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**LIABILITY FOR DISCRETIONARY DECISIONS OF
STATE OFFICERS AND EMPLOYEES UNDER THE
NORTH CAROLINA TORT CLAIMS ACT: A
CRITICAL ANALYSIS OF *HOCHHEISER V.*
*NORTH CAROLINA DEPARTMENT OF TRANSPORTATION***

MARK W. MORRIS*†

I. INTRODUCTION

A person injured by the negligence of a state officer or employee may seek damages from the state only in an action brought under the North Carolina Tort Claims Act.¹ The statute waives the state's sovereign immunity from liability for negligence, sets certain limitations on causes of action to which it applies, and establishes the Industrial Commission as the forum in which such cases are to be tried. The Act does not create a distinction, recognized in tort actions against municipalities, between governmental or discretionary functions on the one hand (for which a city is immune) and proprietary or ministerial functions on the other (for which a city may be liable).² The Act has long been understood as a general waiver of immunity, exposing the agencies of state government to liability for the negligence of their officers or employees while acting within the scope of their office or employment.³ Until the decision of the North Carolina Court of Appeals in *Hochheiser v. North Carolina Department of Transportation*,⁴ characterizing the activity of a state employee as "discretionary" had no bearing on the outcome of a case brought under the Tort Claims Act.

Hochheiser reversed an order of the Industrial Commission awarding damages to the mother of two girls who were killed when their car slid off Newton Road in Raleigh, went down an embankment, and landed

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† The author is especially grateful to Heidi Chapman for her insightful critique of earlier drafts of this article.

1. N.C. GEN. STAT. § 143-291 (1987 & Supp. 1988).

2. This is the general common law rule that applies in the absence of liability insurance. See N.C. GEN. STAT. § 160A-485 (1987) (purchase of liability insurance operates as a waiver of the defense of sovereign immunity).

3. See, e.g., *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

4. 82 N.C. App. 712, 348 S.E.2d 140 (1986), *aff'd without precedential value*, 321 N.C. 117, 361 S.E.2d 562 (1987).

upside down in a creek. The mother had successfully claimed that the Department of Transportation had been negligent in failing to erect a guardrail at the spot where her daughters' car left the road. In upsetting the award, the court of appeals held that a showing of conduct "so clearly unreasonable as to amount to an oppressive and manifest abuse" was necessary to "invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-making decisions of the Department of Transportation."⁵ An evenly divided supreme court allowed the decision of the court of appeals to stand without precedential value.⁶

In Section II, I will discuss two aspects of the doctrine of sovereign immunity: its application in actions against the State of North Carolina before the passage of the Tort Claims Act, and the distinction between governmental and proprietary functions that is an important feature of tort claims against municipalities. Section III, will briefly outline the major features of our Tort Claims Act, and Section IV will examine the decision of the court of appeals in *Hochheiser*. In Section V, I will suggest several ways in which the holding of the case can be understood. In Section VI, I will discuss an alternative basis that could have been used to upset the award of the Industrial Commission.

Hochheiser was wrongly decided because the reasons given, however they are taken, were wrong. If the decision means what it appears to say, it calls for a drastic and completely unnecessary disruption of well-settled doctrine. The court's rationale threatens what has until now been understood as the law governing the jurisdiction of the Industrial Commission and of the court, the immunity of the state under the Tort Claims Act, and the conduct for which a claimant can recover under the Act. None of that law should be affected by characterizing the activity giving rise to a claim as "discretionary". Left as it is, even "without precedential value,"⁷ *Hochheiser* is an invitation to unnecessary confusion and litiga-

5. *Id.* at 718, 348 S.E.2d at 143.

6. 321 N.C. 117, 361 S.E.2d 562 (1987).

The court of appeals decision in *Hochheiser* is subject to attack on several fronts. For example, the court of appeals determined (or assumed) that the Department of Transportation made a conscious decision not to place a guardrail at the site of the accident, 82 N.C. App. at 717, 348 S.E.2d at 142, when the parties stipulated, Record on Appeal at 18, *Hochheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 348 S.E.2d 140 (1986) (No. 8610IC152), and the Deputy Commissioner found as a fact that Newton Road had never been inspected for hazards, *id.* at 25-26. The court did not explain why it was not bound by the factual findings of the Commission. Having assumed that there was a conscious decision not to install a guardrail, what permitted the court of appeals to further assume that that decision was "not a negligent omission"? 82 N.C. App. at 717, 348 S.E.2d at 142. The court characterized several of the Deputy Commissioner's findings of fact as "no more than erroneous conclusions of law." *Id.* How could those findings be irrelevant and immaterial, as the court said? Finally, spirited disagreement as to the rightness of the result is not hard to imagine. Neither side in that debate can take much comfort in the decision, with the question of the state's liability in these circumstances left open.

7. 321 N.C. at 117, 361 S.E.2d at 562.

tion. Recent decisions from the court of appeals have limited *Hochheiser* somewhat, but the court continues to be implored to create immunity for "discretionary" acts of state employees.⁸ Prudent attorneys now routinely include an allegation of "oppressive and manifest abuse of discretion" in affidavits filed with the Industrial Commission, against the chance that the Attorney General's office will claim the activity that produced the claimant's injuries was "discretionary." The North Carolina Supreme Court should seize the next opportunity to set these matters aright.

II. SOVEREIGN IMMUNITY

A. *Tort Claims Against the State Before 1951*

The common law doctrine of sovereign immunity provides that the state cannot be sued without its consent.⁹ This immunity, or freedom from suit, is a modern reflection of the ancient notion that the King could do no wrong.¹⁰ North Carolina continues to recognize the common law rule, except to the extent that the immunity has been waived by statute.¹¹

Until 1951 a plaintiff injured by the negligence of an employee of state government had no cause of action in tort against the state because of sovereign immunity.¹² If the plaintiff were injured by the negligence of a municipal employee rather than a state employee, the prospects for recovery greatly increased because sovereign immunity for cities and counties extended only to governmental, as opposed to proprietary, functions.¹³ As it applied to the state or state agencies, sovereign immunity from tort liability was complete and unqualified. Courts did not recognize the distinction between governmental and proprietary activ-

8. *E.g.*, Defendant-Appellant's Brief at 6-21, *Woolard v. North Carolina Dep't of Transp.*, 93 N.C. App. 214, 377 S.E.2d 267 (1989) (No. 8810IC694).

9. *Moody v. State Prison*, 128 N.C. 12, 38 S.E. 131 (1901). This rule of sovereign immunity originated in England in the case of *Russel v. Men of Devon*, 100 Eng. Rep. 359 (1798), which held that a town could not be liable for damage caused by a defective bridge. It was applied in North Carolina in 1889 by *Moffit v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889).

10. PROSSER AND KEETON ON THE LAW OF TORTS § 131 at 1032, 1043 (5th ed. 1984). See also HARPER, *Statutory Waiver of Municipal Immunity Upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis*, 4 CAMPBELL L. REV. 41 (1981).

11. The North Carolina Supreme Court has said:

The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action.

Great American Ins. Co. v. Gold, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961).

12. See *infra* text accompanying notes 53-55.

13. See *infra* text accompanying notes 16-18.

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ity.¹⁴ An injured plaintiff could bring a lawsuit against the individual state officer or employee who caused the injuries or seek compensation from the General Assembly through a private bill.¹⁵

B. Governmental v. Proprietary Functions

Until the enactment of legislation allowing cities and counties to waive sovereign immunity through the purchase of liability insurance,¹⁶ the most important feature of sovereign immunity, as it applied to cities and counties, was the difference between governmental and proprietary functions. If the activity that produced the plaintiff's injury was categorized as governmental, the plaintiff's cause of action was barred.¹⁷ If, however, it was proprietary, the municipality could be liable just as any private corporation might be. With the issue of sovereign immunity resolved against it, the municipal defendant was not entitled to any other special privileges.¹⁸

The labels used by the court to denominate protected activities are not precise. Most of the time the courts refer to such activity as "governmental." "Discretionary" is often used as an equivalent, or it is incorporated into the definition of governmental. The rule that government officials are immune from personal liability for "discretionary" activities within the scope of their office provides additional pressure to equate the two terms.

The various definitions of governmental and proprietary are far easier to state than to apply. Justice Barnhill's statement of the rule is often repeated.¹⁹

Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of

14. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 533-34, 299 S.E.2d 618, 625 (1983). See also NOTE, *State Tort Claims Act — Construction*, 33 N.C.L. REV. 613 (1955).

15. See NOTE, *State Tort Claims Act — Construction*, 33 N.C.L. REV. 613 (1955).

16. The current law is codified at N.C. GEN. STAT. § 160A-485 (1987).

17. *Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972); *Valevais v. City of New Bern*, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

18. See *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967); *Roberson v. City of Kinston*, 261 N.C. 135, 134 S.E.2d 193 (1964). See also *Lyons & Sons v. North Carolina State Bd. of Educ.*, 238 N.C. 24, 76 S.E.2d 553 (1953).

The difference between governmental or discretionary functions on the one hand, and proprietary or corporate functions on the other, reflects the duality of municipal corporations. Municipalities are subdivisions of state government, created by the legislature, having many characteristics of sovereignty. They are also corporate entities resembling private corporations. "A town acts in the dual capacities of an *imperium in imperio*, exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit." *Moffit v. City of Asheville*, 103 N.C. 237, 254, 9 S.E. 695, 697 (1889). This duality led to the judicially created exception to sovereign immunity for tortious conduct in carrying out proprietary activities.

19. It also illustrates the courts' propensity to define governmental by using the term discretionary. Often, the words are used interchangeably. This imprecision and circularity may account for some of the indeterminacy of the rules and for some of the confusion as to their use.

the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.²⁰

This test, which looks primarily to the interest advanced by the activity that produces the injury, explains many of the cases. The municipality acts in its governmental capacity when it promotes the "health, safety, security or general welfare of its citizens."²¹ Thus, spraying for mosquitoes,²² installing traffic signals,²³ and maintaining a public library²⁴ or a storm drainage system²⁵ are governmental functions. But when the town supplies electricity for profit,²⁶ or operates a coliseum to produce revenue,²⁷ the activity is proprietary. In other cases, the court focuses on the authority exercised in carrying out the activity. If the activity is "in the exercise of police power, or judicial, discretionary or legislative authority," it is governmental.²⁸ Thus, it is well settled that, absent statutory law to the contrary, a municipality may not be held liable for tortious conduct of its police officers in the performance of their duties.²⁹ The source of the authority is not so important as its character. Another approach asks whether government or the private sector has traditionally performed the function. The activity is governmental if only a governmental agency could perform it or has historically performed it. It is proprietary if a private corporation or individual could do the same thing.³⁰ This approach becomes increasingly less useful as

20. *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942). Another court put it this way:

When power conferred has relation to public purposes and for the public good, it is to be classified as governmental in its nature and appertains to the corporation in its political capacity. But when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature, and the municipality, in respect to its exercise, is regarded as a legal individual.

Metz v. City of Asheville, 150 N.C. 748, 750, 64 S.E. 881, 882 (1909). See also *Moffit v. City of Asheville*, 103 N.C. 237, 254-55, 9 S.E. 695, 697 (1889) (immunity where city exercises "judicial, discretionary, or legislative authority, conferred by its charter or is discharging a duty, imposed solely for the benefit of the public"; no immunity when city acts in its "ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage").

21. *Clark v. Scheld*, 253 N.C. 732, 735, 117 S.E.2d 838, 841 (1961) (quoting *Millar*, 222 N.C. 340, 341, 23 S.E.2d 42, 44. (1942)).

22. *Clark*, 253 N.C. 732, 117 S.E.2d 838 (1961).

23. *Hodges v. City of Charlotte*, 214 N.C. 737, 200 S.E. 889 (1939).

24. *Seibold v. Kinston-Lenoir County Pub. Library*, 264 N.C. 360, 141 S.E.2d 519 (1965).

25. *Stone v. City of Fayetteville*, 3 N.C. App. 261, 164 S.E.2d 542 (1968).

26. *Harrington v. Commissioners of Wadesboro*, 153 N.C. 357, 69 S.E. 399 (1910).

27. *Aaser v. City of Charlotte*, 265 N.C. 494, 144 S.E.2d 610 (1965).

28. *Hamilton v. Town of Hamlet*, 238 N.C. 741, 742, 78 S.E.2d 770, 771 (1953) (traffic signal installation and maintenance).

29. *Croom v. Town of Burgaw*, 259 N.C. 60, 129 S.E.2d 586 (1963); *McIlhenney v. City of Wilmington*, 127 N.C. 146, 37 S.E. 187 (1900).

30. See *Sides v. Cabarrus Memorial Hosp.*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975) (and

the activities of government usurp the private sector at the same time that many functions of government, such as the operation of prisons, are privatized.

To further complicate the matter, different phases of an activity can be either governmental or proprietary, such as supplying water to extinguish fires or selling it for public consumption.³¹ Liability in these cases must be decided by determining which aspect of the activity gave rise to the plaintiff's injury. Absurd results are not difficult to find. A person injured by the negligent driving of a city employee on his way to fix a pothole might recover, but if the driver were on his way to repair a burned out traffic signal, the doctrine of sovereign immunity would bar recovery.³²

Activities held to be governmental³³ include operating a sewer system,³⁴ a public library,³⁵ a jail,³⁶ or a city park,³⁷ maintaining a storm drain,³⁸ or a street lighting system,³⁹ spraying to control mosquitoes,⁴⁰ and supplying fire⁴¹ and police protection.⁴² Proprietary functions include operating a coliseum,⁴³ an airport,⁴⁴ a housing project,⁴⁵ a civic center,⁴⁶ a golf course,⁴⁷ or a hospital,⁴⁸ leasing municipal property pursuant to statutory authority,⁴⁹ and the sale of electricity for profit.⁵⁰

The distinction has been called one of the most unsatisfactory known to the law,⁵¹ and it is a bane in every jurisdiction where it is known,

cited cases); *Bowling v. City of Oxford*, 267 N.C. 552, 148 S.E.2d 624 (1966) (burst dam; waterworks held proprietary).

31. *Faw v. Town of North Wilkesboro*, 253 N.C. 406, 117 S.E.2d 14 (1960).

32. *See Beach v. Town of Tarboro*, 225 N.C. 26, 33 S.E.2d 64 (1945).

33. An extensive list of the older cases can be found in *Rhyne v. Town of Mount Holly*, 251 N.C. 521, 526-27, 112 S.E.2d 40, 44-45 (1960).

34. *Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E.2d 299 (1980); *Metz v. City of Asheville*, 150 N.C. 748, 64 S.E. 881 (1909).

35. *Seibold v. City of Kinston*, 268 N.C. 615, 151 S.E.2d 654 (1966).

36. *Moffit v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889).

37. *Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972).

38. *Stone v. City of Fayetteville*, 3 N.C. App. 261, 164 S.E.2d 542 (1968).

39. *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971); *Baker v. City of Lumberton*, 239 N.C. 401, 79 S.E.2d 886 (1954).

40. *Clark v. Scheld*, 253 N.C. 732, 117 S.E.2d 838 (1961).

41. *Valevais v. City of New Bern*, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

42. *Croom v. Town of Burgaw*, 259 N.C. 60, 129 S.E.2d 586 (1963).

43. *Aaser v. City of Charlotte*, 265 N.C. 494, 144 S.E.2d 610 (1965).

44. *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth.*, 288 N.C. 98, 215 S.E.2d 552 (1975); *Airport Auth. v. Stewart*, 278 N.C. 227, 179 S.E.2d 424 (1971); *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E.2d 371, *reh'g denied*, 230 N.C. 759, 53 S.E.2d 313 (1949).

45. *Carter v. City of Greensboro*, 249 N.C. 328, 106 S.E.2d 564 (1959).

46. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

47. *Lowe v. City of Gastonia*, 211 N.C. 564, 191 S.E. 7 (1937).

48. *Sides v. Cabarrus Memorial Hosp.*, 287 N.C. 14, 213 S.E.2d 297 (1975).

49. *Lewis v. City of Washington*, 63 N.C. App. 552, 305 S.E.2d 752, *modified on other grounds*, 309 N.C. 818, 310 S.E.2d 610 (1983).

50. *Harrington v. Commissioners of Wadesboro*, 153 N.C. 437, 69 S.E. 399 (1910).

51. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 25.01 (3d ed. 1972).

including North Carolina. Our supreme court has said:

The case law *defining* governmental and proprietary powers as relating to municipal corporations is consistent and clearly stated in this and other jurisdictions. However, application of these flexible propositions of law to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary. In this jurisdiction the cases of *Glen v. Raleigh*, [248 N.C. 378, 103 S.E.2d 482 (1958)] and *James v. Charlotte*, [183 N.C. 630, 112 S.E. 423 (1922)], preserve this tradition of confusion by adopting apparently divergent views as to the effect of receiving income while performing an otherwise governmental service.⁵²

Because this distinction was relevant only to actions against municipalities, litigation under the Tort Claims Act has been free of such confusion until now. *Hochheiser*, however, invites the courts to "preserve this tradition of confusion" by introducing it in a completely new context. The court would be wise to refuse.

III. THE NORTH CAROLINA TORT CLAIMS ACT

In 1951, the General Assembly waived the state's immunity from liability in tort by enacting section 143-291.⁵³ The act constitutes the North Carolina Industrial Commission as a court:

for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. . . . [and to determine if] the claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency, or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.⁵⁴

The Commission may award damages, up to \$100,000, if such negligence was the proximate cause of the claimant's injuries and the claimant was not contributorily negligent.⁵⁵

The Tort Claims Act waives the state's immunity by permitting recovery for injuries proximately caused by the negligence of state employees acting within the scope of their employment. The language of the statute is unqualified. It does not speak of discretionary, governmental, ministerial or proprietary activities.

52. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972).

53. N.C. GEN. STAT. § 143-291 (1987 & Supp. 1988). See also *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983).

54. N.C. GEN. STAT. § 143-291 (1987 & Supp. 1988).

55. Although section 143-291 requires a finding that the claimant was not contributorily negligent, the burden of proof on that issue is on the defendant. N.C. GEN. STAT. § 143-299.1 (1987).

IV. *HOCHHEISER V. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION*

Newton Road is a paved secondary road in Wake County, twenty-one feet wide with a six foot shoulder, running slightly downhill where the Hochheiser children were killed. Off the shoulder of the road, hidden by vegetation, is a twenty to twenty-five foot embankment with a two-to-one vertical slope.⁵⁶ A stream flows through a culvert at the bottom of the embankment. Six days after a snow storm in Raleigh, with the stream swollen to a depth of three or four feet by melting snow, seventeen-year-old Renee Hochheiser drove down Newton Road on her way to school with her fifteen-year-old sister, Claudine. The car hit a patch of ice, skidded off the road and went down the embankment. It landed on its roof in the water, and both girls drowned. At the point where the car left the road there was no guardrail or warning sign.⁵⁷

The girls' mother, as administratrix of their estates, filed claims with the Industrial Commission alleging that the lack of warning signs and a guardrail made Newton Road dangerous for travel,⁵⁸ and that the negligence of Department of Transportation employees responsible for maintaining the road was a proximate cause of the girls' deaths.⁵⁹ The Deputy Commissioner concluded that the site of the accident was particularly hazardous,⁶⁰ and that the defendant's employees were negligent in failing to exercise ordinary care to make the area reasonably safe.⁶¹ This negligence was found to be a proximate cause of the deaths of the claimant's children. There being no evidence that Renee Hochheiser was negligent in operating the car, the Deputy Commissioner entered an order awarding the claimant \$200,000.⁶² On review before the full Commission, the opinion and award was affirmed, with one commissioner dissenting. The defendant appealed to the North Carolina Court of Appeals.⁶³

The specific question for decision, framed by the court itself, was "whether the State of North Carolina can be held liable under the Tort Claims Act for its decision . . . not to construct a guardrail on . . . Newton Road at the point where the Hochheiser vehicle ran off the high-

56. A two-to-one vertical slope drops vertically two feet for each horizontal foot.

57. *Hochheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 713, 348 S.E.2d 140, 140 (1986).

58. Record at 3-12.

59. *Id.*

60. *Id.* at 28.

61. 82 N.C. App. at 714, 348 S.E.2d at 141.

62. *Id.* The award, \$100,000 for each of the plaintiff's daughters, represents the maximum allowable under the Tort Claims Act. The parties stipulated prior to the hearing that if the plaintiff were entitled to receive anything, the damages with respect to each child were at least \$100,000. Record at 17.

63. 82 N.C. App. at 714, 348 S.E.2d at 141.

way and overturned down the embankment.”⁶⁴

The court began its analysis with the question of whether the Department of Transportation had a duty to erect a guardrail. The court quoted and summarily dismissed as “erroneous conclusions of law”⁶⁵ nine of the Deputy Commissioner’s findings of fact that went to that issue. The court concluded its analysis by stating:

Defendant had actual or constructive knowledge of the absence of a guardrail through one or more of its employees. We can assume that defendant made a conscious, informed choice not to put a guardrail at this particular location and that its decision not to erect a guardrail was not a negligent omission. Thus, the Commission’s findings or conclusions regarding defendant’s duty to inspect are irrelevant and immaterial.⁶⁶

The court explained that the Department of Transportation has been delegated a broad range of discretionary authority to discharge its statutory responsibility for the design, construction, and maintenance of the public highways.⁶⁷ Decisions such as the one not to erect a guardrail on Newton Road are “discretionary” and, therefore, not reviewable by the court unless “so clearly unreasonable as to amount to an oppressive and manifest abuse.”⁶⁸ The court concluded:

We hold that the Department of Transportation’s intentional, discretionary decision not to erect a guardrail at the site of this accident was not “so clearly unreasonable as to amount to oppressive and manifest abuse” so as to invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-making decisions of the Department of Transportation.⁶⁹

The court went on to hold that the Department’s failure to erect a guardrail, which it again characterized as intentional and discretionary, “was not a breach of any duty imposed upon it by the facts and circumstances of [the] case.”⁷⁰ Finally, the court held that the evidence and findings of fact supported neither the conclusion that the defendants had been negligent,⁷¹ nor that the defendant’s conduct proximately caused

64. *Id.* at 715, 348 S.E.2d at 141. Initially, the court of appeals framed the issue in the most general terms available:

[T]he question before us is whether these claims “arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.” N.C. GEN. STAT. § 143-291. *Id.* at 714, 348 S.E.2d at 141.

65. *Id.* at 717, 348 S.E.2d at 142.

66. *Id.*

67. *Id.*

68. *Id.* at 718, 348 S.E.2d at 143.

69. *Id.*

70. *Id.*

71. The court said the evidence failed to support the conclusion that the defendant was “negligent in any respect in these cases *within the meaning of the Tort Claims Act*,” *Id.* at 718, 348 S.E.2d

the deaths of Renee and Claudine Hochheiser.⁷²

The claimant's petition for discretionary review by the North Carolina Supreme Court was allowed. The per curiam opinion of the supreme court is brief enough to include in its entirety.

Justice Webb took no part in the consideration or decision of this case. The remaining members of the Court were equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. See *State v. Johnson*, 286 N.C. 331, 210 S.E.2d 260 (1974). Affirmed.⁷³

V. ANALYSIS

The following language from the decision of the court of appeals is critical.

We hold that the Department of Transportation's intentional, discretionary decision not to erect a guardrail at the site of this accident was not "so clearly unreasonable as to amount to oppressive and manifest abuse" *so as to invoke the jurisdiction of the judiciary or the Industrial Commission to review the discretionary policy-making decisions of the Department of Transportation.*⁷⁴

In one sentence, the court collapses the boundaries between notions of jurisdiction, sovereign immunity, and judicial review of decisions of government agencies. Each of these principles relates, in a broad sense, to judicial intervention in the workings of executive and legislative agencies of government. Correctly applied, each could produce substantively similar results: that is, if the court lacks jurisdiction, the defendant is immune or judicial review is not proper, the plaintiff loses. These rules are related to each other in ways that have yet to be fully explored, however, they are best understood and most usefully employed if they are kept separate and distinct. One of the most troubling aspects of *Hochheiser* is the result of this merger of doctrine: it is hard to know what the court meant. The quoted sentence might be understood in a number of ways.

A. Jurisdiction

Was the court really talking about jurisdiction? The concept of jurisdiction is fundamental to administrative law and cuts across a wide range of topics such as exhaustion of remedies, primary jurisdiction, and the

at 143 (emphasis added), but the italicized language adds nothing because the meaning of negligence is the same, within or without the Tort Claims Act.

72. *Id.*

73. *Hochheiser v. North Carolina Dep't of Transp.*, 321 N.C. 117, 361 S.E.2d 562 (1987).

74. 82 N.C. App. at 718, 348 S.E.2d at 143 (emphasis added).

availability and scope of judicial review.⁷⁵ Jurisdiction may refer to original or appellate jurisdiction, or to jurisdiction over the person or the subject matter of the litigation. One cannot be certain of the sense in which the *Hochheiser* court used the word "jurisdiction" in the passage quoted above.

The court's reference to the "jurisdiction of the judiciary" is problematic. The case did not raise an issue of the power of the district and superior courts to hear negligence claims against the state, and the law on that question is well settled. The Industrial Commission's jurisdiction is original and exclusive; the trial courts simply do not have subject matter jurisdiction over such claims.⁷⁶ If a showing of oppressive and manifest abuse of discretion took the action out of the scope of the Tort Claims Act, perhaps the courts would have jurisdiction, but such an action, if it were still considered a tort claim, would presumably be barred by the doctrine of sovereign immunity.

The trial courts have jurisdiction to hear other, non-tort claims against the Department of Transportation. Under the Administrative Procedure Act,⁷⁷ an aggrieved person may petition the Superior Court to review a final decision of the Department in a contested case after all administrative remedies have been exhausted. Decisions concerning the location of new highways, for example, are reviewable by this means.⁷⁸ Jurisdiction is conferred by statute,⁷⁹ and it does not depend upon a showing of oppressive and manifest abuse of discretion.

The court simply could not have been referring to its own power to hear appeals from the Industrial Commission. The right to appeal a final order of the full Commission,⁸⁰ and the jurisdiction of the court of appeals hear such cases⁸¹ are beyond question. Nor can it be seriously maintained that either is limited to cases involving oppressive and manifest abuse.

If the court meant that absent proof of oppressive and manifest abuse of discretion, the Industrial Commission did not have subject matter jurisdiction, that too is problematic. The Industrial Commission has jurisdiction to hear only claims based on negligence.⁸² If oppressive and

75. Even sovereign immunity has jurisdictional implications that are not entirely theoretical. See *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 360 S.E.2d 115 (1987).

76. See *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 299 S.E.2d 618 (1983); *Etheridge v. Graham*, 14 N.C. App. 551, 188 S.E.2d 551 (1972).

77. N.C. GEN. STAT. § 150B-43 and -45 (1986).

78. See *Orange County v. North Carolina Dep't of Transp.*, 46 N.C. App. 350, 359-77, 265 S.E.2d 890, 898-908 (1980).

79. N.C. GEN. STAT. § 7A-250 (1986).

80. N.C. GEN. STAT. § 143-293 (1987 & Supp. 1988).

81. N.C. GEN. STAT. § 7A-29 (1986 & Supp. 1988).

82. Intentional torts are not mentioned in the Act, therefore the state has no liability for the intentional wrongdoing of its employees. *Davis v. North Carolina State Highway Comm'n*, 271

manifest abuse of discretion is a species or degree of negligence, the Industrial Commission clearly has jurisdiction. If oppressive and manifest abuse of discretion is not a form of negligence, a claim based on that theory would fall outside the Tort Claims Act. It makes no sense whatever to hold that the jurisdiction of the Industrial Commission cannot be invoked except upon a showing that would effectively remove the case from the scope of the Tort Claims Act.⁸³

As a statement regarding jurisdiction, the court's pronouncement appears to be contrary to the plain meaning of the Tort Claims Act⁸⁴ and to the case law describing the requisites to invoke the jurisdiction of the Industrial Commission.⁸⁵

B. Sovereign Immunity

Perhaps the court was really talking about sovereign immunity under the Tort Claims Act, rather than jurisdiction. Perhaps it meant that because the decision not to install a guardrail was "discretionary," the Department was immune from suit unless the claimant established a manifest abuse of discretion. If the state were immune, it would follow that the Commission was without jurisdiction.⁸⁶ This reading of the court's holding proceeds from the premise that there is a broad range of activities, "intentional, discretionary" activities, for which the state remains immune from liability under the Tort Claims Act. If that premise is correct, *Hochheiser* is the only authority for it, and much of the law of

N.C. 405, 156 S.E.2d 685 (1967); *Jenkins v. North Carolina Dep't of Motor Vehicles*, 244 N.C. 560, 94 S.E.2d 577 (1956).

83. Even if oppressive and manifest abuse of discretion is not beyond the scope of the Act, the jurisdiction of the Commission would have to be "invoked" to hear evidence on the issues necessary to determine that it was without jurisdiction. *Lucas v. L'il General Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976). See generally *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 350 S.E.2d 83 (1986); *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E.2d 215 (1983); *Vaughn v. North Carolina Dep't of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979). Furthermore, the Commission's denial of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction would not be immediately appealable. See *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 118 (1987). Presumably, the hearing would go on. In that event, the question of jurisdiction would threaten to subsume the substantive issue of liability.

84. N.C. GEN. STAT. § 143-297 (1987).

85. Justice Denny, speaking for a unanimous court said:

No formal pleadings are required in a proceeding under our State Tort Claims Act. It is only necessary in order to invoke the jurisdiction of the Industrial Commission for the claimant or person in whose behalf the claim is made to file with the Industrial Commission an affidavit in duplicate setting forth the material facts, as required by 143-297 N.C. GEN. STAT. § 143-297. *Branch Banking & Trust Co. v. Wilson County Bd. of Educ.*, 251 N.C. 603, 607-08, 111 S.E.2d 844, 848 (1960). *Accord Turner v. Gastonia City Bd. of Educ.*, 250 N.C. 456, 109 S.E.2d 211 (1959).

86. Whether sovereign immunity raises an issue of *in personam* jurisdiction or subject matter jurisdiction is a question with practical implications. While the denial of a motion to dismiss for lack of subject matter jurisdiction under Rule 12 (b)(1) is not immediately appealable, the grant or denial of a 12(b)(2) motion for lack of jurisdiction over the person is. See *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982). The question is as yet undecided. *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 116 (1987).

this state will have to be rethought.⁸⁷

Until *Hochheiser*, no North Carolina appellate decision had even intimated that in passing the Tort Claims Act, the General Assembly meant to preserve the state's immunity for governmental or discretionary functions. In fact, the supreme court in 1983 held, "we continue to recognize no distinction between 'governmental' or 'proprietary' functions of the State as sovereign."⁸⁸ The language of the statute is plain and unqualified: the state is liable for the negligence of its officers and employees acting within the scope of their office or employment, just as if the state were a private person.⁸⁹ There is no mention in the statute of governmental, discretionary, proprietary or ministerial activities.

The Federal Tort Claims Act,⁹⁰ enacted three years before the North Carolina statute, contains an explicit exception for discretionary functions.⁹¹ The application of this exception is a major source of litigation under the federal act. The North Carolina statute did not contain a similar provision when enacted. Thirty-eight years, several amendments, and thousands of tort claims later, it remains unqualified. Nonetheless, the argument is still made that the General Assembly did not intend to waive sovereign immunity for governmental or discretionary activities, and that *Hochheiser* so held.⁹² It seems unlikely that the court of appeals in *Hochheiser* would "interpret" the statute to contain so enormous an ex-

87. Actually, if that premise is correct, the state would be liable for little beyond injuries caused in motor vehicle cases. See PROSSER AND KEETON ON THE LAW OF TORTS § 131 at 1044-45 (5th ed. 1984).

88. *Guthrie v. North Carolina State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983).

89. See *supra* text accompanying note 54.

90. 28 U.S.C. § 1346 (1976 & Supp. 1987).

91. 28 U.S.C. § 2680 (1965).

92. The defendants assert that the liability created by the Tort Claims Act is only as broad as the personal liability of public officers, that the General Assembly could not have intended more exposure for the state than for its employees as individual. Defendant-Appellee's New Brief at 22-34, *Hochheiser v. North Carolina Dep't of Transp.*, 321 N.C. 117, 361 S.E.2d 562 (1987) (No. 624PA86). Defendant-Appellant's Brief at 12-17, *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 360 S.E.2d 115 (1987) (No. 87101C127). Public officers, of course, cannot be held personally liable for negligence in performing the governmental or discretionary duties of their office or employment. See, e.g., *In re Grad v. Kaasa*, 312 N.C. 310, 321 S.E.2d 888 (1984). This argument ignores the fundamental difference between the policy of protecting government officials from personal liability and the policy of allowing people injured by the negligence of government employees to recover against the state. See *Langely v. Taylor*, 245 N.C. 59, 95 S.E.2d 115 (1956); *Miller v. Jones*, 224 N.C. 783, 32 S.E.2d 549 (1945); *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985). It also ignores the reported cases in which recovery was sought for negligence involving the discretion of state officials. See, e.g., *Vaughn v. North Carolina Dep't of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979) (county director negligently placed child with foster parent); *Wrape v. North Carolina State Highway Comm'n*, 263 N.C. 499, 139 S.E.2d 570 (1965) (court said a showing of negligence in the plan or specification of a construction project was necessary for award); *Phillips v. North Carolina Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986); *Watson v. North Carolina Dep't of Corrections*, 47 N.C. App. 718, 268 S.E.2d 546 (1980) (deputy director of prisons decided to use mattresses he knew to be flammable).

ception without even a passing reference to its method of construction or the intent of the General Assembly.⁹³

Two subsequent cases have significantly diminished the strength of *Hochheiser* as authority for the notion that immunity survives for discretionary decisions of state officers and employees. In *Zimmer v. North Carolina Department of Transportation*,⁹⁴ the claimant sought to recover for his injuries on the theory that the Department had been negligent in designating a detour route, by failing to make the detour safe, and by failing to warn of its dangers. The Department argued, before the Commission⁹⁵ and on appeal,⁹⁶ that the acts alleged to have been negligent were "discretionary governmental functions" and that it was, therefore, immune from suit. Judge Martin, writing for a unanimous panel, said:

By enactment of the Tort Claims Act, the State has specifically waived immunity from tort claims falling within the Act without regard to whether the function out of which the claim arises is a governmental function or a proprietary function. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983). The waiver of immunity is not dependent upon whether the alleged negligent act involves the exercise of discretion. North Carolina's Tort Claims Act does not create an exception for negligent performance of duties involving discretion.⁹⁷

In *Woolard v. North Carolina Department of Transportation*,⁹⁸ the claimant alleged that a Department engineer's negligent design of a ferry landing proximately caused the death of her son. The defendant asserted sovereign immunity, arguing that the Tort Claims Act did not create liability for "discretionary governmental functions" such as the design of a ferry landing, citing *Hochheiser* in its brief. The court rejected the argument, citing *Zimmer* and *Guthrie* for the proposition that no such distinction is recognized in tort claims against the state. The court did not discuss *Hochheiser*.

93. In both *Hochheiser* and *Zimmer*, the defendants cautioned the court against liberal construction. Defendant-Appellant's Brief at 27, *Hochheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 348 S.E.2d 140 (1986) (No. 8610IC152); Defendant-Appellant's Brief at 8, *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 360 S.E.2d 115 (1987) (No. 8710IC127). It is an often recited maxim that the Tort Claims Act must be strictly construed, that the intent and purpose of the legislature can be determined by looking at the ordinary meaning of the words of the statute, and that liberal construction cannot be used to enlarge its scope beyond its ordinary meaning. See, e.g., *Nello L. Teer Co. v. North Carolina State Highway Comm'n*, 265 N.C. 1, 143 S.E.2d 247 (1965); *Alliance Co. v. State Hospital*, 241 N.C. 329, 85 S.E.2d 386 (1955); *Smith v. McDowell County Bd. of Educ.*, 68 N.C. App. 541, 316 S.E.2d 108 (1984); *Withers v. Charlotte-Mecklenburg Bd. of Educ.*, 32 N.C. App. 230, 231 S.E.2d 276 (1977). But cf. NOTE, *State Tort Claims Act — Construction*, 33 N.C.L. REV. 613 (1955). Yet, there is nothing "strict" about a construction that would suppress the ordinary meaning of the statute.

94. 87 N.C. App. 132, 360 S.E.2d 115 (1987).

95. Record on Appeal at 6-10, *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 360 S.E.2d 115 (1987) (No. 8710IC127).

96. Defendant-Appellant's Brief at 12-17, *Zimmer* (No. 8710IC127).

97. 87 N.C. App. at 135-36, 360 S.E.2d at 117.

98. 93 N.C. App. 214, 377 S.E.2d 267 (1989).

C. Judicial Review

Perhaps the court was really talking about the circumstances in which it is proper for the court to substitute its own judgment for that of the "policy-makers" at the Department of Transportation. If so, the reference to jurisdiction merely obscures the court's real concern: judicial review of administrative action. The court of appeals cited *Guyton v. North Carolina Board of Transportation*,⁹⁹ as authority for the proposition that discretionary activities of the Department of Transportation were not *reviewable* in an action under the Tort Claims Act "unless [the Department's] action is so clearly unreasonable as to amount to oppressive and manifest abuse."¹⁰⁰ The court's error in this regard is in employing a rule of law in a context where it clearly does not belong.

The right to judicial review of administrative action, along with procedures for obtaining it, may be provided by the statute creating the administrative agency. Where enabling legislation makes such provisions, the statute controls all issues related to judicial review.¹⁰¹ If the statute does not require a showing of oppressive and manifest abuse, there is no general requirement of such a showing in order to obtain judicial review. If no other statute provides an adequate procedure for review, the North Carolina Administrative Procedure Act¹⁰² grants the right to judicial review to any person aggrieved by a final decision of an agency in a contested case, after all administrative remedies have been exhausted.¹⁰³ Again, there is no requirement of oppressive and manifest abuse, and no special case for acts of discretion.¹⁰⁴

The actions and decisions of counties, cities, and agencies of local government are specifically exempt from the Administrative Procedures Act because those bodies are excluded from the definition of "agency."¹⁰⁵ Judicial review of local governmental action is, in this sense, nonstatutory. In this context, North Carolina has a long tradition of judicial deference to the authority of local government and its agencies, especially where legislative and executive decisions of local government are attacked.¹⁰⁶

99. 30 N.C. App. 87, 226 S.E.2d 175 (1976).

100. 82 N.C. App. 712, 718, 348 S.E.2d 140, 143 (quoting *Guyton v. North Carolina Board of Transp.*, 30 N.C. App. 87, 90, 226 S.E.2d 175, 177 (1976)).

101. *Snow v. North Carolina Bd. of Architecture*, 559 N.C. 559, 570-71, 160 S.E.2d 719 (1968); *State ex. rel Grimsley v. Buchanan*, 64 N.C. App. 637, 307 S.E.2d 385 (1983).

102. N.C. GEN. STAT. §§ 150B-1 to -64 (1987 & Supp. 1988).

103. N.C. GEN. STAT. § 150B-43 (1987).

104. See generally *Vass v. Board of Trustees*, 324 N.C. 402, 379 S.E.2d 26 (1989); *Davis v. Hiatt*, 92 N.C. App. 748, 376 S.E.2d 44 (1989); *Tennessee v. Environmental Management Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

105. N.C. GEN. STAT. § 150B-2(1) (1987).

106. For a thorough explication and spirited critique of this tradition, see MARKHAM, *A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action*, 12 N.C. CENT. L.J. 21 (1980).

The circumstances in which a court may or should intervene is an issue whenever the plaintiff asks the court to alter such a decision or to restrain local government bodies from acting. The "manifest and oppressive abuse of discretion" test developed as one of the rules used to resolve that issue, an issue quite unrelated to tort claims against the state.

One of the earliest cases in North Carolina to use the expression was *Rosenthal v. City of Goldsboro*,¹⁰⁷ in which the plaintiff sought to enjoin the city from cutting down elm trees in her yard. There was no allegation that the decision to cut the trees was negligent. The city alleged that the roots had penetrated the sewer system and were a threat to its continued usefulness. The trial court granted the plaintiff a permanent injunction, until a proper condemnation proceeding could be instituted. In reversing the judgment below, the court said:

[I]t may now be considered as established with us, that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers, conferred upon them for the public weal, and will never do so *unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion*.¹⁰⁸

Precisely the same language was used in *Guyton*. In that case, plaintiffs sought to enjoin the Board of Transportation from excavating an old roadway, in which they asserted a property interest, as part of a project to construct a new bridge. Plaintiffs alleged that the old roadway provided the only access to their property.¹⁰⁹ Again, there was no allegation that the Board's decision was negligent. A statute conferred discretionary authority on the Department to change any part of the state highway system when in its judgment the public good so required.¹¹⁰ The court denied equitable relief because there was no showing of an oppressive and manifest abuse of the authority granted by the statute and because the plaintiff had an adequate remedy at law, namely an action for just compensation for the taking of their property.¹¹¹

Other cases in which the "oppressive and manifest abuse" standard is used are as equally foreign to tort actions against the state as *Rosenthal* and *Guyton*.¹¹² The three North Carolina cases, other than *Guyton*, cited to the court of appeals by the defendant bear no relation whatever to the Tort Claims Act. *Pharr v. Garibaldi*,¹¹³ was an action to permanently enjoin the operation of Camp Polk Prison brought by a nearby resident

107. 149 N.C. 128, 62 S.E. 905 (1908). See *Tate v. City of Greensboro*, 114 N.C. 392, 401, 19 S.E. 767, 769 (1894).

108. 149 N.C. at 134, 62 S.E. at 908 (emphasis added).

109. *Guyton v. North Carolina Bd. of Transp.*, 30 N.C. App. 87, 88, 226 S.E.2d 175, 176 (1976).

110. *Id.* at 90, 226 S.E.2d at 177 (quoting N.C. GEN. STAT. § 136-60, repealed in 1973).

111. *Id.* at 90, 226 S.E.2d at 177-78.

112. For an extensive but partial list, see Markham, *supra* note 106, at 34, n.64.

113. 252 N.C. 803, 115 S.E.2d 18 (1960).

on the theory that the prison was a continuing nuisance. *Highway Commission v. Young*,¹¹⁴ was a suit brought by the state to enjoin the obstruction of the right of way of a highway. In *Town of Williamston v. Atlantic Coast Line Railroad Co.*,¹¹⁵ the plaintiff municipality sought a mandatory injunction to compel the defendant railroad company to repair a street. In those cases, the *Guyton-Rosenthal* formula may have some application. However, *Hochheiser's* reliance on *Guyton* is a serious misuse of authority, and the effort to inflict the principle of *Rosenthal* and its progeny on a tort claim against the state produces an aberration completely without precedent. In fact, *Zimmer* and *Hochheiser* are the only reported North Carolina cases to discuss manifest and oppressive abuse of discretion in the context of a claim brought under the Tort Claims Act.

The issues of availability and scope of judicial review, especially important in administrative law, go to the propriety of judicial intervention in the legislative and executive activities of government agencies. They are rooted in the constitutional principle of separation of powers. It is a familiar principle of administrative law that where review is provided by statute, as it is in the Administrative Procedure Act and the Tort Claims Act, the statute controls. An action under the Tort Claims Act is a means of obtaining judicial review of agency action, at least in the sense that the Industrial Commission must determine whether officials or employees of the state were negligent. The nature and scope of the Commission's inquiry is plainly set out in the statute: the Commission must find *negligence*. Limiting the Commission's power to "review" tort claims to cases in which there has been oppressive and manifest abuse of discretion would gut the legislation and contravene the clear language of the statute. The common law formula used by the *Hochheiser* court has no place in an action under the Tort Claims Act, and it should not be used to undermine the General Assembly's waiver of sovereign immunity.

D. Discretionary Decisions: A Special Case?

Perhaps the court was not really talking about jurisdiction, or immunity or judicial review. Perhaps it meant simply that in cases where a state officer or employee must exercise discretion, mere negligence is not enough to permit recovery from the state.¹¹⁶ The court may have felt that for certain activities the state should be insulated from liability unless something more than the lack of ordinary care of its employees could be

114. 200 N.C. 603, 158 S.E. 91 (1931).

115. 236 N.C. 271, 72 S.E.2d 609 (1952).

116. *Zimmer* could be read to support this interpretation of *Hochheiser*. See *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 137, 360 S.E.2d 115, 118 (1987). "*Hochheiser* merely holds that a claimant must show an 'oppressive and manifest abuse' of discretion in order to prove that an act or omission involving the exercise of discretion was negligent."

established.¹¹⁷

Judicial deference to high level executive and legislative activities of government, activities that have sometimes been characterized as "discretionary," is certainly sound policy. But the institutional concerns and constitutional principles that animate that policy are simply not at stake when the decision is whether a guardrail should be placed on a certain section of highway.¹¹⁸ Whether to install a safety device is precisely the kind of decision that, if negligently made, ought to result in liability if people are injured by it,¹¹⁹ and the cases imposing liability for such negligence are legion.¹²⁰ Holding a government agency responsible when one of its employees is negligent in this way can hardly be seen a judicial invasion of the province of the executive branch. If the court felt that liability was inappropriate on the facts of *Hochheiser*, it must have been motivated by something other than the character of the activity that produced the injury. Furthermore, since the *Hochheiser* case, the court has allowed an action under the Tort Claims Act brought on the theory that a ferry landing had been negligently designed.¹²¹ Highway design is somewhat closer to the "discretionary" activities protected under federal law,¹²² but *Woolard v. North Carolina Department of Transportation* refused to treat it as a special case.¹²³

Even if the idea of protecting the state from liability in such cases were a good one, the statute simply does not provide for it. What has been said before about statutory interpretation and legislative intent applies here with equal force.¹²⁴ Suffice it to add that no theory of statutory interpretation, however imaginatively employed, could legitimately divine such an elaborate scheme from the simple words of section 143-291. The statute¹²⁵ speaks only of negligence, and the cases confirm that negligence under the Tort Claims Act is negligence is negligence.¹²⁶

117. The court twice characterized the failure to install a guardrail as an "intentional discretionary decision." "Decision" means a conscious choice. Every decision is, by definition, intentional. Without discretion, the freedom to choose one course of action over another, decision-making cannot go on, therefore, the court's characterization of the decision in *Hochheiser* does little to advance the analysis.

118. For a good discussion of tort immunity for basic policy decisions, see PROSSER AND KEETON ON THE LAW OF TORTS § 131 at 1046-47 (5th ed. 1984).

119. Whether the circumstances warrant taking precautions for the safety of others is nearly a paradigm of the negligence formula taught everywhere in Torts in the first year of law school. See PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984); *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

120. See generally, PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984).

121. *Woolard v. North Carolina Dep't of Transp.*, 93 N.C. App. 214, 377 S.E.2d 267 (1989).

122. 28 U.S.C. § 2680 (1965).

123. 93 N.C. App. 214, 377 S.E.2d 267 (1989).

124. See *supra* text accompanying notes 89-93.

125. See *supra* text accompanying note 54.

126. See, e.g., *Barney v. North Carolina State Highway Comm'n*, 282 N.C. 278, 284, 192 S.E.2d

VI. AN ALTERNATIVE BASIS FOR DECISION

The court of appeals seems to have been intent on denying recovery to Mrs. Hochheiser, perhaps in response to the alarming specter of unlimited liability conjured in the defendant's brief.¹²⁷ Most of the roads in North Carolina would probably be safer if they had guardrails, and the court may have been concerned that any motorist whose vehicle left the road might have a plausible claim against the state on that theory if the claimants in *Hochheiser* prevailed. Constrained as it was to limit its inquiry to whether the Commission's findings of fact were supported by any competent evidence, and whether the facts supported the conclusions of law, the court may have thought itself powerless to upset the award without discovering an error of law. That may not have been necessary. If the court had left the Commission's findings undisturbed, the award could have been reversed on other, legitimate, grounds.

The Deputy Commissioner concluded that the Department's employees "failed to exercise the care which an ordinarily prudent person would exercise in the discharge of their duties to make the area in and around the site of the accident reasonably safe for its intended use."¹²⁸ The record reveals that the failure to erect a guardrail at the accident site was not an "intentional, discretionary decision" of the Department of Transportation. In fact, no decision regarding the matter appears to have been made. The only conduct, therefore, to which the Deputy Commissioner's conclusion of negligence could have applied was the defendant's failure to inspect the area where the accident occurred.¹²⁹ If the Department's negligence was the failure to inspect, the question should have been whether that negligence — the failure to inspect — caused the deaths of Renee and Claudine Hochheiser. To show a causal relationship between the negligence of the defendant and the claimant's injuries, the claimant would have to demonstrate that a guardrail would have been installed if the road had been inspected. There was no such evidence. The court of appeals could have held there was no competent evidence to support the conclusion that the defendant's negligence, the failure to inspect, caused the accident in which the Hochheiser children died.

VII. CONCLUSION

Where no statutory form of judicial review is provided, one common law formula provides that a court may not restrain government officials

273, 277 (1972); *MacFarlane v. North Carolina Wildlife Resources Comm'n*, 244 N.C. 385, 93 S.E.2d 557 (1956).

127. Defendant-Appellant's Brief at 35-36, *Hochheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 348 S.E.2d 140 (1986) (No. 8610IC152).

128. Record at 28-29, *Hochheiser* (No. 8610IC152).

129. *Id.* at 27.

from acting unless their conduct is so unreasonable as to amount to oppressive and manifest abuse of discretion. Because there is a statutory standard in the Tort Claims Act, which sets out the elements for recovery and requires the Commission to determine whether those elements have been proved, the common law rule is irrelevant in a tort action against the State of North Carolina or its agencies. The Industrial Commission has exclusive, original jurisdiction to hear such claims, and the state is not immune from liability, even if the act that produced the injury was discretionary. The decision of the court of appeals in *Hochheiser v. North Carolina Department of Transportation*, though it stands without precedential value, permits these basic principles to be confused. The North Carolina Supreme Court should put an end to this confusion.