damages, caused by a dangerous condition
29 of designated Commonwealth highways created by potholes or
30 sinkholes or other similar conditions created by natural

1 elements, except that the claimant to recover must establish
2 that the dangerous condition created a reasonably foreseeable
3 risk of the kind of damage which was incurred and that the
4 Commonwealth agency had actual written notice of the
5 dangerous condition of the highway a sufficient time prior to
6 the event to have taken measures to protect against the
7 dangerous condition.

8 (6) Care, custody or control of animals.--Damages caused
9 by animals in the care, custody or control of Commonwealth
10 agencies, including but not limited to police dogs and horses
11 and animals incarcerated in Commonwealth laboratories, but
12 shall not include damages caused by wild animals including
13 but not limited to bears and deer except as otherwise
14 provided by statute.

15 (7) Dram shop liability.--Damages caused by the sale of
16 alcoholic beverages by a Commonwealth employee.

17 (8) National Guard activities.--Damages caused by a
18 member of the Pennsylvania military forces.

19 (b) Certain defenses retained.--The following existing
20 common law defenses are retained:

21 (1) An official of the Commonwealth agency or a member
22 of the General Assembly or the judiciary may assert on his
23 own behalf, or the Commonwealth may assert on his behalf,
24 defenses which have heretofore been available to such
25 officials.

26 (2) An employee of a Commonwealth agency, a member of
27 the General Assembly or the judiciary may assert on his own
28 behalf, or the Commonwealth may assert on his behalf, the
29 defense that the employee was acting pursuant to a duty
30 required by a statute or statutorily authorized regulation.

1 (3) An official or employee of a Commonwealth agency, a
2 member of the General Assembly or the judiciary, may assert
3 on his own behalf or the Commonwealth may assert on his
4 behalf, the defense that the act or omission was within the
5 discretion granted to the official or employee by statute or
6 statutorily authorized regulation.

7 (c) Legal assistance.--When an action is brought pursuant to
8 this section against an official or employee of a Commonwealth
9 agency or any other Commonwealth government employee, and it is
10 alleged that the act or omission occurred within the scope of
11 his employment, the Commonwealth through the Attorney General
12 shall defend the suit, unless the Attorney General determines
13 that the act or omission did not occur within the scope of
14 employment. In the latter case, if it is subsequently determined
15 that the act or omission occurred within the scope of
16 employment, the Commonwealth shall reimburse the official or
17 employee for the cost of his legal defense in such amounts as
18 shall be determined to be reasonable by the court. If a
19 Commonwealth government employee is sued and it is alleged that
20 the act or omission occurred outside the scope of his
21 employment, and he successfully defends the suit on the basis
22 that the act or omission was within the scope of his employment,
23 and he has given prior notice to the Attorney General and the
24 Attorney General has refused to defend the action, he shall
25 likewise be entitled to the reasonable costs of the defense.

26 (d) Counterclaim and set-off by the Commonwealth.--In any
27 action initiated under this section, the Commonwealth may set
28 forth any cause of action or set-off which it has against the
29 plaintiff. A counterclaim need not diminish or defeat the relief
30 demanding by the plaintiff. It may demand relief exceeding in

1 amount or different in kind from that demanded by the plaintiff.
2 § 5111. Limitations on damages.

3 (a) Amount recoverable.--No verdict or verdicts against the
4 Commonwealth on actions brought pursuant to section 5110
5 (relating to limited waiver of sovereign immunity) arising from
6 the same cause of action or transaction or occurrence or series
7 of causes of action or transactions or occurrences shall exceed
8 \$250,000 in favor of any plaintiff or \$1,000,000 in the
9 aggregate.

10 (b) Types of damages recoverable.--Damages shall be
11 recoverable only for:

12 (1) Loss of past, present and future income and earning
13 capacity.

14 (2) Pain and suffering.

15 (3) Medical and dental expenses including the reasonable
16 value of reasonable and necessary medical and dental
17 services, prosthetic devices and necessary ambulance,
18 hospital, professional nursing, and physical therapy expenses
19 accrued and anticipated in the diagnosis, care and recovery
20 of the claimant.

21 (4) Loss of consortium.

22 (5) Property losses, except property losses shall not be
23 recoverable in claims brought pursuant to section 5110(a)(5).

24 § 5522. Six months limitation.

25 (a) Notice prerequisite to action against government
26 unit.--Within six months from the date that any injury was
27 sustained or any cause of action accrued, any person who is
28 about to commence any civil action or proceeding within this
29 Commonwealth or elsewhere against a government unit for damages
30 on account of any injury to his person or property shall file in

1 the office of the government unit, and if the action is against
2 a Commonwealth agency for damages then also file in the office
3 of the Attorney General, a statement in writing, signed by or in
4 his behalf, setting forth:

5 (1) The name of the person to whom the cause of action
6 has accrued.

7 (2) The name and residence of the person injured.

8 (3) The date and hour of the accident.

9 (4) The approximate location where the accident
10 occurred.

11 (5) The name and address of any attending physician.

12 If the statement provided for by this subsection is not filed,
13 any civil action or proceeding commenced against the government
14 unit more than six months after the date of injury shall be
15 dismissed and the person to whom any such cause of action
16 accrued for any personal injury shall be forever barred from
17 proceeding further thereon within this Commonwealth or
18 elsewhere. The court shall excuse compliance with this
19 requirement upon a showing of reasonable excuse for failure to
20 file such statement.

21 * * *

22 Section 3. Powers and duties of Attorney General.

23 (a) Reports to General Assembly.--The Attorney General shall
24 report on April 1, 1980 and annually thereafter to the General
25 Assembly through the Speaker of the House of Representatives and
26 the President pro tempore of the Senate, the number and types of
27 claims instituted against the Commonwealth, their disposition or
28 status, including settlements agreed or verdicts entered, and
29 such other information as the Attorney General shall deem
30 appropriate.

1 (b) Rules and regulations.--The Attorney General shall
2 promulgate rules and regulations not inconsistent with this act
3 in order to implement the intent of the act. The subject of the
4 rules and regulations may include the procedures for settlement
5 of claims prior to or after the institution of suit, the
6 designation of local and principal offices for Commonwealth
7 agencies, the basis for undertaking and continuing legal defense
8 of claims, and the procedures for payment of claims and
9 satisfaction of judgments. The rules and regulations, and
10 amendments thereto, promulgated pursuant to this section shall
11 not take effect until the requirements of the "Commonwealth
12 Documents Law" have been complied with and 30 days have expired
13 after transmission of the rules and regulations to the General
14 Assembly through the Speaker of the House of Representatives and
15 the President pro tempore of the Senate.

16 Section 4. Repeals.

17 (a) The provisions of the following acts, and all other acts
18 and parts of acts, are repealed insofar as they waive or purport
19 to waive sovereign immunity inconsistent with this act, but are
20 saved from repeal insofar as they provide defenses or immunities
21 from suit:

22 Section 11, act of March 19, 1951 (P.L.28, No.4), known as
23 the "State Council of Civil Defense Act of 1951."

24 Section 5.2, act of October 27, 1955 (P.L.744, No.222), known
25 as the "Pennsylvania Human Relations Act."

26 Section 603, act of October 20, 1966 (3rd Sp.Sess., P.L.96,
27 No.6), known as the "Mental Health and Mental Retardation Act of
28 1966."

29 Section 1001, act of October 15, 1975 (P.L.390, No.111),
30 known as the "Health Care Services Malpractice Act."

1 Section 11, act of November 26, 1975 (P.L.438, No.124), known
2 as the "Child Protective Services Law."

3 Section 114, act of July 9, 1976 (P.L.817, No.143), known as
4 the "Mental Health Procedures Act."

5 (b) Except as provided in subsection (a), all other acts and
6 parts of acts are repealed insofar as they are inconsistent with
7 this act.

8 (c) Nothing in this section shall repeal the waiver of
9 sovereign immunity in:

10 Section 1207, act of April 9, 1929 (P.L.177, No.175), known
11 as "The Administrative Code of 1929."

12 Sections 405, 1003 and 1004, act of April 9, 1929 (P.L.343,
13 No.176), known as "The Fiscal Code."

14 Act of May 20, 1937 (P.L.728, No.193), referred to as the
15 Board of Arbitration of Claims Act.

16 Section 5. Effective date.

17 This act shall take effect on July 1, 1979 and shall apply
18 only to causes of action occurring on or after that date.