Note

A Separation of Powers Analysis of the Absolute Immunity of Public Entities

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In 1984, the Arizona Legislature enacted title 12, chapter 7, article 2 of the Arizona Revised Statutes, regulating tort actions against public entities and public officials in the State of Arizona.[1] The legislation provides for absolute immunity,[2] qualified immunity,[3] and affirmative defenses[4] in favor of public entities and public employees. The level of immunity or affirmative defense available to a public employee in a particular action depends upon the nature of the activity giving rise to the potential liability.

Section 12-820.01 of the legislation provides absolute immunity to a public entity for 1) acts and omissions of its employees constituting the exercise of a judicial or legislative function; and 2) the exercise of an adminstrative function involving the determination of fundamental governmental policy.[5] The courts should narrowly construe the immunity granted by the statute; the immunity should not extend any further than required by the separation-of-powers doctrine found in article III of the Arizona Constitu-

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1. Act of April 25, 1984, ch. 285, 1984 Ariz Sess. Laws 1091 (codified at ARIZ. REV. STAT. ANN. §§12-820 to -823 (Supp. 1985)) [hereinafter Session Laws].

2. ARIZ. REV. STAT. ANN. § 12-820.01 (Supp. 1985). *Absolute Immunity*

"A. A public entity shall not be liable for acts and omissions of its employees constituting:

1. The exercise of a judicial or legislative function; or

2. The exercise of an administrative function involving the determination of fundamental governmental policy.

B. The determination of a fundamental governmental policy involves the exercise of discretion and shall include, but is not limited to:

1. A determination of whether to seek or whether to provide the resources necessary for:

(a) The purchase of equipment,

(b) The constuction or maintenance of facilities,

(c) The hiring of personnel, or

(d) The provision of governmental services.

2. A determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel.

3. The licensing and regulation of any profession or occupation.

3. ARIZ. REV. STAT. ANN. § 12-820.02 (Supp. 1985).

4. *Id.* § 12-820.03 (Supp. 1985).

5. *See supra* note 2.

tion. This Note will examine the case law construing similar grants of absolute immunity and will suggest an analysis of section 12-820.01 based on the separation-of-powers doctrine.

THE LEGISLATIVE HISTORY OF SECTION 12-820.01

In 1982, the Arizona Supreme Court decided the landmark case of *Ryan v. State*.[6] In *Ryan*, the court clearly abolished the vestiges of governmental immunity that remained in Arizona under prior case law.[7] In doing so, the court reaffirmed the policy that liability is the rule and immunity is the exception in an action against the government involving tortious conduct.[8] The *Ryan* court invited the legislature to assist in the development of the law in this field.[9]

The Arizona Legislature responded to the court's invitation with Senate Bill 1391, introduced on March 2, 1983.[10] Senate Bill 1391, modeled after the New Jersey "Tort Claims Act,"[11] provided for a comprehensive treatment of both public-entity liability and public-employee liability.[12] Because Senate Bill 1391 did not pass in the House of Representatives, at the close of the 1983 legislative session Governor Bruce Babbitt appointed a Commission on Governmental Tort Liability to study the issue.[13]

The Commission drafted and adopted the proposed "Arizona Govern-

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6. 134 Ariz. 308, 656 P.2d 597 (1982). *See* Note, *Governmental Tort Immunity Revisited*: Ryan v. State, 25 ARIZ. L. REV. 1081 (1983).

7. Arizona abolished sovereign immunity in Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963). Six years later, however, the Arizona Supreme Court limited the scope of governmental liability by constructing a public duty — private duty dichotomy so that an individual injured by a public employee's performance (or nonperformance) of a "public duty" had no judicial recourse. Massengill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969).

In *Ryan*, all vestiges of sovereign immunity were clearly abolished in the following terms:

> We shall no longer engage in the speculative exercise of determining whether the tortfeasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery. . . . Thus, the parameters of duty owed by the state will ordinarily be coextensive with those owed by others.

134 Ariz. at 310, 656 P.2d at 599.

8. 134 Ariz. at 310, 656 P.2d at 599.

9. *Id.*

10. S. 1391, 36th Leg., 1st Sess. (1983). [Hereinafter Senate Bill 1391.]

11. Minutes of the Committee on the Judiciary, Arizona State Senate, 36th Leg., 1st Sess., at 3 (March 8, 1983). The text of the New Jersey "Tort Claims Act" is found at NEW JERSY STAT. ANN. §§ 59:1-1 to :12-3 (1972).

12. The bill would have repealed or amended various statutory grants of public-employee immunity to allow a comprehensive treatment of both public-employee and public-entity liability under the Act. The sections subject to repeal or amendment included: ARIZ. REV. STAT. ANN. §§ 6-130 (state banking department); 9-255 (town council members); 11-266 (county board of supervisors); 15-202 (members of state board of education); 15-1621 (members of board of regents); 26-314 (immunity in connection with emergency response plan); 32-110 (members, agents, employees and advisors of board of technical registration); 32-802 (board of podiatry examiners); 32-1207 (dental board); 32-1402 (board of medical examiners); 32-1403 (employees and investigators in connection with activities of board of medical examiners); 32-1502 (naturopathic physicians' board of examiners); 32-1802 (board of osteopathic examiners); 32-2505 (personnel, consultants or agents of joint board on the regulation of physician's assistants); 36-2030 (any person in connection with approved alcoholic treatment facility); 41-621 (discretionary immunity of all state officers, agents and employees); 45-108 (director of department of water resources); and 46-452 (certain acts of adult protective services worker).

Since this bill eventually was defeated, these statutory grants of immunity remain intact.

13. *Report of the Governor's Commission on Governmental Tort Liability* (submitted to the Governor on December 16, 1983) [hereinafter *Commission Report*].

mental Tort Claims Act," and made its final report on December 16, 1983.[14] The proposed act dealt exclusively with public-entity liability[15] and combined elements of the former Senate Bill 1391[16] with elements of the *Restatement (Second) of Torts.*[17]

The House of Representatives' Committee on Governmental Operations introduced an amended version of the proposed act as Senate Bill 1225 which was approved by the full House.[18] The House version of Senate Bill 1225 passed by a unanimous vote in the Senate[19] and the Governor approved it on April 25, 1984 under the heading "Actions Against Public Entities or Public Employees" (the Act).[20]

THE IMMUNITY OF SECTION 12-820.01 AS AN EXCEPTION TO THE GENERAL RULE OF GOVERNMENTAL LIABILITY

The preamble to the Act set forth the legislative purpose and the intent. The format of the statement of intent closely followed those found in tort claims acts adopted in other states.[21] The essence of the expressed intent is, however, very different from other tort claims acts.

The Arizona Legislature clearly stated that public entities are liable for the acts and omissions of their employees "in accordance with the statutes and common law of this state."[22] The legislature implicitly rejected language from other tort claims acts providing that public entities are liable only within the limitations, and in accordance with the provisions, of the

14. *Id.*

15. Section 12-0820.01 of the proposed act provided: "This act shall not be construed to affect, alter or otherwise modify rules of tort immunity regarding public officers as developed at common law and as established under the statutes and the Constitution of the state of Arizona." Commission Report, *supra* note 13, at 20. The proposed act also deleted the section of the former Senate Bill 1391 which would have repealed various statutory grants of public-employee immunity found elsewhere. *See supra* note 12.

16. Much of the language of various sections of Senate Bill 1391 was amended for use in the proposed act. For instance, the examples given for administrative activities which should be provided absolute immunity in the proposed act were taken largely from § 12-820.06(A)(3) and (4); § 12-820.07; and § 12-820.11 of Senate Bill 1391.

17. *Commission Report, supra* note 13, at 12.

18. S. 1225, 36th Leg., 2d Sess. (1984). [Hereinafter Senate Bill 1225.] Senate Bill 1225 was originally a reintroduction of the former Senate Bill 1391. The House of Representatives Committee on Government Operations then struck everything after the enacting clause of the reintroduced bill and inserted an amended version of the act proposed by the Governor's Commission on Governmental Tort Liability. *Report of the Committee on Government Operations*, 36th Leg., 2d Sess., at 1 (March 28, 1984).

19. Roll Call record of the Arizona State Senate, 36th Leg., 2d Sess., (April 23, 1984).

20. Session Law, *supra* note 1, Ch. 285.

21. *See* NEW JERSEY STAT. ANN. § 59:1-2 (1972). *Legislative declaration*

> The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

22. Session Laws, *supra* note 1, Ch. 285 § 1.

particular act.[23] The Arizona Legislature went even further in section 12-820.05 establishing that, except as specifically provided, the article "shall not be construed to affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state."[24]

The retention of the common law under the Act may distinguish it from the tort claims acts of other states. Several other states established governmental liability by legislation when their common law retained governmental immunity.[25] This led to a narrow contruction of the provisions of the legislation granting permission to sue the government.[26] The common law policy in Arizona is that, as a rule, the government is liable for its tortious conduct; immunity is an exception to that rule.[27] This should lead Arizona to align itself with those jurisdictions giving a strict construction to legislative provisions which grant immunity only as an exception to the rule of liability.[28] A strict construction is consistent with the traditional Arizona approach recognizing that the defense of absolute immunity is appropriate "only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy."[29]

One approach to implementing this policy of "necessary immunity" is

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23. The preamble to the proposed act of the Governor's Commission on Governmental Tort Liability provided: "[I]t is . . . declared to be the public policy of this state that governmental entities shall be liable in tort within the limitations of and in accordance with the fair and uniform principles established in this act." *Commission Report, supra* note 13, at 18.

Senate Bill 1225, as orginally introduced, read: "[I]t is hereby declared to be the public policy of this state that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established in this act." S. 1225, 36th Leg., 2d Sess. (1984) (Senate version at 2).

The California Tort Claims Act uses similar terms to restrict liability to the provisions of the act. *See* CAL. GOV. CODE § 815 (West 1983). In construing this language, the California Supreme Court stated: "Thus the intent of the [California Tort Claims Act] is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied." Williams v. Horvath, 16 Cal. 3d 834, 838, 548 P.2d 1125, 1127, 129 Cal. Rptr. 453, 455 (1976).

24. ARIZ. REV. STAT. ANN. § 12-820.05 (Supp. 1985). The legislature specifically amended this section to apply to public entities. The proposed section, *supra* note 15, was intended to exclude public officers from coverage of the Act.

25. *See* e.g., CONN GEN. STAT. § 19a-24 (1983); ME. REV. STAT. ANN. tit. 14, § 8104 (1977); R. I. GEN. LAWS § 9-31-1 (1969 Reenactment).

26. *See* Duguay v. Hopkins, 191 Conn. 222, 464 A.2d 45 (1983); Hodgdon v. State, 500 A.2d 621 (Me. 1985); Andrade v. State, 448 A.2d 1293 (R.I. 1982).

27. *Ryan*, 134 Ariz. at 309, 656 P.2d at 598; *Stone*, 93 Ariz. at 392, 381 P.2d at 115. The Governor's Commission on Governmental Tort Liability recognized this principle in the following language: "Immunity should be the exception rather than the rule and even then the citizens should demand that strong reasons exist for any exceptions." *Commission Report, supra* note 13, at 9.

28. *See* Freeman v. State, 705 P.2d 918 (Alaska 1985); Breed v. Shaner, 57 Haw. 656, 562 P.2d 436 (1977); Wells v. Valencia County, 98 N.M. 3, 644 P.2d 517 (1982).

The Arizona Court of Appeals previously adopted this principle: "While we recognize the power of the State to grant immunity to itself or its subdivisions as to tort liability, if it wishes to exercise its sovereign powers in this regard, it must spell out its intent. The granting of immunity from a common right will not be lightly implied." State v. Watson, 7 Ariz. App. 81, 85, 436 P.2d 175, 179 (1967) (citations omitted).

29. *Ryan*, 134 Ariz. at 311, 656 P.2d at 600. In *Ryan*, the court describes immunity as a "defense." This is consistent with the case law which places the burden of establishing immunity on the public entity. *See* Stevenson v. State Dept. of Transp., 290 Or. 3, 15, 619 P.2d 247, 254 (1980).

to recognize liability whenever the exercise of judicial power would be proper under the separation-of-powers doctrine. The chief justification for legislative and administrative immunity is that the judiciary should not invade the province of these coordinate branches of government by supervising their decisions through tort law.[30] The immunity of a public entity for judicial functions, under *respondeat superior*, is justifiable by the lack of the public entity's control over the independent judiciary.[31] Thus, the separation-of-powers doctrine provides the basis for the policy justification for public-entity immunity arising from judicial, legislative and administrative functions. Given the limited role of public-entity immunity, it follows that a grant of immunity in a particular case is appropriate only when required by the same constitutional justification. Absolute immunity is necessary only when judicial consideration of the acts or ommissions of a public employee would result in a violation of the separation-of-powers doctrine.

ACTIONS AGAINST THE PUBLIC ENTITY AND THE DOCTRINE OF SEPARATION OF POWERS

A. The Basis of Public-Entity Liability

A public entity acts through its officers and employees.[32] The acts and omissions of the public officers and employees give rise to potential liability.[33] An injured citizen may seek redress from either the public entity or its employee, or both. However, the rules governing recovery from a public entity differ from those that apply to public employees.

A public entity can only be vicariously responsible. Courts have held consistently that *respondent superior* is applicable to the breach of a duty by a governmental employee or agent acting within the scope of employment.[34] If the public entity has no control over the employee or agent, however, the public entity is not liable for his or her negligence.[35] Similarly, if the employee or agent is acting outside the scope of employment, *respondeat supe-*

30. *See infra* notes 54 and 65 and accompanying text.

31. *See infra* note 72 and accompanying text.

32. Bone v. Bowen, 20 Ariz. 592, 185 P. 133 (1919).

33. A public entity is liable on the same terms as a private individual. *Ryan*, 134 Ariz. at 311, 656 P.2d at 600. This is recognition that a public entity, like a private employer, is liable for the acts and omissions of its employees on a *respondeat superior* basis. *See* James v. Prince George's County, 288 Md. 315, 331, 418 A.2d 1173, 1182 (Ct. App. 1980); Jaffe, *Suits Against Governments and Officers: Damages Actions*, 77 HARV. L. REV. 209, 211 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 652 (1955). One court has suggested that a governmental agency itself, rather than an employee, may be responsible to act in certain situations and liability would attach directly to the agency under those circumstances. Ross v. Consumers Power Co., 420 Mich. 567, 621, 363 N.W.2d 641, 662 (1984). Most courts, however, would still impute the negligence of an agency to the public entity in this situation.

At any rate, § 12-820.01 provides immunity for the acts and omissions of the employees of a public entity, *supra* note 2. Therefore, *a respondeat superior* basis of liability will be assumed in this Note.

34. Jesik v. Maricopa County Community College Dist., 125 Ariz. 543, 611 P.2d 547 (1980); Patterson v. City of Phoenix, 103 Ariz. 64, 436 P.2d 613 (1968); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963).

35. Hernandez v. Maricopa County, 138 Ariz. 143, 673 P.2d 341 (Ct. App. 1983); Yamamoto v. Santa Cruz County Bd. of Supervisors, 124 Ariz. 538, 606 P.2d 28 (Ct. App. 1980); *see also* Fridena v. Maricopa County, 18 Ariz. App. 527, 504 P.2d 58 (1972).

rior does not apply.[36] In such cases, the employee or agent still may be liable in his individual capacity if sued directly for his own tortious conduct.[37]

It is also necessary to distinguish governmental immunity from the official immunity granted to public employees. Governmental immunity protects a public entity in its corporate or fiscal capacity.[38] Official immunity protects the public employee in his or her individual capacity.[39] These separate immunities are based on different policies,[40] and the immunities are not interchangeable.[41] Thus, the immunity of a public entity does not protect the public employee in his or her individual capacity when the employee is sued directly for his or her own tortious conduct.[42] Similarly, the official immunity of a public employee may not protect a public entity under an application of *respondeat superior*.[43]

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36. State v. Superior Court, 111 Ariz. 130, 524 P.2d 951 (1974); Robarge v. Bechtel Power Corp., 130 Ariz. 280, 640 P.2d 211 (Ct. App. 1982); Ohio Farmers Ins. Co. v. Norman, 122 Ariz. 330, 594 P.2d 1026 (Ct. App. 1979).

37. *See* James, *supra*, note 33, at 635; Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U. L. REV. 85, 87 (1975).

38. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

39. *Ross*, 420 Mich. at 590, 363 N.W.2d at 662; Smith v. Cooper, 256 Or. 485, 475 P.2d 78 (Or. 1970); Lister v. Bd. of Regents of Univ. Wis. Sys., 72 Wis. 2d 282, 240 N.W.2d 610 (1976).

40. The immunity of the public entity derives from the concept of sovereign immunity. The traditional notion was that the "King can do no wrong" and therefore the sovereign was never liable. At one time, courts reasoned that since the sovereign could do no wrong, it also would never authorize an employee to do wrong and consequently, any wrongful act of the employee was solely the employee's responsibility. *See* James, *supra* note 33, at 613. Another reason posited for sovereign immunity was that the sovereign was not amenable to suit in the courts of its own creation. *Ross*, 420 Mich. at 597, 363 N.W.2d at 650.

The several purposes of official immunity, on the other hand, were summarized by the Wisconsin Supreme Court:

> (1) The danger of influencing public officers in the performance of their functions by the threat of a lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

Lister, 72 Wis. 2d at 299, 240 N.W.2d at 621.

41. Larabee v. City of Kansas City, 697 S.W.2d 177, 179 (Mo. Ct. App. 1985) ("[T]he tests of sovereign immunity and official immunity are mutually exclusive.").

42. James, *supra* note 33, at 635; Vaughn, *supra* note 37, at 97.

43. *James*, 288 Md. at 331, 418 A.2d at 1182; Taplin v. Town of Chatham, 390 Mass. 1, 3, 453 N.E.2d 421, 423 (1983); *Ross*, 420 Mich. at 621, 363 N.W.2d at 662; Spencer v. King County, 39 Wash. App. 201, 208, 692 P.2d 874, 879 (1984); Maynard v. Madison, 101 Wis. 2d 273, 283, 304 N.W.2d 163, 169 (Ct. App. 1981).

RESTATEMENT (SECOND) OF AGENCY § 217 comment b (1958) provides that an employer may be liable under an application of *respondeat superior* where an employee is not liable because of an immunity. The reason for this rule was explained by the Oklahoma Supreme Court in the following terms:

> Under respondeat superior, the *negligence* or *wrongful act*, as opposed to the civil liability of the servant, is imputed to the master. Thus, a finding of no negligence on the part of the servant, conclusively negates the liability of the master. . . It is the servant's negligence or *wrongful act* which *establishes* the master's *liability*, not the servant's own civil liability. Therefore, the servant's status in relation to the injured person is not determinative."

Hooper v. Clements Food, 694 P.2d 943, 945 (Okla. 1985) (emphasis in orginal, citations omitted).

In this regard, the Washington Supreme Court reasoned that a governmental entity can invoke an employee's immunity only if the policies underlying the immunity favor its extension to the governmental employer. Creelman v. Svenning, 67 Wash.2d 882, 885, 410 P.2d 606, 608 (1966).

The Arizona Court of Appeals rejected the view that a public employee's immunity does not protect the public entity in *Hernandez v. Maricopa County*, 138 Ariz. 143, 145, 673 P.2d 341, 343. The court noted, however, that the parties failed to address the subject in their briefs. In addition,

Ryan v. State abolished governmental immunity in Arizona[44] but did not eliminate the official immunity enjoyed by certain public employees.[45] In turn, the absolute immunity provided by section 12-820.01 applies to public entities and not specifically to public employees in their individual capacities.[46] The purpose of section 12-820.01 is directed solely towards limiting tort actions against public entities and does not affect the official immunity recognized by the Arizona common law.

B. The Separation-of-Powers Doctrine as a Limitation of Public-Entity Liability.

Article III of the Arizona Constitution provides that the government is divided into three separate departments: legislative, executive and judicial. Article III also provides that no one of these departments shall exercise the powers properly belonging to either of the others.[47] This separation of powers under article III may limit tort actions against public entities in two ways. First, there are areas inherent in the act of govering that cannot be the subject of judicial scrutiny.[48] Second, the separation of powers limits the liability of the public entity, under *respondeat superior*, to the extent that it limits the public entity's control over the judicial branch.[49]

Following this model, section 12-820.01 provides absolute immunity to public entities for acts and omissions of its employees constituting the exercise of a legislative function or the exercise of an administrative function involving the determination of fundamental governmental policy. Additionally, since a public entity is liable only on a *respondeat superior* basis, the public entity is not liable for the acts and omissions of public employees over which it exercises no control. Thus, absolute immunity is provided for acts and omissions that constitute the exercise of a judicial function because the public entity has no control over the exercise of judicial power.

The constitutional separation-of-powers doctrine presents reasonable

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the same Court of Appeals recognized that an employee's immunity does not necessarily protect an employer in the private sector. Brunbaugh v. Pet Inc., 129 Ariz. 12, 14, 628 P.2d 49, 51 (Ct. App. 1981).

44. *See supra* note 6.

45. *Ryan*, 134 Ariz. at 310, 656 P.2d at 599; *Hernandez*, 138 Ariz. at 145, 673 P.2d at 343.

46. The act proposed by the Governor's Commission on Governmental Tort Liability dealt exclusively with public entity liability, *see supra* note 13 and accompanying text. The legislature recognized this and added language to make the qualified immunity, *see supra* note 3, and the affirmative defenses, *see supra* note 4, applicable to public employees. The legislature did not add any language to make the absolute immunity provision, *see supra* note 2, applicable to public employees. Given the narrow construction of the grant of immunity, the language applying absolute immunity only to the public entity should control. In addition, the legislature chose not to follow the procedure of the former Senate Bill 1391 in repealing statutory grants of public employee immunity found elsewhere, *see supra* note 12. The immunity of public employees should be controlled by those other sections and not by § 12-820.01. A recent Attorney General's Opinion assumed, however, without discussion, that the absolute immunity provisions applied to public employees. Op. Ariz. Atty. Gen. I84-123 (1984).

47. Article III of the Arizona Constitution provides:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

48. *See* Department of Transp. v. Neilson, 419 So.2d 1071, 1075 (Fla. 1982).

49. *See infra* note 72 and accompanying text.

guidelines for determining the tort liability of a public entity. The doctrine provides a workable standard to establish which acts and omissions of public employees will subject a public entity to tort liability. The courts are familiar with the separation-of-powers analysis and have established a body of case law in the area. Further, reliance on the doctrine will prevent the thwarting of governmental functions, while at the same time ensuring that immunity is a limited exception to the general rule of liability. Finally, focusing on the separation-of-powers doctrine will insure independent decision-making within the three branches of government and will prevent encroachment on article III.

Case law has established the separation-of-powers doctrine as the basis of public-entity immunity.[50] Since the statutory grant of immunity incorporates the common law, it follows that the separation-of-powers doctrine should be central to the interpretation of section 12-820.01.

C. Administrative Functions

Section 12-820.01(A)(2) provides that a public entity shall not be liable for acts and omissions of its employees constituting the exercise of an administrative function involving the determination of fundamental governmental policy.[51] The use of the language "fundamental governmental policy" is an attempt to avoid the confusion inherent in the terms "discretionary act" and "discretionary function" found in the Federal Tort Claims Act and in similar state acts.[52] Avoidance of these terms is consistent with the approach taken by the Arizona Supreme Court in *Ryan*.[53]

The provision of immunity for conduct involving the determination of fundamental governmental policy is based on the recognition that the executive branch of government is coordinate with the judicial branch.[54] Therefore, the judiciary should not invade the province of the executive branch by supervising administrative decisions through tort law.[55] There is, however, a substantial area of administrative action which does not involve the determination of fundamental governmental policy. Absolute immunity does not apply to this latter area and a court would not violate the separation-of-powers doctrine by imposing tort liability where no determination of fundamental governmental policy occured.[56]

The question whether absolute immunity should apply in a particular case is usually one of law for the court to decide, although some cases may present mixed questions of law and fact.[57] The court should determine

50. *See infra* notes 54, 65 and 72.

51. The statute is based upon RESTATEMENT (SECOND) OF TORTS § 895B (1977). *Commission Report, supra* note 13, at 12.

52. RESTATEMENT (SECOND) OF TORTS § 895B comment d (1977).

53. *Ryan*, 134 Ariz. at 310, 656 P.2d at 599.

54. RESTATEMENT (SECOND) OF TORTS § 895B comment d (1977); Johnson v. State, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968); Commercial Carrier Corp. v. Indian River City, 371 So.2d 1010, 1022 (Fla. 1979); Dunbar v. United Steelworkers, 100 Idaho 523, 546, 602 P.2d 21, 44 (1979); King v. City of Seattle, 84 Wash. 2d 239, 246, 525 P.2d 228, 233 (1974).

55. W. PROSSER AND W.P. KEETON, THE LAW OF TORTS § 131, at 1033 (5th ed. 1984).

56. RESTATEMENT (SECOND) OF TORTS § 895B comment d (1977).

57. Evangelical United Bretheren Church of Adna v. State, 67 Wash. 2d 246, 253, 407 P.2d 440, 444 (1965).

whether the particular administrative decision "rises to the level of insulation from judicial review" based on the doctrine of separation-of-powers.[58] Two principles should guide the court in making its decision.[59] First, absolute immunity should apply only when the particular administrative conduct involves the actual determination of a fundamental governmental policy and is essential to the realization of that policy.[60] Second, absolute immunity should apply only if "such a policy decision, consciously balancing risks and advantages, took place."[61]

The first principle describes the type of administrative conduct that should be immune from tort liability. The administrative conduct must involve and be essential to the realization of a "fundamental governmental policy." The fact that the administrative conduct involves "discretion" or "evaluation, judgment and expertise" is not sufficient to require immunity. For example, the decision of a governmental physician to perform a particular medical treatment would not be immune from liability, if negligent, even though it involved expertise and the exercise of medical discretion because of the absence of a "fundamental governmental policy."[62] For the same reason, descretionary decisions of police officers are not immune from liability.[63] Similarly, the implementation, as opposed to the development, of administrative rules and regulations does not involve the type of policy judgment requiring the protection of absolute immunity.[64]

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58. *Johnson*, 69 Cal. 2d at 793, 447 P.2d at 360, 73 Cal. Rptr. at 248.

59. In order to assist in the identification of situations involving the " determination of a fundamental governmental policy," the Governor's Commission on Govenmental Tort Liability suggested that "the judiciary should pay heed to the following excerpt from Comment (d) to Section 895B of the Second Restatement of Torts:"

> d. *Administrative functions.* Like the legislative branch of the government, the executive branch is coordinate with the judicial branch. But within the scope of the executive branch are many agencies, officers and employees that are merely administrative. The State does not retain immunity for all of the acts or omissions that they perform. It is only when the conduct involves the determination of fundamental governmental policy and is essential to the realization of that policy, and when it requires "the exercise of basic policy evaluation, judgment and expertise" that the immunity should have application. Evangelical United Brethren Church of Adna v. State, (1965) 67 Wash. 2d 246, 255, 407 P.2d 440, 445. The purpose of the immunity is "to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government ... [if] such a policy decision, consciously balancing risks and advantages, took place." Johnson v. State, (1968) 69 Cal. 2d 782, 794, 447 P.2d 352, 361, 73 Cal. Rptr. 240, 249. This means that the court should show self-restraint and not itself seek to make a policy decision that is better left to the administrative officials.

Commission Report, supra note 13, at 11, 12.

60. *Id.* at 12.

61. *Id.*

62. Scarpaci v. Milwaukee County, 96 Wis. 2d 674, 687, 292 N.W.2d 816, 827 (1980) ("The type of discretion necessary to immunize official conduct must be governmental not medical discretion," *quoting* Jackson v. Kelly, 557 F.2d 735, 738-39 (10th Cir. 1977)).

The same reasoning should apply whenever the case involves any type of professional judgment rather than governmental discretion. Rupp v. Bryant, 417 So.2d 658, 665 (Fla. 1982)(supervision of public school students held not to be a discretionary function); Carpenter v. Johnson, 231 Kan. 783, 789, 649 P.2d 400, 405 (1982)(highway engineers); *see generally* Trianon Park Condominium v. City of Hialeah, 468 So. 2d 912, 921 (Fla. 1985).

63. Chambers-Castanes v. King County, 100 Wash. 2d 275, 283, 669 P.2d 451, 457 (1983); Bender v. City of Seattle, 99 Wash. 2d 582, 589-90, 664 P.2d 492, 498-99 (1983).

64. Freeman v. State, 705 P.2d 918, 920 (Alaska 1985); Little v. Utah Div. of Family Serv., 667 P.2d 49, 52 (Utah 1983); Peterson v. State, 100 Wash. 2d 421, 435, 671 P.2d 230, 240-41 (1983).

D. *Legislative Functions*

Section 12-820.01 (A)(1) provides that a public entity is not liable for the acts and omissions of its employees that constitute legislative functions. The legislative branch, like the executive branch, is coordinate with the judicial branch and the courts must respect legislative decisions.[65] In addition, the standards applied to legislative functions are somewhat more liberal than those applied to administrative functions. For example, the standard that immunity applies only to a "considered" administrative action[66] has no counterpart in the legislative area. Immunity extends to legislative decisions even if those decisions are neither "considered" nor "reasonable."[67]

The absolute immunity provided for legislative functions should apply equally to employees aiding legislators in the performance of legislative tasks.[68] The immunity should extend to all acts "generally done" in the process of enacting legislation.[69] On the other hand, activities of a legislator not legislative in nature but which involve essentially administrative or executive functions should be considered under section 12-820.01(A)(2) providing immunity for the determination of fundamental governmental policy-making.[70] For example, the dismissal of a legislative aide, while resulting from a policy decision, may not involve a legislative function, and judicial review of the dismissal would not violate the separation-of-powers doctrine.[71]

E. *Judicial Functions*

Section 12-820.01(A)(1) provides that a public entity shall not be liable

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65. RESTATEMENT (SECOND) OF TORTS § 895B comment c (1977). The separation-of-powers analysis works very well in the legislative immunity area. Both the separation-of-powers test and the test under § 12-820.01(A)(1) focus on "legislative functions." In Arizona, the rule is: "In the absence of express statutory power, the courts are without jurisdiction to interfere, whether by injunction or otherwise, with the exercise of the legislative function or with the enactment of legislation." Adams v. Bolin, 74 Ariz. 269, 285, 247 P.2d 617, 628 (1952). *See* Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisiors, 108 Ariz. 449, 451, 501 P.2d 391, 393 (1972); City of Phoenix v. Superior Court, 65 Ariz. 139, 144, 175 P.2d 811, 814 (1946). Thus, in most instances the legislative immunity will be coextensive with the limitation of judicial power under the separation-of-powers doctrine.

66. *See* RESTATEMENT (SECOND) OF TORTS § 895B comment d (1977).

67. Miller v. Pacific County, 91 Wash. 2d 744, 747, 592 P.2d 639, 641 (1979).

68. The speech and debate clause of the constitution, however, did not provide a legislative aide with immunity from an action for damages in Steiger v. Superior Court, 112 Ariz. 1, 4, 536 P.2d 689, 692 (1975). Cases interpreting the speech and debate clause of the constitution should be helpful in defining the boundaries of the immunity granted to legislative functions within a separation-of-powers analysis. The speech and debate clause speaks directly to separation-of-powers concerns. State v. Haley, 687 P.2d 305, 319 (Alaska 1984). As the United States Supreme Court stated:

> The purpose of the [Speech and Debate] Clause is 'to protect the intregrity of the legislative process by insuring the independence of individual legislators.' Thus, '[i]n the American governmental structure the clause serves the ... function of reinforcing the separation-of-powers so deliberately established by the Founders.' The Clause is therefore a paradigm example of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.'

Davis v. Passman, 442 U.S. 228, 235 n.11 (1979)(citations omitted).

69. *Steiger*, 112 Ariz at 3, 536 P.2d at 691.

70. Legislative immunity does not apply to essentially administrative functions. Bischofshausen v. Pinal-Gila Counties, 138 Ariz. 109, 110-11, 673 P.2d 307, 308-9 (Ct. App. 1983).

71. *Haley*, 687 P.2d at 319.

for those acts and omissions of its employees that constitute judicial functions. The rules established by the separation-of-powers doctrine limit the liability of a public entity for judicial functions in a different manner than those rules limit liability for legislative and administrative functions. The separation-of-powers doctrine limits the public entity's control over the employee exercising a judicial function.[72] Since, under a *respondeat superior* anaysis,[73] a public entity is liable for the acts and omissions of an employee only to the extent of its control over the employee, the doctrine of separation-of-powers limits the liability of the public entity to the same degree that it limits its control over the employee exercising a judicial function.[74]

The use of the doctrine of separation-of-powers as a means of setting the boundaries of the immunity for judicial functions works reasonably well in cases involving the acts and omissions of the officers of the judicial branch. The lack of control over the judicial branch effectively limits the liability of the public entity for the judicial acts and omissions of judges, justices of the peace, court clerks and other judicial officers.[75]

Difficulty arises when the acts and omissions of administrative officers exercising "quasi-judicial" functions lead to potential liability. While some jurisdictions extend judicial immunity to quasi-judicial functions,[76] Arizona apparently does not. The Arizona Supreme Court distinguishes between the "judicial power" exercised by the judiciary and the "quasi-judicial power" resulting from a blending of judicial and administrative functions.[77] The constitution may require immunity for judicial functions; however, it is clear that quasi-judicial immunity is not mandated by the constitution but is based merely on public policy.[78] Officials exercising quasi-judicial functions there-

72. Hernandez v. Maricopa County, 138 Ariz. 143, 145, 673 P.2d 341, 343; Yamamoto v. Santa Cruz County Bd. of Supervisors, 124 Ariz. 538, 540, 606 P.2d 28, 30; *see* Fridena v. Maricopa County, 18 Ariz. App. 527, 529, 504 P.2d 58, 61 (1972).

The same principle has been applied under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-80 (1976). Under the FTCA, the federal government is liable to the same extent as a private party for the torts of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1976); *see* United States v. Orleans, 425 U.S. 807 (1976). Members of the judiciary, however, at least while exercising judicial functions, have been thought to be beyond the control of the federal government and thus not "employees of the government." Foster v. MacBride, 521 F.2d 1304, 1305 (9th Cir. 1975)("[A] federal district judge in trying cases is not an 'employee of the government' as required by 28 U.S.C. § 1346"); Cromelin v. United States, 177 F.2d 275, 277 (5th Cir. 1949), *Cert. denied*, 339 U.S. 944 (1950) ("[I]n trying cases [the judge] is a member of the independent judiciary and is not under the control of the United States any more than a member of the legislative department is in legislating."); Tomalewski v. United States, 493 F.Supp. 673, 675 (W.D. Penn. 1980) ("[T]he judges of this Court and their Clerks are under the Judicial Branch of Government pursuant to Article III of the Constitution and are not employees of the United States as defined in the Federal Tort Claims Act.").

73. *See supra* notes 34-35 and accompanying text.

74. *See supra* note 72.

75. The judiciary has an inherent power of control over the personnel directly connected with the operation of the courts. Winter v. Coor, 144 Ariz. 56, 60, 695 P.2d 1094, 1098 (1985); Broomfield v. Maricopa County, 112 Ariz. 565, 567, 544 P.2d 1080, 1082 (1975); Mann v. County of Maricopa, 104 Ariz. 561, 563, 456 P.2d 931, 933 (1969).

76. *See* Loran v. Iszler, 373 N.W.2d 870 (N.D. 1985); RESTATEMENT (SECOND) OF TORTS § 895B comment c (1977).

77. Batty v. Arizona State Dental Board, 57 Ariz. 239, 245, 112 P.2d 870, 873 (1941).

78. Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 264, 564 P.2d 1227, 1231 (1977).

fore are given only qualified immunity.[79] The same reasoning should apply to the immunity granted to the public entity. Absolute immunity under section 12-820.01 should protect a truly judicial function while other sections of the Act should apply to quasi-judicial functions.[80]

Another problem arises when a judicial employee engages in a nonjudicial function that results in potential liability. An example is a judge who drives an automobile on official business and negligently injures another.[81] In this situation, the public entity probably would be vicariously liable under a *respondeat superior* analysis.[82] The scope of duty is broader than the definition of judicial function because of the many administrative tasks inherent in the job of the judge.

F. An Illustration of a Separation-of-Powers Test

The recognition of a tort action against a public entity for acts and omissions involving legislative or administrative functions entails blending the judicial function with the functions of the coordinate branches; the judiciary is called upon to second-guess decisions committed to the discretion of the separate branches. Such blending results in the potential violation of the separation-of-powers doctrine. The blending of the coordinate functions, however, is not uncommon in modern government and Arizona courts have not required an absolute separation of powers in all cases.[83] Arizona courts do require sufficient checks and balances in order to insure the preservation of each branch's core functions.[84]

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79. *Id.* at 265, 564 P.2d at 1233.

80. The situation in *Grimm*, involving an injury resulting from the parole of a prisoner, is treated specifically under the qualified immunity section. § 12-820.02(3)(Supp. 1985). This is consistent with a separation-of-powers analysis of the absolute immunity section. The doctrine limits the public entity's control only as to "the judiciary," now defined as those connected with the exercise of "judicial power."

81. *See* United States v. LePatourel, 571 F.2d 405, 410 (8th Cir. 1978)(treatment of this situation under the FTCA).

82. Under the FTCA analysis, the judicial officer engaged in a judicial function is beyond the control of the United States and therefore, not an employee of the government. *See supra* note 72. However, if the judicial officer is engaged in a nonjudicial function, the officer is considered an employee of the United States and the United States can be liable under the FTCA. *LePatourel*, 571 F.2d 405, 410 (8th Cir. 1978); *see also* United States v. LePatourel, 593 F.2d 827, 832 (8th Cir. 1979).

The Arizona Court of Appeals applied a similar principle in State v. Pima County Adult Probation Dept., 147 Ariz. 360, 708 P.2d 1337 (Ct. App. 1985). This case involved a contest between the state and the county concerning which should be vicariously responsible for the acts of county probation officers previously found to be nonjudicial and thus not protected by the officials' judicial immunity in Acevedo v. Pima County Adult Probation Dept., 142 Ariz. 319, 322, 690 P.2d 38, 41 (1984). The Court of Appeals held the state vicariously liable, reasoning first that the probation officers were employees of the judicial department of the state. 147 Ariz. at 363, 708 P.2d at 1340. Second, even though the probation officers were engaged in nonjudicial actions and thus not immune, they still were acting within the scope of their employment and the state was liable on a *respondeat superior* basis. Thus, local public entities, such as municipalities and counties, never will be liable for the acts and ommissions of judicial officers because the local public entities have no control over the judiciary under any circumstances. On the other hand, the state, consistent with the analysis under the FTCA, will be liable for the acts and omissions of judicial officers which do not constitute judicial functions.

83. *See* Southwest Eng'g Co. v. Ernst, 79 Ariz. 403, 412, 291 P.2d 764, 770 (1955); *Batty*, 57 Ariz. at 245, 112 P.2d at 873; Udall v. Severn, 52 Ariz. 65, 79, 79 P.2d 347, 352 (1938).

84. J.W. Hancock Enter. v. Arizona State Registrar of Contractors, 142 Ariz. 400, 405, 690 P.2d 119, 124 (Ct. App. 1984).

One of the major problems in any separation-of-powers case is the lack of any meaningful definitions of legislative, executive and judicial functions.[85] Indeed, it is difficult outside the context of specific cases to define these terms specifically.[86] In order to overcome this lack of definition, the Arizona Court of Appeals, in *J.W. Hancock Enterprises v. Arizona State Registrar of Contractors*,[87] adopted a balancing test to identify violations of the separation-of-powers doctrine. *Hancock* involved a legislative grant of power to the Registrar of Contractors[88] to construe and interpret contractual terms in disputes involving contractors. After applying a four-factor test initially developed by the Kansas Supreme Court,[89] the court of appeals found no usurpation of judicial power by the executive. The Kansas Supreme Court had identified four factors to determine whether a violation of the separation-of-powers doctrine had occurred: 1) the classification of the essential nature of the power exercised; 2) the degree of control exercised over a coordinate branch with a focus on a potential coercive influence; 3) the nature of the legislative objective in allowing the blending; and 4) the practical result of the blending of powers.[90] The essence of the test is a balancing of the degree of blending permitted, against the risk of coercive influence.[91]

The balance struck by the legislature in providing absolute immunity for legislative and administrative functions is similar to the balance struck in the blending cases. The essence of section 12-820.01 is a balancing of the need for the protection of citizens provided by the tort system against the risk of a coercive judicial influence on the public entity.[92] In this respect, the balancing test may provide a useful tool in the application of the absolute immunity made available by section 12-820.01.

In order to illustrate the use of the balancing test in this context, it may be useful to view the examples of the determination of fundamental governmental policy given in section 12-820.01(B).[93] The Arizona Legislature specifically decided that a qualified immunity applies to a public entity's activity in connection with the issuance of or failure to revoke or suspend any permit, license or certificate.[94] However, absolute immunity was provided for

85. *Id.* at 405, 690 P.2d at 124.
86. *Id.*
87. *Id.*
88. ARIZ. REV. STAT. ANN. § 32-1154(3)(1975).
89. State *ex. rel.* Schneider v. Bennett, 219 Kan. 285, 290-91, 547 P.2d 786, 792-93 (1976).
90. *Id.* at 290-91, 547 P.2d at 792-93. *See* State *ex. rel.* Stephan v. Kansas House of Rep., 236 Kan. 45, 60, 687 P.2d 622, 635 (1984).
91. *J.W. Hancock Enterprises*, 142 Ariz at 407, 690 P.2d at 126.
92. As stated by the Governor's Commission on Governmental Tort Liability:
> The Arizona Governmental Tort Claims Act strikes a balance between the inherently unfair and inequitable results which occur to citizens of the state in the strict application of the traditional tort doctrine of sovereign or governmental immunity and the need for governmental immunity in limited situations because of the unique role of government and because of competing policy and fiscal considerations.

Commission Report, supra note 13, at 8.
93. *See supra* note 2.
94. ARIZ. REV. STAT. ANN. § 12-820.03(5)(Supp. 1985). The legislature had the option of providing absolute or qualified immunity for this activity; *see* the majority and minority reports of the Governor's Commission on Governmental Tort Liability, *Commission Report, supra* note 13, at 22 and 29.

the licensing and regulation of any profession or occupation.[95]

Applying the first factor of the balancing test, it appears that the development of administrative regulations for a profession is of a fundamental governmental nature, while the issuing or revoking of a license is not.[96] Second, the degree of judicial control and coercive influence is significantly greater in a decision involving the regulation of a profession than in an individual issuance of a license. Third, the legislative objective in allowing the judiciary to consider some questions involved in the issuance of a license is to allow the judiciary to provide its expertise in settling a dispute between two parties. The judiciary, however, has no more expertise in the regulation of a profession than does the appropriate administrative agency. Finally, judicial intervention in the regulation of a profession necessarily involves policy issues central to the regulation of a profession as a whole. The practical result of such intervention may be that the administrative agency would revamp its regulations. On the other hand, the judicial decision in an individual case would probably not have such a significant effect.

CONCLUSION

The separation-of-powers doctrine provides a workable framework for setting the boundaries of the absolute immunity of public entities. The courts should strictly construe section 12-820.01 establishing the absolute immunity of public entities for the acts and omissions of public employees constituting judicial, legislative and administrative functions. Absolute immunity should not extend any further than required by the separation-of-powers doctrine found in article III of the Arizona Constitution. A narrow contruction should allow independent decision-making in all three departments of government while ensuring that immunity will be the exception to the rule of liability when a public employee tortiously injures a member of the public.

95. ARIZ. REV. STAT. ANN. § 12-820.01(B)(3)(Supp. 1985).
96. *Peterson*, 100 Wash. 2d at 433, 671 P.2d at 239.