THE VERBAL THRESHOLD SINCE BROOKS V. ODOM: THE UNCERTAINTY OF PUBLIC ENTITY LIABILITY FOR PAIN AND SUFFERING DAMAGES IN NEW JERSEY

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INTRODUCTION

Mary Motorist is stopped at a red light when she is startled by a loud crash. Her head jerks forward as her car is shaken. She has just been rear-ended by Cathy Careless, a New Jersey Department of Transportation ("DOT") worker on her way to an appointment in a state vehicle. The two exchanged insurance information, and Mary felt well enough to go home. Later, she found that she was still experiencing pain in her neck. Mary went to the doctor, who in turn sent her to a radiologist and an orthopedist. Mary was diagnosed with whiplash and a sprain of the cervical spine. After consulting with a personal injury attorney, Mary filed suit against Cathy Careless and the New Jersey DOT, seeking damages for pain and suffering. Discovery revealed that in the opinion of Mary's orthopedist, Mary's injuries were permanent and that she would suffer chronic pain in her back and neck for the rest of her life.

Provided that Cathy was negligent, the DOT should be liable for the damage to Mary's car, and for her medical bills. But should the DOT, and thus implicitly, the taxpayers of New Jersey, be liable for her pain and suffering damages? The New Jersey Tort Claims Act attempts to strike a balance: persons who sue public entities may not recover pain and suffering damages, with the exception "of permanent loss of a bodily function,

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permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $ 3,600.00."[2]

Mary's doctor has opined that her injuries are permanent, and that her medical expenses are in excess of the $3,600 threshold. She has not been disfigured or dismembered, but is her injury a permanent loss of a bodily function? Suppose Mary testifies in her deposition that she retired from being a teacher two years before the accident. However, her injuries have made it difficult to perform household chores that she used to do regularly. She can no longer vacuum or reach the top cabinets in the kitchen. She also can no longer play golf. She continues to take pain relievers to manage her back and neck pain.

In an ordinary civil suit, Mary would likely be entitled to pain and suffering damages. However, when the state is the defendant, is it proper for taxpayers to foot the bill for the pain caused by a chronic injury? Cases like Mary's raise the all-important question: what, exactly, is a permanent loss of a bodily function? Must one be unable to walk? Is not being able to vacuum or play golf a loss of a bodily function? This note will examine the New Jersey Tort Claims Act's history and goals. Recent developments in case law will be surveyed, and the weaknesses of the current approach will be explored. A philosophical justification for limiting the tort liability of public entities will also be given. Finally, this note will argue in favor of proposed solutions to create a standard that is more predictable and more deferential to the interest of the public in reducing the state's liability for pain and suffering damages.

HISTORY OF THE TORT CLAIMS ACT

PASSAGE AND GOALS

In response to the judicial abrogation of New Jersey's common-law sovereign immunity,[3] the Legislature passed the

[2] New Jersey Tort Claims Act, N.J. STAT. ANN. § 59:9-2(d) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2).

[3] Willis v. Dep't of Conservation & Econ. Dev., 264 A.2d 34, 37 (N.J. 1970).

New Jersey Tort Claims Act ("Tort Claims Act") in 1972.[4] In its section on damages, the Tort Claims Act places several limitations on the sort of damages that plaintiffs may recover in suits against public entities in New Jersey. No interest accrues prior to the awarding of judgment against a public entity.[5] Public entities are immune from punitive damages.[6] Finally, the Tort Claims Act establishes a default rule that public entities are not liable for pain and suffering damages.[7] This is subject to an exception, known as the "verbal threshold," for particularly severe injuries.[8] Plaintiffs may recover pain and suffering damages if they incur medical treatment expenses over $3600 (the "objective prong") and their injuries amount to a permanent loss of a bodily function, permanent disfigurement, or dismemberment (the "subjective prong").[9]

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[4] New Jersey Tort Claims Act, 1972 N.J. Laws 140 (codified as amended at N.J. STAT. ANN. § 59:1-1 to 12-3 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2)).

[5] N.J. STAT. ANN. § 59:9-2(a) ("No interest shall accrue prior to the entry of judgment against a public entity or public employee.").

[6] § 59:9-2(c) ("No punitive or exemplary damages shall be awarded against a public entity.").

[7] § 59:9-2(d), which provides in full:

No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.

[8] *See id. See also* N.J. STAT. ANN. § 39:6A-8(a) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2.), the equivalent provision of the no-fault automobile insurance statute. *See generally* Marisa L. Ferraro, Note, *New Jersey and the Verbal Threshold: Imperfect Together*, 54 RUTGERS L. REV. 707 (2002) (providing a history and analysis of the insurance statute's verbal threshold).

[9] N.J. STAT. ANN. § 59:9-2(d).

The Tort Claims Act was preceded by a report by the Attorney General's Task Force on Sovereign Immunity, which analyzed the Tort Claims Acts passed by California, New York, and the federal government and, based on the experiences of those jurisdictions, made recommendations for New Jersey.[10] The Report's recommendations were passed by the Legislature as the Tort Claims Act. The Report's § 59:9-2(d) was identical to that passed by the Legislature, although the monetary threshold amount has since been increased.[11] The Report's comment to this section read as follows:

> The limitation on the recovery of damages in subparagraph (d) reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damages, such as pain and suffering, except in aggravated circumstances—cases involving permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $1,000. The limitation that pain and suffering may only be awarded when medical expenses exceed $1,000 insures that such damages will not be awarded unless the loss is substantial.[12]

To summarize, the Tort Claims Act aimed (1) generally, to restore sovereign immunity except where specifically exempted;[13] and (2) specifically, to allow the recovery of pain and suffering damages only in exceptional circumstances.

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[10] GEORGE F. KUGLER, JR,, REP. OF THE ATTORNEY GENERAL'S TASK FORCE ON SOVEREIGN IMMUNITY 2 (1972).

[11] *Id.* at 234. *See* 2000 N.J. Sess. Law Serv. 136, § 32 (raising monetary threshold from $1,000.00 to $3,600.00).

[12] Kugler, *supra* note 10, at 234 (emphasis added).

[13] Note that for public employees, this policy is reversed: they are liable for their acts unless specifically *exempted* from liability by the Act. N.J. STAT. ANN. § 59:3-1(a) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2.) ("Except as otherwise provided by this act, a public employee is liable for injury caused by his act or omission to the same extent as a private person."). However, the Act

BROOKS V. ODOM

Perhaps the most important development in the judicial interpretation of this provision of the Tort Claims Act was *Brooks v. Odom,* which required that a permanent loss of a bodily function must be "substantial."[14] Ms. Brooks was entering her parked car when a New Jersey Transit bus driven by Willie Mae Odom struck her door, knocking her into the car.[15] Ms. Brooks complained of pain in her back, neck, and head, and was transported to the hospital by an ambulance, where X-rays revealed "degenerative changes at C5-C6."[16] She left after being fitted with a cervical collar and being prescribed medication.[17]

The following year, she was diagnosed with "residual of post-traumatic myositis and fibromyositis of the cervicodorsal and lumbosacral region and post-traumatic headache syndrome."[18] Her doctor opined that there was a "direct causal relationship" between her injuries and the accident and that she had a "significant and permanent loss of function with chronic pain that was exacerbated by the usual activities of daily living" from which she was unlikely to recover.[19] Ms. Brooks stayed home for two weeks, missing eight work days.[20] After this, she was able to work, but could not sit or stand for extended periods of time without experiencing pain in her lower back.[21] She also

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then provides that "[a] public employee is not liable for an injury where a public entity is immune from liability for that injury." § 59:3-1(c).

[14] Brooks v. Odom, 696 A.2d 619, 624 (N.J. 1997).

[15] *Id.* at 620.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 621. "Myositis is the 'inflammation of muscle tissue.' Fibromyositis is 'characterized by pain, tenderness, and stiffness of joints, capsules, and adjacent structures.'" *Id.* (citations omitted).

[19] *Id.*

[20] Brooks v. Odom, 696 A.2d 619, 621 (N.J. 1997).

[21] *Id.*

experienced headaches and dizziness, and could no longer perform certain household chores, such as vacuuming and carrying groceries.[22]

Ms. Brooks filed suit against the New Jersey Transit Corporation and the bus driver, Willie Mae Odom.[23] The trial court granted summary judgment in favor of the defendants, Odom and New Jersey Transit.[24] The Appellate Division reversed, and the New Jersey Supreme Court reversed again, holding that Ms. Brooks' injuries were not substantial.[25] The court focused its effort on divining the legislative intent behind the Tort Claims Act,[26] which was generally to "reestablish the general rule of the immunity of public entities from liability for injuries to others," except where the statute explicitly provided otherwise.[27] Because the Tort Claims Act does not define "permanent," "loss," "bodily," or "function," the court turned to ordinary dictionary definitions of those terms:

> "Function" means "[t]he action performed by any structure. In a living organism this may pertain to a cell or part of a cell, tissue, organ or system of organs." "Loss" means "the act of losing possession" and the "decrease in amount, magnitude or degree." Finally, "bodily" is defined as "pertaining to or concerning the body; of or

[22] *Id.*

[23] *Id.* at 620.

[24] *Id.*

[25] *Id.* at 622, 624.

[26] "When construing a statute, the judicial role is to give effect to the legislative intent." Brooks v. Odom, 696 A.2d 619, 622 (N.J. 1997) (citing State v. Madden, 294 A.2d 609, 615 (N.J. 1972)).

[27] *Brooks*, 696 A.2d at 622. *See* N.J. STAT. ANN. § 59:2-1(a) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2.) ("Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.").

> belonging to the physical constitution." Those definitions, although helpful, are not dispositive.[28]

Regarding the exclusion of pain and suffering damages in § 59:9-2(d), the court cited the Attorney General's Task Force on Sovereign Immunity, noting "the policy judgment that in view of the economic burdens presently facing public entities," pain and suffering damages should only be available in "aggravated circumstances."[29]"Underlying the reenactment of immunity was the Legislature's concern about that liability on the public coffers."[30] The court read this purpose as requiring a "chary interpretation of a public entity's exposure to liability."[31]

Under the Tort Claims Act, a plaintiff first had to prove with "objective medical evidence" that he or she sustained a permanent injury.[32] Neither temporary injuries, nor "subjective feelings of discomfort," are recoverable under the Tort Claims Act.[33] The *Brooks* court distinguished the Tort Claims Act from the no-fault automobile insurance law, AICRA, which provided for a different set of circumstances in its verbal threshold.[34]

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[28] *Brooks*, 696 A.2d at 622 (citations omitted).

[29] *Id.* (further citation and internal quotations omitted)..

[30] *Id.*

[31] *Id.*

[32] *See id.* at 622-23.

[33] *Id.* at 623 (quoting Ayers v. Twp. of Jackson, 525 A.2d 287, 294 (N.J. 1987)).

[34] Brooks v. Odom, 696 A.2d 619, 623 (N.J. 1997). AICRA allows recovery for injuries that fall into the following categories:

[1] death;

[2] dismemberment;

[3] significant disfigurement;

[4] a fracture;

[5] loss of a fetus;

"[While] [i]n some respects the threshold issue in actions against public entities is similar to the verbal-threshold issue in no-fault cases[,] . . . [t]he substantive standards in the two statutes . . . differ."[35]

The Legislature did not state "that a mere limitation on a bodily function would suffice."[36] The court likewise ruled out a requirement that a loss of a bodily function be *total*, but given the aims of the law, required that any permanent loss of a bodily function be *substantial*.[37] The court attempted to tease out some additional meaning from the requirement of a "permanent loss of a bodily function," but left future courts with little actual guidance as to what would be considered substantial. While a total permanent loss of use would certainly satisfy the requirement, it is not necessary.[38] The court accepted that Ms. Brooks suffered continued pain, as well as a permanent loss of motion, but held that her injuries were not substantial, as she could still "function both in her employment and as a homemaker."[39]

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[6] permanent loss of the use of a body organ, member, function or system;

[7] permanent consequential limitation of use of a body organ or member;

[8] significant limitation or use of a body function or system; or

[9] a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Id. (citing N.J. STAT. ANN. § 39:6A-8(a)).

[35] *Id.*

[36] *Id.* at 624.

[37] *Id.* ("As the Workers' Compensation Act demonstrates, the Legislature is aware of the distinction between permanent injuries that are total and those that are partial.").

[38] *Id.*

[39] *Id.*

Shortly after the decision, it was opined that "[t]he Brooks opinion sen[t] a clear message to all trial courts to raise the shields to protect public entities from liability for injuries to others."[40] However, because the court seemed to rely on "the lasting effect that the injury has on daily activities, rather than with the severity of the injury itself . . . [t]he Brooks court stopped short of providing trial courts and practitioners with the guidance necessary to frame properly a given injury within the statutory standard."[41] Indeed, the court did not adequately explain what, exactly, was not substantial about the plaintiff's injuries. The court reached the correct result, but unfortunately, as this note argues, *Brooks* did too little to clarify the criteria for §59:9-2(d)'s exception to the general rule that plaintiffs should not be able to recover pain and suffering damages from public entities, resulting in substantial confusion.

THE PROBLEMATIC AMBIGUITY OF THE *BROOKS* STANDARD

A. THE BROOKS TEST REITERATED

As it stands, the test for whether a plaintiff can recover pain and suffering damages is too indeterminate and uncertain. This leaves potential plaintiffs unsure of whether they can recover pain and suffering damages, and makes it more difficult for state defendants to determine which claims to settle and which to litigate. Greater certainty in the law would be beneficial to both claimants and public entities. This uncertainty also jeopardizes the Tort Claims Act's policy of preserving sovereign immunity unless entities are specifically made liable.[42] Additionally, as this note will argue in Section IV,

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[40] Richard P. Earley, *Tort Law--New Jersey Tort Claims Act--Plaintiff May Not Recover Under the New Jersey Tort Claims Act for Pain and Suffering Unless the Sustained Permanent Loss of a Bodily Function is Substantial--Brooks v. Odom, 150 N.J. 395, 696 A.2d 619 (1997),* 28 SETON HALL L. REV. 1396, 1401 (1998).

[41] *Id.*

[42] N.J. STAT. ANN. § 59:2-1 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2.); *Brooks*, 696 A.2d at 622 ("We read the provision in the light of the

there are compelling ethical and jurisprudential reasons to limit taxpayer liability for non-economic harms.

The current test is as follows: first, the plaintiff's medical expenses must be in excess of $3,600.00 (the objective prong).[43] The objective prong also requires some objective medical impairment, "such as a fracture."[44] Second, the plaintiff must sustain either a permanent loss of a bodily function, permanent disfigurement, or dismemberment (the subjective prong).[45] Finally, *Brooks v. Odom* imposed the requirement that a permanent loss of a bodily function or disfigurement must be "substantial."[46] These requirements are supposed to ensure that only the most deserving plaintiffs can receive pain and suffering damages from public entities.

The main problem with this test is the vagueness of the substantiality requirement. What seems substantial to one judge may seem trivial to another. This leaves a great deal of uncertainty in the law, and may make judges reluctant to grant summary judgment motions when plaintiffs allege pain and suffering damages for chronic pain injuries. Whether an injury is substantial under current case law essentially involves argument by analogy: is the injury worse than that of Ms. Brooks?

Given the subjectivity of this test, it is unsurprising that it has yielded a variety of results. Some of the results seem eminently sensible, such as a decision ruling that a person's difficulty breathing as a result of a broken nose sustained in an attack could be substantial.[47] Severe disk herniation has also

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general legislative intent in the Act to establish immunity as the general rule and to subject a public entity for liability only as the Act provides.").

[43] N.J. STAT. ANN. § 59:9-2(d) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2).

[44] HARRY A. MARGOLIS & ROBERT NOVACK, NEW JERSEY STATUTES TITLE 59 CLAIMS AGAINST PUBLIC ENTITIES 122 (1988).

[45] *Id.*

[46] *Brooks*, 696 A.2d. at 624.

[47] Gerber *ex rel.* Gerber v. Springfield Bd. of Educ., 744 A.2d 670, 678 (N.J. Super. Ct. App. Div. 2000).

been deemed substantial.[48] Less severe disk herniation may be insubstantial.[49] Other results seem wildly inconsistent; knee pain due to a torn medial meniscus was deemed insubstantial,[50] but a knee that functioned only due to reconstructive surgery was deemed substantial.[51] The inconsistency of the latter ruling was pointed out in the dissenting opinion, which noted that while Ms. Brooks suffered at least some permanent effects and could not recover pain and suffering damages, in *Gilhooley*, the "plaintiff suffers no loss of movement and her knee is functioning properly; yet, she is found to have satisfied the *Brooks* standard."[52]

A torn rotator cuff may[53] or may not[54] be substantial. Psychological injuries have been deemed substantial in some cases,[55] but not in others.[56] Other examples of injuries deemed substantial include a hand laceration resulting in continued numbness[57] and a stillborn birth caused by negligent medical

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48 Knowles v. Mantua Twp. Soccer Ass'n, 823 A.2d 26, 28-31(N.J. 2003).

49 Heenan v. Greene, 809 A.2d 836, 840 (N.J. Super. Ct. App. Div. 2002). The Appellate Division attempted to draw the line at "injuries that would have rendered an extremity useless without significant surgical intervention," as in Gilhooley v. Cnty. of Union, 753 A.2d 1137 (N.J. 2000), and Kahrar v. Borough of Wallington, 791 A.2d 197 (N.J. 2002). *Id.*

50 Ponte v. Overeem, 791 A.2d 1002, 1006-07 (N.J. 2002).

51 Gilhooley v. Cnty. of Union, 753 A.2d 1137, 1142 N.J. 2000).

52 *Id.* at 1146 (Verniero, J., dissenting).

53 Kahrar v. Borough of Wallington, 791 A.2d 197, 204-05 (N.J. 2002).

54 DeNigris v. DeNigris, No. A-6371-03T2, 2005 N.J. Super. Unpub. LEXIS 247, at *13 (N.J. Super. Ct. App. Div. Nov. 15, 2005).

55 Hoag v. Brown, 935 A.2d 1218, 1235-36 (N.J. Super Ct. App. Div. 2007).

56 Gerber *ex rel.* Gerber v. Springfield Bd. of Educ., 744 A.2d 670, 678 (N.J. Super. Ct. App. Div. 2000); Hammer v. Twp. of Livingston, 723 A.2d 988, 992 (N.J. Super. Ct. App. Div. 1999).

57 McLaughlin v. Homer, No. A-2315-04T2, 2006 N.J. Super. Unpub. LEXIS 681, at *2-3 (N.J. Super. Ct. App. Div. Feb. 24, 2006).

care.[58] This last example is especially problematic, as it involves harm primarily to a person who legally did not yet exist, with the harm to the parents being mostly emotional.[59] Granted, some of these examples could be argued to have differed in severity, rather than the type of injury involved. However, the courts have not provided a definite level of the severity required.

ATTEMPTS AT CLARIFICATION

New Jersey appellate courts have revisited the verbal threshold issue in several cases. The New Jersey Supreme Court next addressed the issue in *Gilhooley v. County of Union*.[60] Gilhooley, a clinical social worker, was visiting the Union County Jail to accompany a nurse in administering methadone to incarcerated veterans.[61] As she exited the building, a sheriff's officer assisted her in getting across the lobby floor because it was covered in wet soap.[62] She then slipped and fell down a cement ramp, claiming that her fall was caused by the soap on her shoes.[63] Gilhooley injured her nose and knee, the latter of which was the subject of the case.[64] Due to a loss of quadriceps power, her doctors performed a surgery that inserted two "pins" and a "band wire" into her knee.[65] This procedure allowed her

[58] Willis v. Ashby, 801 A.2d 442, 443 (N.J. Super. Ct. App. Div. 2002).

[59] Emotional distress may be recoverable only if it results "in permanent physical sequelae such as disabling tremors, paralysis or loss of eyesight." Srebnik v. State, 585 A.2d 950, 954 (N.J. Super. Ct. App. Div. 1991).

[60] Gilhooley v. Cnty. of Union, 753 A.2d 1137 (N.J. 2000).

[61] *Id.* at 1139.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

to return to work, but left her with "constant stiffness and pain in her knee."[66]

The trial court granted summary judgment to the defendants, which the Appellate Division affirmed.[67] However, the New Jersey Supreme Court reversed, describing Gilhooley's injury as a "permanent injury resulting in a substantial loss of bodily function."[68] Analogizing her injury to a hearing loss requiring the use of a hearing aid, the court explained that a substantial loss of bodily function occurs even when a person's abilities are restored by "artificial mechanisms or devices."[69] In his dissent, Justice Verniero took a different approach, "find[ing] the proper focus under both the statute and *Brooks* to be on the loss of bodily function, not on the injury."[70] Noting that Gilhooley's knee was now functioning and she had returned to work, Justice Verniero wrote that the majority's result was incompatible with the Tort Claims Act's policy of reestablishing governmental immunity.[71] Further, due to the effects of the restorative surgery in *Gilhooley*, "the *Brooks* plaintiff arguably suffered more of a permanent loss than did plaintiff in this case."[72]

Two cases, *Kahrar v. Borough of Wallington* and *Ponte v. Overeem*, were decided on the same day in 2002, and may thus bear some significance as an attempt by the New Jersey Supreme Court to clarify the *Brooks* standard.[73]

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[66] Gilhooley v. Cnty. of Union, 753 A.2d 1137, 1139 (N.J. 2000).

[67] *Id.* at 1139-40.

[68] *Id.* at 1142.

[69] *Id.*

[70] Gilhooley v. Cnty. of Union, 753 A.2d 1137, 1145 (2000) (Verniero, J., dissenting).

[71] *Id.*

[72] *Id.* at 1146.

[73] Ponte v. Overeem, 791 A.2d 1002 (N.J. 2002); Kahrar v. Borough of Wallington, 791 A.2d 197 (N.J. 2002).

In *Kahrar*, the plaintiff was injured when she tripped on a hole while crossing a street.[74] She went home, but pursued medical treatment after feeling continued pain in her shoulder, whereupon an MRI revealed a severely torn rotator cuff.[75] Surgical intervention only partially corrected her injury, and she was diagnosed with a permanent limitation in the range of motion in her arm.[76] She was able to return to work, but experienced limitations in the chores that she could perform around the home, and could not use her bad arm for long periods of time, resulting in difficulties with her woodworking and furniture stripping hobbies.[77]

The *Kahrar* court explained its ruling in *Brooks* more thoroughly, writing that "distinctions between sedentary and non-sedentary plaintiffs in applying the Tort Claims Act standard are inappropriate. Rather, the appropriate focus is on the degree of injury and impairment."[78] Thus, a shoulder injury cannot be considered more severe for an athlete than a homemaker. Reasoning that the plaintiff's "ability to use her arm to complete normal tasks has been significantly impaired because plaintiff has lost approximately forty percent of the normal range of motion in her left arm," the court found her injuries to be a substantial loss of a bodily function.[79]

In *Ponte*, the court also considered an injury that required surgical intervention—arthroscopic knee surgery.[80] In *Ponte*, the plaintiff's car had been struck by a New Jersey Transit bus while stalled due to an electrical failure.[81] Plaintiff struck his knee on the dashboard and suffered a torn

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[74] *Kahrar*, 791 A.2d at 198.

[75] *Id.* at 198-99.

[76] *Id.* at 199-200.

[77] *Id.*

[78] *Id.* at 204.

[79] *Id.* 205.

[80] Ponte v. Overeem, 791 A.2d 1002, 1002 (N.J. 2002).

[81] *Id.* at 1002-03.

meniscus.[82] Plaintiff underwent arthroscopic surgery, but continued to complain of pain in his knee, and his orthopedist opined that the knee's internal derangement constituted a permanent loss of a bodily function.[83] Examination by defendant's orthopedist, however, revealed that his injured knee had the same range of motion as the other knee, his gait was normal, and he was able to squat normally.[84]

Like the plaintiff in *Kahrar*, he claimed that his activities were affected: he could no longer bike or lift weights as frequently, and he was limited in the household chores he could perform.[85] Stating that "it is the nature or degree of the ongoing impairment that determines whether a specific injury meets the threshold requirement under the Tort Claims Act," the court found that Ponte, unlike Kahrar, did not suffer a substantial and permanent loss of a bodily function.[86] However, the court seemed to be more influenced by a lack of evidence than by positive evidence of an insufficient injury. The court noted that the "plaintiff was never deposed," and the record contained no evidence of impairment in his gait or ability to walk.[87] The difference between the two cases, according to the court, was that there was no "physical manifestation of his claim that the injury to his knee is permanent and substantial."[88]

However, one can imagine what would happen if Ponte had a bit more evidence on his side: what if he had, say, a 10% reduction in the motion of his injured knee, and his gait was slightly impaired? While the outcome in both cases may have been fair,[89] the court certainly could have provided a better

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[82] *Id.* at 1003.

[83] *Id.* at 1004.

[84] *Id.*

[85] *Id.* at 1004-05.

[86] Ponte v. Overeem, 791 A.2d 1002, 1006-07 (N.J. 2002).

[87] *Id.* at 1006.

[88] *Id.*

[89] It should be noted, however, that two justices would have found that both cases presented non-substantial injuries. *Id.* at 1007 (Verniero, LaVecchia,

explanation of where the dividing line is between substantial and non-substantial injuries.

SUBSEQUENT CASES

In the same year, the Appellate Division decided *Heenan v. Greene* and *Newsham v. Cumberland Regional High School*.[90] The plaintiff in *Newsham* was a high school cheerleader who was injured when she fell from the top of a human "pyramid" to the gymnasium floor.[91] She was taken to the hospital, "where X-rays revealed a compression fracture at the T7 vertebra," but after several months, her treating physician told her "that she need not limit her activity in any way."[92] She was later diagnosed with a "T7 compression fracture" and "cervical strain and sprain," which her chiropractor characterized as "a significant, permanent impairment of the neuromusculoskeletal system."[93]

She was able to participate in gym classes, work as a waitress, and attend college.[94] However, she was no longer able to take part in contact sports, she abandoned a potential career as a physical therapist due to the weight-lifting requirements, she experienced pain when sitting for a long time, and she had to take frequent breaks at work.[95] The trial judge noted that she was able to work and attend school, concluded her injuries were similar to those of Ms. Brooks, and granted summary judgment.[96] Applying the New Jersey Supreme Court's recent

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JJ., concurring); Kahrar v. Borough of Wallington, 791 A.2d 197, 211-12 (N.J. 2002) (Verniero, J., dissenting).

[90] Heenan v. Greene, 809 A.2d 836 (N.J. Super. Ct. App. Div. 2002); Newsham v. Cumberland Reg'l High Sch., 797 A.2d 878 (N.J. Super. Ct. App. Div. 2002).

[91] *Newsham*, 797 A.2d at 879.

[92] *Id.*

[93] *Id.* at 879-80.

[94] *Id.* at 880.

[95] *Id.*

[96] *Id.* at 880-81.

decisions, the Appellate Division affirmed, stating that her condition was "analogous to that described in *Brooks* and *Ponte* . . . while she has some limitations, she did not suffer a permanent loss of a bodily function that is substantial."[97]

The plaintiff in *Heenan*, a special education teacher, suffered a herniated cervical disk with radiculitis after being struck by a truck.[98] While the plaintiff did establish an objective permanent injury, she failed to establish a permanent, substantial loss of a bodily function.[99] Applying *Gilhooley* and *Kahrar*, the Appellate Division explained that the plaintiff did not suffer the sort of injury that "would have rendered an extremity useless" but for surgical intervention.[100] The plaintiff did not miss work and her "limitation of movement is analogous to the limitations experienced by the plaintiff in *Brooks,* which were found insubstantial."[101] These cases, like others, demonstrate the courts' method of analogizing every plaintiff to Ms. Brooks.

The New Jersey Supreme Court next took up the verbal threshold issue in *Knowles v. Mantua Township Soccer Association*.[102] Knowles was leaving a soccer game on public land when a lowering park gate struck his car, crashing through the windshield and striking his upper body.[103] Knowles sought treatment and was eventually diagnosed with "post traumatic cervicothoracic and lumbosacral sprain/strain with myofascitis, lumbar disc herniation, L4-L5, lumbar radiculopathy and

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[97] Newsham v. Cumberland Reg'l High Sch., 797 A.2d 878, 884 (N.J. Super. Ct. App. Div. 2002). The court noted, "[o]ur reading of *Brooks, Gilhooley, Kahrar,* and *Ponte* leads us to conclude that the underlying principles set forth in *Brooks* still control." *Id.* at 883.

[98] Heenan v. Greene, 809 A.2d 836, 837-38 (N.J. Super. Ct. App. Div. 2002).

[99] *Id.* at 167.

[100] *Id.*

[101] *Id.*

[102] Knowles v. Mantua Twp. Soccer Ass'n, 823 A.2d 26 (N.J. 2003).

[103] *Id.* at 27.

impingement tendonitis of the left shoulder," which in his physician's opinion was permanent.[104] The plaintiff only missed one week of work, but alleged that he was unable to stand, sit, or walk for extended periods of time, that his sleep was disrupted, and that his injuries caused him to become "moody."[105]

The trial court and Appellate Division both concluded that Knowles' injuries did not rise to the level of "permanent loss of a bodily function," and that the Township of Mantua was entitled to summary judgment.[106] The New Jersey Supreme Court, however, reversed.[107] Stating that the defendant "contends that plaintiff's injuries are not as severe as those suffered in *Kahrar* or *Gilhooley*, but rather are comparable to those suffered by the plaintiff in *Brooks*,"[108] the court came fairly close to admitting that the real standard is: is the plaintiff's injury comparable to Mrs. Brooks? The analysis involved is "fact-sensitive" and the court must "determine whether the facts and circumstances of plaintiff's injuries place him on that part of the 'continuum of cases' in which this Court has determined that an injury is substantial and permanent."[109]

The court proceeded to attempt to clarify the law. Some injuries are "inherently objectively permanent," such as "injuries causing blindness, disabling tremors, paralysis and loss of taste and smell."[110] In less clear cases, there must be some "physical manifestation" rather than "subjective feelings of discomfort."[111] However, critically, "neither an absence of pain nor a plaintiff's

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[104] *Id.* at 28 (internal quotations omitted).

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Knowles v. Mantua Twp. Soccer Ass'n, 823 A.2d 26, 29 (N.J. 2003).

[109] *Id.* at 30 (citing Gilhooley v. Cnty. of Union, 753 A.2d 1137, 1142 (N.J. 2000)).

[110] *Id.* at 30 (citing *Gilhooley*, 753 A.2d at 1142) (internal quotations omitted).

[111] *Id.* (further citations and internal quotations omitted).

ability to resume some of his or her normal activities is dispositive."[112] The court found that the plaintiff's injuries "more closely resemble[ed] *Gilhooley* and *Kahrar* than *Brooks* and *Ponte*."[113] The court explained that the difference was in the degree of impairment of daily activities,[114] but this makes little sense, as the plaintiffs in all of these cases claimed that their abilities to perform certain household chores were impacted. Is vacuuming more important than changing a light bulb? It is, of course, necessary for any test involving personal injuries to be highly fact-sensitive, but a clearer test may be desirable.

Cases decided since then have provided little more in the way of clear guidance. In the unpublished case *DeNigris v. DeNigris*, the Appellate Division considered the case of a plaintiff who was injured in a collision with a police car. [115] The plaintiff did not require medical treatment at the scene of the accident, but later went to the emergency room to have MRIs of her shoulder and spine, revealing a torn rotator cuff and degenerative disk disease.[116] DeNigris underwent surgery and physical therapy to repair the torn rotator cuff in her shoulder.[117] Her doctor opined that her degenerative disk disease was made worse by the accident; however, the Appellate Division ruled that she failed to present objective evidence of a causal connection between this injury and the accident.[118] The court upheld the trial court's dismissal of her Tort Claim Act claims, holding that she did not suffer a *loss* of any bodily function.[119]

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[112] *Id.*

[113] *Id.*

[114] Knowles v. Mantua Twp. Soccer Ass'n, 823 A.2d 26, 31 (N.J. 2003).

[115] DeNigris v. DeNigris, No. A-6371-03T2, 2005 N.J. Super. Unpub. LEXIS 247, at *1 (N.J. Super Ct. App. Div. Nov. 15, 2005).

[116] *Id.* at *2-4.

[117] Id. at *4-5

[118] *Id.* at *6, 13.

[119] *Id.* at *13-14.

In another unpublished decision, *McLaughlin v. Homer*, the Appellate Division considered the case of a child whose hand was injured at school when he attempted to climb onto a sink and it collapsed.[120] He sustained a "mangling laceration," for which he underwent surgery.[121] Two years after the surgery, plaintiffs' doctor reported that McLaughlin had cold intolerance and a limited range of motion, while defendants' doctor found his condition to be an "excellent" save for damage to one nerve.[122] Plaintiff claimed that he could no longer grip things as well, affecting his handwriting ability and rendering him unable to play baseball or the piano.[123] The trial court granted summary judgment, finding that McLaughlin had not fulfilled the *Brooks* criteria.[124] However, the Appellate Division reversed and remanded, comparing the "significant surgical intervention" that occurred to the installation of hardware in *Gilhooley*.[125]

In *Baligian v. Hunterdon Central Regional High School*, the plaintiff, another high school cheerleader, fell from the shoulders of another cheerleader and struck her chin.[126] She was transported to the emergency room, and with no signs of a fracture being found, was discharged with a diagnosis of soft tissue injury.[127] She saw a dentist the next day complaining of "separation between her lower front teeth, problems with her bite, and difficulty opening her mouth" and was diagnosed with a hairline fracture in her central incisor.[128] Several of her teeth

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[120] McLaughlin v. Homer, No. A-2315-04T2, 2006 N.J. Super. Unpub. LEXIS 681, at *1-2 (N.J. Super. Ct. App. Div. Feb. 24, 2006).

[121] *Id.* at *2.

[122] *Id.* at *3.

[123] *Id.* at *4.

[124] *Id.* at *5-7.

[125] *Id.* at *11-13.

[126] Baligian v. Hunterdon Cent. Reg'l High Sch., No. A-2026-08T2, 2009 N.J. Super. Unpub. LEXIS 2823, at *2 (N.J. Super. Ct. App. Div. Nov. 12, 2009).

[127] *Id.*

[128] *Id.* at *3.

required periodontal surgery to repair fractures, but her range of motion was full and the prognosis for the teeth was favorable.[129] However, she exhibited signs of temporomandibular joint dysfunction ("TMJ"), which although treated with retainers, was considered permanent by her treating physicians.[130] The motion judge, who was quoted approvingly by the Appellate Division, granted summary judgment to the defendants on the pain and suffering damages for two reasons. First, there was "no 'proof of permanency;' only speculation" and secondly, under the *Brooks* analysis, the plaintiff was still able to "attend[] school, participat[e] in sports and band and work[]."[131] She was even medically cleared to participate in cheerleading, although she no longer did so.[132] Summary judgment as to her claim of pain and suffering damages was affirmed.[133]

PSYCHIC INJURIES

An injury need not be physical to vault the verbal threshold; indeed, psychological injuries may pass the threshold.[134] In *Collins v. Union County Jail*, the New Jersey Supreme Court reversed the determination of the trial court and Appellate Division that post-traumatic stress disorder (PTSD) was subjective and insufficient to vault the threshold.[135] That case involved a prisoner who had been forcibly sodomized by a guard, suffering permanent psychological harm.[136] The court

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[129] *Id.* at *4.

[130] *Id.* at *5-6.

[131] *Id.* at *11-13.

[132] Baligian v. Hunterdon Cent. Reg'l High Sch., No. A-2026-08T2, 2009 N.J. Super. Unpub. LEXIS 2823, at *13 (N.J. Super. Ct. App. Div. Nov. 12, 2009).

[133] *Id.*

[134] Collins v. Union Cnty. Jail, 696 A.2d 625, 632-33 (N.J. 1997).

[135] *Id.* at 626.

[136] *Id.*

recognized that PTSD was an objective medical condition[137] but it was unclear from the case whether an event of this severity was required for a claim of post-traumatic stress disorder to vault the verbal threshold. The court stated that psychological harms are permanent and substantial injuries “when they arise in a context similar to that which precipitated [Collins's] injuries.”[138]

In *Gerber v. Springfield Board of Education*, the Appellate Division analyzed psychological injuries in the same manner as physical injuries because they stemmed from a violent physical assault.[139] However, in that case, there was insufficient medical proof of the alleged psychological injuries.[140] At least one court has read *Collins* as being limited to “direct, violent and invasive physical assault” such as rape.[141] Somewhat contradictorily, this same court found that plaintiffs whose child was stillborn suffered this requisite degree of emotional damage; as such, a severe harm may arise from negligence just as it may arise from assault.[142]

The inclusion of psychological injuries is a principled result; it should be the severity of the injury that is relevant, not the manner in which it was inflicted, that determines whether the verbal threshold is met. This has been recognized in other cases, and the manner in which the emotional injury is inflicted is, at most, a factor to be considered.[143] The courts have correctly allowed severe emotional injuries to vault the threshold, but cases in which emotional injuries vault the threshold should be exceptionally rare. However, this is an area

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[137] *Id.* at 632.

[138] *Id.* at 633.

[139] Gerber *ex rel.* Gerber v. Springfield Bd. of Educ., 744 A.2d 670, 676 (N.J. Super. Ct. App. Div. 2000).

[140] *Id.* at 677.

[141] Willis v. Ashby, 801 A.2d 442, 447 (N.J. Super. Ct. App. Div. 2002) (internal quotations omitted).

[142] *Id.* at 444-46.

[143] Hoag v. Brown, 935 A.2d 1218, 1234 (N.J. Super. Ct. App. Div. 2007).

of the law in need of clarification, even more so than the verbal threshold as a whole.

DISFIGUREMENT

While the issue of whether a permanent loss of a bodily function is substantial is the more typical situation, the same type of subjective analysis applies to scars in cases of disfigurement.[144] The cases dealing with disfigurement are fewer and provide even less guidance than the cases dealing with loss of a bodily function. The courts have analogized this provision of the Tort Claims Act to the disfigurement provision of the no-fault auto insurance statute,[145] and, following the relevant no-fault jurisprudence, have required that a scar must be "significant, must be 'more than a trifling mark discoverable on close inspection' and must 'detract [] from the appearance of the person,'"[146] or "impair[] or injure[] the beauty, symmetry, or

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[144] The third category of injuries for which pain and suffering damages are available, dismemberment, is presumably straightforward enough not to require much deliberation.

[145] *See* N.J. STAT. ANN. § 39:6A-8 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2). For a full discussion of the disfigurement criteria under the no-fault statute, *see* Puso v. Kenyon, 639 A.2d 1120, 1126-28 (N.J. Super. Ct. App. Div.1994); Falcone v. Branker, 342 A.2d 875, 879-80 (N.J. Super. Ct. Law Div. 1975). When discussing the disfigurement criteria under the no-fault statute, the Appellate Division stated:

> [f]rom an objective, empirical standpoint, the appearance, coloration, existence and size of the plaintiff's scars are undisputed matters of fact. These factors, along with shape, characteristics of surrounding skin, the remnants of the healing process, and the factors which may be developed as being cosmetically important on a case-by-case basis, are all objective factors which may be utilized by the court in considering whether the scar is significant in a summary judgment motion in a verbal threshold case. Presumably many scars will not require judicial analysis . . . . Those scars which are subject to judicial analysis on a tort threshold motion must be scrutinized objectively by the court.

Puso, 639 A.2d at 1126-27 (internal quotations omitted).

[146] Gerber *ex rel.* Gerber v. Springfield Bd. of Educ., 744 A.2d 670, 677 (N.J. Super. Ct. App. Div. 2000) (quoting *Falcone*,342 A.2d at 880).

appearance of [the plaintiff]; that which renders unsightly, misshapen, or imperfect, or deforms in some manner."[147]

How large or prominent must a scar be before it is considered a significant disfigurement? One example of a scar significant enough to preclude summary judgment was one "at least fifteen centimeters long and [running] the length of her knee cap, ending in an indentation near the bottom of the scar that [was] discolored and mottled."[148] "[A] scar that measures approximately four to five inches long and extends in a linear fashion over the forward portion of [the plaintiff's] knee from the bottom of her thigh down to just below the kneecap" was also found to create an issue of fact.[149] One scar held not to create a material issue of fact was "a 7 cm [or a 2 3/4 inch] scar of the left shoulder" with "a palpable metal object underneath the scar."[150] The problem of distinguishing whether a disfigurement is significant is therefore essentially the same problem as distinguishing whether a loss of a bodily function is substantial.

OTHER ISSUES

There are exceptions to the verbal threshold rule, such as when an agent of a public entity engages in willful misconduct. The Tort Claims Act specifically exempts willful conduct of an employee from its ambit.[151] The New Jersey Supreme Court has

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[147] *Falcone*, 342 A.2d at 879 (quoting Superior Mining Co. v. Indus. Comm'n, 141 N.E. 165, 166 (Ill. 1923) (internal quotations omitted)).

[148] Hammer v. Twp. of Livingston, 723 A.2d 988, 990 (N.J. Super. Ct. App. Div. 1999).

[149] Gilhooley v. Cnty. of Union, 753 A.2d 1137, 1139, 1143 (N.J. 2000).

[150] Soto v. Scaringelli, 917 A.2d 734, 738, 745-46 (N.J. 2007) (applying the disfigurement standard in the no-fault automobile insurance context).

[151] N.J. STAT. ANN. § 59:3-14 (West, Westlaw current through L.2011, c. 36, 38 and J.R. No. 2):

> a. Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

unambiguously held that this exempts plaintiffs in such a situation from having to satisfy the verbal threshold.[152] This is prudent, for public entities should be strongly discouraged from allowing intentional wrongs to take place under their authority. In *DelaCruz v. Borough of Hillsdale*, the New Jersey Supreme Court held that the threshold applies to false arrest claims to the same extent that it normally applies, as the Tort Claims Act treats all torts similarly.[153]

What if a public entity or employee is found to be negligent, but other tortfeasors are involved? In *Bolz v. Bolz*, plaintiff Mrs. Bolz was a passenger in a car driven by defendant Mr. Bolz.[154] Mr. Bolz saw a tractor-trailer owned by the City of Englewood and operated by its driver, Herrera, backing up and stopping, but failed to move his car, resulting in the truck striking the Bolzs' car, injuring Mrs. Bolz.[155] In her complaint, she alleged that she "was severely injured, disabled and disfigured; including a comminuted fracture of the proximal left tibia, suffered and will suffer in the future great pain and torment, both mental and physical; and was and will be prevented from attending to her usual duties for a long period of time."[156] The jury found that both Herrera and Mr. Bolz were negligent, but that Mrs. Bolz's injury was not substantial.[157] Englewood was thus not liable for her damages, so the jury

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b. Nothing in this act shall exonerate a public employee from the full measure of recovery applicable to a person in the private sector if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.

[152] Toto v. Ensuar, 952 A.2d 463, 471 (N.J. 2008).

[153] DelaCruz v. Borough of Hillsdale, 870 A.2d 259, 268 (N.J. 2005). *See also Toto*, 952 A.2d. at 470-71; Hoag v. Brown, 935 A.2d 1218, 1233 (N.J. Super. Ct. App. Div. 2006); Kelly v. Cnty. of Monmouth, 883 A.2d 411, 417 (N.J. Super. Ct. App. Div. 2005);.

[154] Bolz v. Bolz, 946 A.2d 596, 597 (N.J. Super. Ct. App. Div. 2008).

[155] *Id.*

[156] *Id.* (footnote and internal quotations omitted).

[157] *Id.* at 598-99.

skipped the comparative negligence question and found Bolz liable for the entire amount.[158]

The Appellate Division reversed, reasoning that even though Englewood was not itself liable, its liability must still be considered for purposes of the Comparative Negligence Act.[159] Once a jury finds that both a public entity and a third party are both negligent, they are "joint tortfeasors" for the purpose of the CNA. In such cases, the jury must first apportion liability among the tortfeasors and then decide whether the injury in question is permanent and substantial before fixing damages.[160]

In essence, the problem with the *Brooks* standard (and the related disfigurement standard) is that it is barely a standard at all. This makes it far too difficult, as a matter of law, for public entity defendants to dismiss pain and suffering claims of permanent losses of bodily function or disfigurement. In practice, this allows many plaintiffs to obtain settlements that contain at least some consideration for pain and suffering. This runs contrary to the intent of the Legislature that pain and suffering damages be available only in extraordinary situations.

JUSTIFICATION OF PUBLIC ENTITY TORT LIABILITY

At this point, plaintiffs and their attorneys will object. They have been injured, and must be made whole. But whether plaintiffs ought to be able to recover pain and suffering damages from a public entity depends on how one justifies tort liability. If corrective justice is the only theory underlying tort law, then it seems that plaintiffs should be able to recover the same damages to make them whole, regardless of whether the defendant is a public entity. However, there are other principles underlying tort law that justify narrowing the scope of available damages when the defendant is funded by taxpayers.

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[158] *Id.* at 599. *See* Comparative Negligence Act (CNA), N.J. STAT. ANN. §§ 2A:15-5.1 to 5.8 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2).

[159] *Bolz*, 946 A.2d at 597, 601-02.

[160] *Id.* at 601-02.

FORMS OF JUSTICE

Corrective justice requires that the offender has a duty to those harmed without justification by his actions or omissions to correct the wrong by making the victim whole.[161] It plays a central role in the justification of tort liability. The legal philosopher A.M. Honoré borrowed H.L.A. Hart's method of justification from his analysis of the criminal law, which applied different justifying principles at different stages, and applied it to tort theory.[162] Like Hart's criminal law theory, Honoré believed that the general justifying aim of tort law was harm prevention or deterrence.[163] However, tort liability offers little deterrence for governmental employees, who stand to lose little in court compared to the government itself. It may be argued that tort liability gives the government an incentive to better train and supervise its employees and otherwise shape policies that will improve public safety. This is a compelling reason to allow public entity liability but it must be balanced against other justifying and limiting aims.

A suit against the government should also be justified on an individual level. Corrective justice steps in to justify the individual relationship between plaintiffs and defendants in a tort suit.[164] It is the harm done by the offender to the victim that justifies the victim's suing the offender for compensation, rather than having some other system of compensation for injured persons.[165] This is what Jules Coleman, another legal philosopher, called the "bilateral relationship."[166] When a person is injured by the negligence of an employee whose

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[161] A.M. Honoré, *The Morality of Tort Law: Questions and Answers*, in ARGUING ABOUT LAW 532 (Aileen Kavanagh & John Oberdiek eds., 2009)

[162] *Id.* at 529-30.

[163] *See id.* at 531.

[164] *Id.* at 532.

[165] *Id.* at 533.

[166] Gregory C. Keating, *Is Tort a Remedial Institution*, UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL LAW AND ECONOMICS WORKING PAPERS SERIES 20 (Nov. 21, 2010), 2.

actions are properly imputed to a public entity, then corrective justice requires that the entity compensate the injured person.

Honoré believed that retributive justice, often most closely associated with criminal law, also has a role to play in tort theory.[167] Retributive justice holds that punishment is justified by the desert, or blameworthiness, of the offender.[168] In criminal law, retributive justice can function as both a general justifying aim and as a limitation.[169] While both retributive justice and corrective justice look to some extent for fault on the part of the offender, corrective justice is different because it emphasizes the role of the victim. If only retributive justice is at play, then the criminal punishment or tort liability of the offender only needs to be proportionate to his guilt or fault.[170] However, corrective justice requires that the victim be made whole, even if the cost of doing so is disproportionately larger, or smaller, than the fault of the wrongdoer.[171]

As these examples show, the fundamental difference between corrective justice and retributive justice is in which party each theory is primarily concerned with. Corrective justice looks out for the interests of the victim, requiring that the person who harmed him make him whole.[172] Retributive justice, on the other hand, looks to the guilt of the offender, requiring that he be punished in accordance with his blameworthiness.[173] If the only justifying principle of tort law is corrective justice, then the fact that the state is at fault for an injury should play no role in defining what remedies are available to an injured party. However, if retributivism is brought in as a limiting principle, then it must be recognized that a public entity, which may itself

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[167] Honoré, *supra* note 161, at 538.

[168] *Id.* at 536.

[169] *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 10 (1968).

[170] Honoré, *supra* note 161, at 538.

[171] *Id.*

[172] *Id.* at 533.

[173] *Id.* at 539.

be morally culpable for causing an injury, is financed by morally innocent taxpayers.

Of course, there are other situations in which a party other than the wrongdoer is legally obligated to pay for the injuries of a claimant. For example, insurers contract to indemnify and defend the insured, and employers are held liable under the doctrine of *respondeat superior* for the actions of their employees.[174] The situation of taxpayers is different, however, because one who lives in a state cannot avoid paying taxes, whereas an insurance company or employer can, theoretically at least, avoid contracting with tortfeasors.

One could even argue that the moral innocence of the taxpayers regarding a tortious condition entirely precludes recovery. However, one does not have to go this far, as "the state must be justified in imposing some limits on the type of harm for which compensation can be claimed," since imposing liability "would be inefficient when, as is likely to be the case with some types of harm difficult to ascertain, the cost of imposing tort liability would much exceed the likely benefit."[175] Such a situation occurs when pain and suffering damages are assessed against already burdened public entities. The interests of morally innocent taxpayers must be balanced against the need to compensate injured persons. Given this need for balancing, it makes sense to provide persons injured by public entities with a tort remedy, but place limits on governmental tort liability.

CONFLICTING PRINCIPLES

The conflict between these and other justifications for and arguments against sovereign immunity have been recognized as an "unending paradox[] where fundamental opposites clash."[176] Wesley Hohfeld, seeking to break law into its "lowest common denominators," believed that legal rights

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[174] BLACK'S LAW DICTIONARY 814, 1338 (8th ed. 2004).

[175] Honoré, *supra* note 161, at 540.

[176] Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI.-KENT L. REV. 61, 100 (1985).

and obligations could be simplified into eight essential concepts.[177] Each of these concepts correlates to another, so that each type of right corresponds to a duty; each also has an opposite.[178] Immunity, according to Hohfeld's classification, is the opposite of liability and correlates with power.[179] Thus, sovereign immunity gives the government the power to act without being subject to liability.[180]

Dean J. Spader extended Hohfeld's rationale, posing arguments for and against governmental immunity as a series of "nine basic conflicting opposites."[181] First, while "Immunity is necessary to protect the interests of the public," "[l]iability is necessary to protect the interests of the injured victim," pitting the interests of the many against those of the individual.[182] A great deal of the argument is centered around the nature of the rule of law: "[i]mmunity is necessary to maintain the supremacy of the lawmaker;" "[l]iability is necessary to maintain the supremacy of the rule of law."[183] While Justice Oliver Wendall Holmes stated that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the rights depends," "[t]oday hardly anyone agrees that [Holmes'] stated

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[177] *Id.* at 63-64 (citing WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING 64 (1964)).

[178] *Id.* at 64.

[179] *Id.*

[180] *Id.* at 66 ("If a government and a governmental official have immunity, then this immunity has a correlative 'disability' on the part of the party who is suing; that is, the plaintiff is 'disabled' or dismissed from the suit due to the immunity of the defendant government or official.").

[181] *Id.* at 68.

[182] Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI.-KENT L. REV. 61, 69 (1985).

[183] *Id.* at 70.

ground for exempting the sovereign from suit is either logical or practical."[184]

Proponents of immunity argue that immunity is necessary for government to function, but for advocates of liability, the issue is one of justice: "For every wrong there ought to be a remedy. [The] general rule is, and always has been, that there must be a remedy for every wrong, that the doctrine of immunity runs directly counter to this basic concept of justice."[185] Because of this demand of justice,

> [t]he question is not whether immunity *or* liability should prevail; both are necessary and both will remain part of the law pertaining to governments. The question is one of degree: How much immunity or liability should exist? . . . The loss must fall somewhere and the choices are to place it on the taxpaying public, the offending official, the governmental entity, the injured, or some combination of these.[186]

The classic floodgates concerns also play a role in this debate. Immunity is argued to be necessary both to protect the public fisc[187] and "prevent vexatious lawsuits and maintain the judicial floodgates against an inundation of lawsuits."[188] Proponents of liability, on the other hand, seek to maintain access to the courts for plaintiffs who have been wronged.[189] All of these seemingly irreconcilable arguments (and others that are

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[184] *Id.* at 70-71 (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); KENNETH DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 96 (1975)).

[185] *Id.* at 72 (quoting HAROLD GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 122 (3d ed. 1983)).

[186] *Id.*

[187] *Id.* at 79.

[188] Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI.-KENT L. REV. 61, 83 (1985).

[189] *Id.*

beyond the scope of this note) result in "loggerheads" that "require[] human faculties beyond logic."[190]

Hohfeld's system of categorization is more than merely academic. "Hohfeld repudiated the idea that his system was 'a merely philosophical inquiry' and stated that his main purpose was to 'aid in the understanding and in the solution of practical, everyday problems of the law.'"[191] In Spader's words, despite the apparently irresolvable clash between governmental immunity and liability, "[i]nsight and creative solutions" are among the benefits that "can be gained by openly recognizing, logically clarifying, and endlessly pursuing such irreconcilable conflicts."[192] However, it "becomes very difficult to find a strict linguistic formula which summarizes the potentially infinite number of degrees and multiple options available for resolving any issue in the complex middle ground."[193] "Legal reality is dichotomous; social reality is infinite degrees."[194]

Resolving these competing tensions is the aim of the New Jersey Tort Claims Act. The Tort Claims Act leans towards governmental immunity when there is a question as to whether or not the government is liable.[195] When their injuries are caused by public entities, injured persons should recover only the most concrete damages in most cases: actual economic losses, such as medical bills, rather than pain and suffering.[196]

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[190] *Id.* at 84.

[191] *Id.* at 64 (citing WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING 26 (1964)).

[192] *Id.* at 100.

[193] *Id.* at 88.

[194] Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values: Ancient Mysteries Crying Out for Understanding*, 61 CHI.-KENT L. REV. 61, 97 (1985).

[195] Brooks v. Odom, 696 A.2d 619, 622 (N.J. 1997) ("Both the history and purpose of the Act suggest that the Legislature intended a chary interpretation of a public entity's exposure to liability.").

[196] A similar conundrum is presented by the issue of awarding punitive damages against public entities. *See* N.J. STAT. ANN. § 59:9-2(c) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2); Megan K. Bannigan, Note, *Judgment Day for Public Entity Punitive Damages? Reexamining the Law and Policy of*

An allowance for pain and suffering should be made only in exceptional cases, where the pain and suffering involved is severe. The Tort Claims Act thus lies somewhere on the spectrum between liability and immunity, with a clear preference for the latter, which is its default position.[197] This is the judgment call that the Legislature has made, and it is a reasonable one. As the old cliché goes, the devil lies in the details.

PROPOSED SOLUTIONS

Any acceptable solution must fulfill three objectives. First, it should restrict the number of claims for pain and suffering damages to protect taxpayers, who are not morally blameworthy in regard to the plaintiffs who have been injured by public entities, but must ultimately foot the bill for any damages. This also recognizes "the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective types of damage, such as pain and suffering, except in aggravated circumstances."[198] However, any acceptable solution should also make pain and suffering damages available to deserving plaintiffs in truly exceptional cases, as originally contemplated by the Legislature. In these severe cases, it may be that the demands of corrective justice override the innocence of the taxpayers and justify imposing pain and suffering liability on the state. Finally, a solution should promote certainty in the law, in order to encourage early settlement and reduce the burden on the court system. Greater certainty will ultimately be advantageous to all parties.

One potential solution is a schedule of pain and suffering damages, similar to the remedies available under a worker's

Awarding Punitive Damages Against New Jersey Public Entities, 38 RUTGERS L.J. 191 (2006).

[197] N.J. STAT. ANN. § 59:2-1 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2).

[198] Kugler, *supra* note 10, at 234.

compensation scheme.[199] The schedule would explicitly reserve a certain amount of pain and suffering damages for certain types of injury, e.g. $10,000 for a cervical sprain. Unfortunately, such a scheme would probably be too complicated to calculate with any precision, as pain and suffering damages are inherently somewhat subjective. For the same reason, it would also be arguably too rigid, ignoring the fact-sensitive nature of personal injury cases and failing to make some plaintiffs whole. A complete overhaul such as this would also require legislative action, and would thus be more difficult to enact than a common-law modification of the current test. A more modest legislative reform would be to simply increase the objective monetary threshold, which has only been raised once since the Act's passage, and at $3,600 is quite low by the standards of modern medical expenses.[200] Better yet, the monetary threshold should be indexed to inflation.

Another potential solution would be to strengthen the second prong, the requirement of permanent loss of a bodily function (or disfigurement or dismemberment). As argued above, the New Jersey Supreme Court did little to clarify this by adding the requirement that a loss of a bodily function be "substantial." Instead, a more useful test would ask whether one of several effects occurred. First, the loss of the use of an organ, limb, or digit is certainly a substantial loss of a bodily function. Second, the loss of a bodily function that causes one to be unable to perform his or her job is certainly substantial. This would not be meant to preclude those who are retired or unemployed from pain and suffering damages, but would rather ask whether the person would be precluded from returning to his or her last occupation if necessary. It should be emphasized that these elements are disjunctions, not conjunctions, and so this element would not be incompatible with the New Jersey Supreme

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[199] For New Jersey's workers' compensation law, *see generally* N.J. STAT. ANN. §§ 34:15-1 to -35.22 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2).

[200] N.J. STAT ANN. § 59:9-2(d) (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2.). *See* 2000 N.J. Sess. Law Serv. 136, § 32 (raising monetary threshold from $1,000.00 to $3,600.00).

Court's insistence that being able to work is not a per se bar to recovery.[201]

Finally, an injury that causes the total loss of ability to engage in a previously enjoyed physical activity, such as a sport or hobby, would be considered a substantial loss of a bodily function. Some further clarification of this last criterion is necessary, lest it be just as vague as the requirement of substantiality. Perhaps this loss of ability would only be considered substantial if that activity could be deemed essential to that person's lifestyle. For example, a person who plays golf four times per year would not suffer a loss of a bodily function that is substantial if he or she could no longer play. A person who plays golf once a week would be a much closer call.

Surely, any reform will still involve judgment calls. However, clearer criteria would at least make it easier for judges to rule, as a matter of law, that certain injuries are not substantial losses of a bodily function; thus more cases against public entities to be settled before trial. These categories would reinforce the sound judgment that subjective pain, in itself, is not sufficient to allow recovery, and prevent such subjective pain from being "backdoored" in by attaching it to certain tasks. It is clear, for example, that merely having back pain is subjective. This should not become objective merely because one has back pain while repairing widgets. This approach of clarification has the advantage of being possible for the judiciary to enact on its own initiative.

A final possible solution is the addition of a third prong to the test that would limit the damages of plaintiffs who meet the first two prongs. Damages could be limited by fixing them at a ratio relative to some objective figure, such as the plaintiff's medical expenses.[202] This has the advantage of being more

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[201] *See, e.g.*, Kahrar v. Borough of Wallington, 791 A.2d 197, 204 (N.J. 2002).

[202] This approach has been suggested by Professor Ronen Avraham as a more general tort reform measure. *See* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87 (2006). Regardless of its merits in relation to suits between two private actors, it may be ethically justified when the defendant is a public entity, and thus any pain and suffering award is paid by the taxpayers.

flexible than a schedule of damages, by recognizing that one neck injury may be more severe than another. It would prevent an award of pain and suffering damages that is greatly disproportionate from the injury sustained. The principal disadvantage of this approach is that it does not actually clarify the *Brooks* test itself, but rather makes an end-run around it to make damages more predictable. However, the upside is that this solution is also fully compatible with the second solution, defining situations that constitute a "substantial" impairment of a bodily function more specifically. Together, these two approaches could help make damages for pain and suffering more predictable and less of a burden on the finances of an already overburdened state.

As the New Jersey Legislature considers ways to reduce the state's ever-troublesome levels of public expenditure, a prudent course of action would be to revisit the Tort Claims Act and place further restrictions on the situations in which plaintiffs suing public entities may recover damages for pain and suffering. The judiciary may even revisit the issue the next time it is called on to clarify the Tort Claims Act. Any solution should reflect and further the purposes of the Tort Claims Act: preserving sovereign immunity except for specifically enumerated exemptions;[203] and limiting pain and suffering damages to deserving plaintiffs in exceptional situations.[204] The measures proposed in this note could be part of a solution that would restore the original meaning of the Tort Claims Act in limiting pain and suffering damages to exceptional situations.

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[203] N.J. STAT. ANN. § 59:2-1 (West, Westlaw through L.2011, c. 36, 38 and J.R. No. 2).

[204] Kugler, *supra* note 10, at 234.

Ultimately, the policy goals of Governor Huntsman's Working 4 Utah initiative are in lockstep with those outlined in the New Jersey Energy Master Plan. By capitalizing on efficiency, the compressed workweek can create positive change and work for New Jersey.

IV. CONCLUSION

It is clear that New Jersey has undertaken proactive measures to address both budget deficits and the demand for increased energy efficiency, but in its attempts, both legislators and citizens have overlooked a simplistic solution that would be an effective first step to combat these problems. The compressed workweek offers a pragmatic, innovative and plausible solution that contributes to solving two of the biggest problems New Jersey faces. Like most of the proposed legislative initiatives, the compressed workweek has its shortcomings, and there are a number of issues that still must be resolved. Fortunately, Utah has paved the way. Its successes and failures provide a reasonable model for implementing a similar program in New Jersey, and highlight key areas that can be improved if New Jersey were to take on such an initiative. To quote Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[150] There is no better time than now for New Jersey to make this change.

[150] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).