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CONSTITUTION OF GEORGIA Immunity from Suit: Provide for Partial Waiver

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CONSTITUTION OF GEORGIA

Immunity from Suit: Provide for Partial Waiver

GA. CONST.:	ART. I, § 2, ¶ 9
BILL NUMBER:	SR 267
ACT NUMBER:	96
SUMMARY:	The Resolution proposed an amendment to the Georgia Constitution which would have clarified the waiver of sovereign immunity when a state agency provided liability insurance coverage. Sovereign immunity would be waived by the purchase of insurance which covered the agency itself, but only for claims which were included in the coverage and only to the extent that any damages awarded would actually be paid by the insurer. The purchase of liability insurance covering state officers and employees would waive neither sovereign nor official immunity. The Resolution expressly stated that immunity of counties, municipalities and school districts would not be subject to the proposed amendment.
EFFECTIVE DATE:	The proposed amendment was placed on the ballot for ratification by the voters in the general election held November 8, 1988. The amendment would have become effective July 1, 1989. However, the amendment was defeated.[1]

History

The doctrine of sovereign immunity[2] was incorporated into Georgia law in 1784 when the state adopted by statute the common law of England.[3]

1. On November 8, 1988, SR 267 was defeated in the general election by a vote of 942,710 to 392,622. Telephone interview with Sharon Lucas, Administrative Clerk, Secretary of State Election Division (Nov. 21, 1988).

2. The doctrine of sovereign immunity acts as a complete bar to a suit against the state or a state agency unless the state consents to be sued. W. PROSSER AND W. KEETON, PROSSER & KEETON ON TORTS § 131, at 1043 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

3. Act of 1784, Cobb's Digest 721 (1851).

Georgia law also recognizes the concept of official immunity.[4] Because sovereign immunity was created judicially, the Georgia courts held for many decades that it could be abrogated judicially.[5] However, the common law rule recognizing sovereign and official immunity, with some exceptions,[6] was consistently upheld into the 1980s.[7]

In 1974, a constitutional amendment was enacted which authorized the establishment of a state court of claims with jurisdiction to try cases involving claims against the state for injury or damages.[8] The amendment stated that the provision was not to be construed as a waiver of sovereign immunity and that it expressly reserved the defense of sovereign immunity to the state "except to the extent of any waiver of immunity provided in this Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by Act of the General Assembly."[9] Thus, the doctrine of sovereign immunity gained constitutional status and could be modified only by another constitutional provision or by an act of the General Assembly, not by judicial fiat.[10]

In 1983, the voters ratified an amendment to the state constitution which expressly provided that the doctrine of sovereign immunity applied to the state but that such immunity was "waived as to those actions . . . for any claim against the state or any of its departments and agencies for which liability insurance . . . has been provided but only to the extent of any liability insurance provided."[11] Although the amendment did not

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4. Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980). Official immunity is a qualified immunity from tort liability available to government officials when injury results from the exercise of the official's discretion so long as the official does not act with malice, bad faith, or corrupt motives. PROSSER AND KEETON, *supra* note 2, § 132, at 1057—60.

5. Sheley v. Board of Pub. Educ., 233 Ga. 487, 212 S.E.2d 627 (1975).

6. *See* Sentell, *Georgia Local Government Tort Liability: The "Crisis" Conundrum*, 2 GA. ST. U.L. REV. 19, 20 (1985-86). Sentell lists some exceptions including proprietary functions, nuisances, and inverse condemnation cases.

7. *Id.* at 22.

8. GA. CONST. of 1976, art. VI, § 5, ¶ 1. The court of claims was never actually established by the legislature. *See* Sentell, *supra* note 6, at 21.

9. GA. CONST. of 1976, art. VI, § 5, ¶ 1.

10. Sheley v. Board of Pub. Educ., 233 Ga. 487, 488, 212 S.E.2d 627, 628. Several statutes address statutory waiver of immunity. *See, e.g.*, O.C.G.A. § 45-9-5 (Supp. 1988) (amending the Code to expressly deny any waiver of immunity under GA. CONST. art. I, § 2, ¶ 9); O.C.G.A. § 33-24-51 (1982) (authorizing counties to purchase liability insurance); O.C.G.A. § 45-9-40 (1982) (authorizing the purchase of automobile liability insurance for state employees driving state-owned vehicles); O.C.G.A. § 45-9-1 (1982) (authorizing the state to purchase liability insurance or to formulate programs of self-insurance); O.C.G.A. § 45-9-5 (1982) (providing that the purchase of liability insurance does not waive sovereign immunity); O.C.G.A. § 45-9-20 (1982) (authorizing the purchase of liability insurance for county employees); O.C.G.A. § 45-9-23 (1982) (purporting to deny the waiver of liability if liability insurance is purchased).

11. GA. CONST. art. I, § 2, ¶ 9. SR 267 would have amended this constitutional provision.

mention the reservation of, or waiver of, official immunity, the Georgia Supreme Court, in *Martin v. Department of Public Safety*,[12] ruled that the waiver applies to official immunity, as well as to sovereign immunity. In addition, the supreme court ruled in *Toombs County v. O'Neal*[13] that the 1983 amendment also applies to local governments and school districts.[14] Thus, under current Georgia law, a broad waiver of both sovereign and official immunity exists to the extent that liability insurance will pay for the claims asserted.[15] This broad waiver applies to both state and local governments.[16]

The breadth of the rulings in both *Toombs County* and *Martin* surprised attorneys representing governmental entities.[17] The state apparently did not anticipate the *Martin* ruling because the court of appeals ruled, in an intervening case,[18] that the purchase of liability insurance covering county officials did not waive official immunity.[19] Additionally, in *Martin*, lawyers for the state argued that only officers and employees

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12. 257 Ga. 300, 357 S.E.2d 569 (1987).

13. 254 Ga. 388, 330 S.E.2d 95 (1985).

14. Toombs County v. O'Neal, 254 Ga. at 390, 330 S.E.2d at 97. It was never the intent of the drafters of the 1983 state constitution that the article I waiver apply to local governments. Telephone interview with Ed Sumner, counsel for the Georgia Municipal Association (Apr. 15, 1988) [hereinafter Sumner Interview].

15. Martin v. Department of Pub. Safety, 257 Ga. at 303, 357 S.E.2d at 572. The *Martin* court made no distinction, in terms of the applicability of the waiver, between insurance purchased by a private provider and insurance provided through a self-insurance trust fund. Coverage by either will trigger the waiver. *Id.* at n.2. Although this failure to distinguish between private insurance and self-insurance did not concern the Attorney General, it did concern the Georgia Municipal Association. Wood, *Sovereign Immunity: State Supreme Court Ruling Worries Local Governments*, Fulton County Daily Rep., Aug. 5, 1987, at 6, col. 1 [hereinafter Wood].

The fact that the insurer must actually pay the claim before the waiver applies was discussed in a recent case. Ward v. Bulloch Co., 258 Ga. 92, 365 S.E.2d 440 (1988). In *Ward*, the plaintiff was injured during his incarceration in Bulloch County Correctional Institute. Bulloch County had purchased a general liability insurance policy covering the negligent acts of its employees. The county waited seventeen months, however, to notify the insurer of plaintiff's claim, resulting in a declaratory judgment that the insurer had no obligation to defend or pay the claim, because the county had not complied with the notice terms of the policy. The majority reasoned that since the insurer was not obligated to pay the claim, there was no waiver of immunity by the county. *Id.* Justice Smith, in dissent, found the result unfair, inasmuch as a government entity could avoid any claim covered by the provided insurance by arbitrarily failing to notify the insurance company. *Id.* (Smith, J., dissenting).

16. *Toombs County*, 254 Ga. at 391—92, 330 S.E.2d at 97.

17. *See* Wood, *supra* note 15, at 1, col. 1; Bedingfield, *Who Says You Can't Sue the State?*, Fulton County Daily Rep., Dec. 14, 1987, at 4, col. 1 [hereinafter Bedingfield].

18. Rea v. Bunce, 179 Ga. App. 628, 347 S.E.2d 676 (1986). *Martin* expressly overruled *Bunce*. *Martin*, 257 Ga. at 301 n.1, 357 S.E.2d at 572 n.1.

19. The Attorney General's office was stunned by the ruling in *Martin*. Bedingfield, *supra* note 17, at 4, col. 3. Local government attorneys, however, were not surprised at all. Wood, *supra* note 15, at 6, col. 1. Local government attorneys believed that *Martin* was the predicted outcome, not *Toombs County*. *Id.*

of the state, not the state agency itself, were insured under the policy.[20] Thus, because the state was not insured, there was no waiver of sovereign immunity pursuant to article I.[21] The *Martin* court found, however, that because

> negligence in performing official acts is covered by . . . insurance, . . . official immunity is waived to the extent to which this coverage will pay for the claims asserted. And, insofar as the department is vicariously liable for the acts of its servants, . . . then sovereign immunity is waived to the extent of the available insurance.[22]

In *Price v. Department of Transportation*[23] the supreme court directly addressed the issue of what type of insurance coverage triggers the waiver of official immunity. On appeal, the trial court's grant of summary judgment for the Department of Transportation (DOT) was affirmed on the ground that sovereign immunity applied. The court of appeals recognized that the Georgia Constitution waived sovereign immunity when insurance was provided, but held that the policy in this case provided coverage only for employees of the DOT and not for the DOT itself.[24]

In reversing the court of appeals, the supreme court held that sovereign immunity will be waived in "(1) [t]hose actions involving a claim against the state, or any department or agency, (2) for which liability insurance protection for such claims has been provided, (3) but only to the extent of insurance provided."[25] The court pointed out that this was an action against both employees of the DOT and the DOT itself. The DOT was a defendant and liable in tort, if at all, only because of the doctrine of respondeat superior.[26] The court observed that a suit is against the state and sovereign immunity attaches "where an officer or agent of the state is sued in his official capacity or where such officers are sued for acting in areas where they are vested with discretion and empowered to exercise

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20. Appellees' Motion for Rehearing at 3, *Martin*, 257 Ga. 300, 357 S.E.2d 569 (No. 44194) (1987). The comprehensive general liability trust fund existing at the time included the following provision:

> This policy covers the following: PERSONAL INJURY, BODILY INJURY, SICKNESS, DISEASE OR DEATH AND PROPERTY DAMAGE caused by or resulting from error, omission or negligence *in the performance of duties within the scope of an insured's employment* with a participating entity that has purchased coverage prior to the date of the occurrence. (emphasis added).

Martin, 257 Ga. at 302, 357 S.E.2d at 571.

21. Appellees' Motion for Rehearing at 6, *Martin*, 257 Ga. 300, 357 S.E.2d 569 (No. 44194) (1987).

22. *Martin*, 257 Ga. at 303, 357 S.E.2d at 572 (citation omitted).

23. 257 Ga. 535, 361 S.E.2d 146 (1987).

24. Price v. Department of Transp., 257 Ga. at 536, 361 S.E.2d at 148.

25. *Id.*

26. Respondeat superior means "a master is liable in certain cases for the wrongful acts of his servant" when the servant is acting within the scope of his authority. BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).

judgment in matters before them . . . ."[27] Because the insurance protection providing for such a claim named the employees as insureds, the fact that the DOT was not named as an insured did not mean that insurance protection for the claim was not provided.[28]

SR 267

The Georgia Legislature reacted to *Toombs County* and *Martin* by introducing and ultimately passing SR 267, a resolution to amend the Georgia Constitution.[29] The resolution was intended to restore or retain official immunity, while permitting a limited waiver of sovereign immunity to the extent that a state agency is protected by liability insurance coverage.[30] An amendment to the Resolution clarified the constitutional waiver of immunity under article I is not applicable to local governments.[31]

SR 267, as passed, was to amend article I, section 2, paragraph 9 of the Georgia Constitution by rewording the general waiver to make it more specific:

> The defense of sovereign immunity will be waived by the existence of

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27. *Price*, 257 Ga. at 537, 361 S.E.2d at 148 (quoting Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980)).

28. *Id.*

29. SR 267 was submitted by the Governor's Administration at the request of the Attorney General as a direct response to *Martin*. The intent was to retain the waiver of sovereign immunity but to eliminate the waiver of official immunity. Telephone interview with Senator Roy Barnes, Senate District No. 33 (Apr. 24, 1988) [hereinafter Barnes Interview].

At one point, the state intended to reword the insurance policy to eliminate coverage for vicarious liability. *See* Bedingfield, *supra* note 17, at 4, cols. 1, 4. *See also* Wood, *supra* note 15, at 4, col. 2. Attorney General Michael Bowers stated: "The key to that is: Don't write your dang insurance to cover it . . . ." Bowers stated that his office was studying ways to change the state's self-insurance policies to ensure that they are written in a way to preserve immunity. "It appears to us at this time this new decision [referring to the court of appeals' ruling in *Price*] will permit, at least as to future claims, preservation of official and sovereign immunity through careful draftsmanship of insurance policies." *Id.* at 4, col. 4. Considering the supreme court's reversal of *Price*, however, the broad ruling may not permit a rewording that, by itself, would preserve sovereign immunity. Also, attorneys for local governments are not certain that it will be easy to rewrite the policies. *Id.* at 4, col. 3. The problem, according to an attorney for the Georgia Municipal Association,

> is that the policies must describe acts, not causes of action. As a result . . . to have insurance to cover areas for which there has been no immunity, such as a federal § 1983 claim, the language may by necessity overlap into areas from which state torts arise, areas where governments may have immunity were it not for the insurance.

Id. at 6, col. 2.

As of the date of this writing, the state had not rewritten its insurance policy. Telephone interview with Jerry Newsome, Risk Manager, Georgia Department of Administrative Services (Apr. 15, 1988).

30. Barnes Interview, *supra* note 29.

31. Sumner Interview, *supra* note 14.

> such liability insurance coverage, but only as to the particular department, agency, board, commission, or authority named as an insured in the applicable liability insurance policy, and only for claims which are included within the coverage of the applicable liability insurance policy, and only to the extent that any damages awarded will be paid by the insurer pursuant to the applicable liability insurance policy.[32]

This provision reflects the holding of the *Martin* decision and has the effect of providing that, unless a particular claim made by a plaintiff is included within the coverage of the policy, no waiver exists.[33] If the court finds a waiver of immunity, damages cannot exceed the maximum limit per claim under the policy since, once that limit is reached, sovereign immunity will be reinstated.[34]

Also, if the policy or self-insurance limits are exceeded for the year due to large jury verdicts, sovereign immunity will again be invoked, not waived.[35] This may be unfair for those plaintiffs filing suit after the insurance funds are exhausted.[36] Additionally, if for any legitimate reason the claim is not paid under the policy, sovereign immunity is not waived.[37] The Resolution also places a cap on damages by providing that sovereign immunity will not be waived as to any claims for punitive, vindictive, or exemplary damages.[38]

Arguably, except for the issue of punitive or exemplary damages, the provisions of SR 267 relating to the waiver of sovereign immunity would not have changed the law, since all of the provisions discussed above hold true under current case law.[39] The most significant aspect of SR 267 relates to the issue of official immunity. It was, in fact, this aspect of the *Martin* ruling that most concerned the Attorney General.[40] It was his belief that without official immunity, state government would be paralyzed, with officials constantly being brought into court to answer for their daily decisions.[41] SR 267 provided that official immunity extends to state officers and employees engaged in discretionary functions, unless they are

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32. SR 267, as passed, 1988 Ga. Gen. Assem.

33. *Martin*, 257 Ga. at 303 n.2, 357 S.E.2d at 572 (footnote omitted). *See also* Dugger v. Sprouse, 257 Ga. 778, 779, 364 S.E.2d 275, 275 (1988).

34. *Martin*, 257 Ga. at 303 n.2, 357 S.E.2d at 572 (footnote omitted). *See also* Department of Transp. v. Land, 257 Ga. 657, 362 S.E.2d 372 (1987).

35. Bedingfield, *supra* note 17, at 5, col. 3.

36. *Id.*

37. Ward v. Bulloch County, 258 Ga. 92, 93, 365 S.E.2d 440, 441 (1988).

38. SR 267, as passed, 1988 Ga. Gen. Assem.

39. The cases cited earlier do not address the issue of punitive or exemplary damages. Any punitive damages that might be awarded, however, would be subject to the limits of the insurance coverage. *See Ward*, 257 Ga. 92, 365 S.E.2d 440; *Martin*, 257 Ga. 300, 357 S.E.2d 569; Price v. Department of Transp., 257 Ga. 535, 361 S.E.2d 146 (1987); Toombs County v. O'Neal, 254 Ga. 390, 330 S.E.2d 95 (1985).

40. *See* Wood, *supra* note 15, at 4, col. 1.

41. *Id.*

found to have acted with willfulness, fraud, malice, or corruption.[42] The Resolution authorized the General Assembly to provide for the purchase of liability insurance for state officers and employees to protect them from personal liability "to the extent that they are not otherwise immune from liability."[43]

Code section 45-9-1, originally enacted in 1977, authorized state agencies to purchase liability insurance for employees "to the extent that they are not immune from liability."[44] At the time that Code section was enacted, the constitutional waiver in article I did not exist.[45] The state argued in *Martin* that because state law did not permit the insurance policy to cover the good faith discretionary acts of state officials, there was no waiver of immunity.[46] Further, the state argued that Code section 45-9-5 expressly states that the provision of such insurance shall not constitute a waiver of sovereign immunity and, as amended in 1986, "shall not constitute the provision of liability insurance protection under Article I, Section II, Paragraph IX of the Constitution."[47]

Although the *Martin* court did not agree with this assertion, it did not address the issue in its opinion. However, a later court did address this argument: "We recognize that OCGA § 45-9-5 expresses a legislative intent that sovereign immunity of the state is not to be waived through the furnishing of insurance authorized by OCGA § 45-9-4. However, we are bound by the language of the constitution to reach a contrary result."[48]

The language in SR 267 was intended to address this issue. The Resolution stated that providing "such insurance will not waive the defense of sovereign immunity or the defense of official immunity."[49] Thus, neither official immunity nor sovereign immunity would be waived by the purchase of insurance for state officials.[50] Even though paragraph 9(c) of

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42. SR 267, as passed, 1988 Ga. Gen. Assem. This is essentially the common law definition of official immunity. *See* PROSSER AND KEETON, *supra* note 2, § 132, at 1057—60. *See also* Partain v. Maddox, 131 Ga. App. 778, 782, 206 S.E.2d 618, 621 (1974).

43. SR 267, as passed, 1988 Ga. Gen. Assem.

44. O.C.G.A. § 45-9-1(a) (Supp. 1988).

45. Art. I, § 2, ¶ 9 was added to the Georgia Constitution in 1983. 1982 Ga. Laws 2546.

46. Appellees' Brief, at 9, *Martin*, 257 Ga. 300, 357 S.E.2d 569 (No. 44194) (1987). Thus, the argument is that Code section 45-9-1 only contemplates insurance coverage for acts done with "willfulness, fraud, malice, or corruption" — acts which would not invoke even official immunity.

47. O.C.G.A. § 45-9-5 (Supp. 1988). *See also* Appellees' Motion for Rehearing, *Martin*, 257 Ga. 300, 357 S.E.2d 569 (No. 44194) (1987).

48. Price v. Department of Transp., 257 Ga. 536, 536 n.2, 361 S.E.2d 146, 147 n.2 (1987).

49. SR 267, as passed, 1988 Ga. Gen. Assem. Thus, while the *Price* court deferred to the constitutional provision over the statutory provision, the inclusion of these words in the constitution would give it the highest authority. *See Price*, 257 Ga. at 536 n.2, 361 S.E.2d at 147 n.2.

50. SR 267, as passed, 1988 Ga. Gen. Assem.

SR 267 stated that the purchase of insurance for a state agency would waive sovereign immunity, paragraph 9(f) provided that the purchase of insurance for state officials and employees would not waive sovereign immunity.[51] This paragraph might have resolved the bootstrapping anomaly of *Martin* whereby sovereign immunity was waived on the basis of vicarious liability, even though there was no liability insurance covering the state agency itself.[52]

SR 267 was amended to address the waiver of local government immunity.[53] Thus, under the amended Resolution, local government immunity would be subject to article IX, which authorizes the General Assembly to waive local government immunity by statute.[54]

The General Election

On November 8, 1988, the voters defeated ratification of SR 267.[55] Thus, the *Toombs County* and *Martin* decisions are still good law regarding sovereign and official immunity in Georgia. Prior to the election, Attorney General Michael Bowers wrote to every daily and weekly newspaper in Georgia and spoke to numerous groups urging passage of SR 267.[56] Stating that Georgia is the only state without official immunity, Bowers warned that if the amendment was not passed, the state has "not seen the trouble begin yet."[57]

As one reader pointed out in a letter to the editors of the *Atlanta Constitution*,[58] Mr. Bowers' comments are somewhat misleading. Official immunity is waived, if at all, only to the extent of any insurance coverage.[59] Justice Hunt noted in *Martin*,

> [T]his holding does not amount to an erosion of the doctrine of sover-

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51. *Id.*

52. *See Martin*, 257 Ga. at 303, 357 S.E.2d at 572.

53. Sumner Interview, *supra* note 14. The amendment provided: "The waiver of immunity of counties, municipalities and school districts shall be provided pursuant to Article IX, Section II, Paragraph IX of this Constitution and such entities shall not be subject to this Paragraph." SR 267, as passed, 1988 Ga. Gen. Assem.

54. GA. CONST. art. IX, § 2, ¶ 9.

55. *9 of 15 Proposed Amendments Voted Down by Georgians*, Atlanta Const., Nov. 10, 1988, at 3B, col. 1; *see supra* note 1.

56. *Official Immunity Should Be Restored, Bowers Says*, Fulton County Daily Rep., Oct. 25, 1988, at 5, col. 1.

57. *Id.*

58. Dyer, *Bowers Presents Specious Arguments for Immunity Amendment*, Atlanta Const., Oct. 28, 1988, at 18A, col. 3 [hereinafter Dyer].

59. *Martin*, 257 Ga. at 303 n.1, 357 S.E.2d at 572 n.1. The city of Atlanta has dealt with the issue of immunity by purchasing only $1,000 in automobile liability insurance coverage, one of the lowest limits of any city in the country. When a city garbage truck slammed into a private automobile recently, killing a four-year-old child, Mayor Andrew Young said the city could do little for the boy's family but apologize. *Death of Boy Fuels Fight Against Governmental Immunity*, Atlanta J. & Const., Sept. 10, 1988, at 1F, col. 1 [hereinafter *Death of Boy*].

> eign immunity beyond that authorized by the 1983 constitution. No law requires the providing of insurance. . . . But if such insurance is in effect . . . then that contract is enforceable, and the claim is to be paid to the limits of the contract, sovereign immunity notwithstanding.[60]

The *Atlanta Journal* initially recommended a yes vote for SR 267.[61] After the election, the *Atlanta Constitution* made the following statement concerning the recently defeated amendment: "Georgians wisely chose not to secure official immunity for state officials until the state relinquishes some of the sovereign immunity by which it shields itself from lawsuits by aggrieved citizens."[62] The article suggested that most voters were confused by the large number of constitutional amendments on the election ballot, and their "votes had the random results of a game of Pin the Tail on the Donkey."[63]

At least one citizen had a definite opinion about the proposal to eliminate the current waiver of immunity, stating in response to the Attorney General's remarks urging passage of SR 267: "Mr. Bowers perhaps should be reminded that the immunities exist for the benefit of the public, not the state government or its employees, and the will of the people already has been expressed in the Constitution."[64] It seems that on November 8 the people once again expressed their will.

A. Teel

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60. *Martin*, 257 Ga. at 303 n.2, 357 S.E.2d at 572 (n. omitted).

61. *Journal's Recommendations On Changes to Constitution*, Atlanta J., Nov. 7, 1988, at 18A, col. 1.

62. *School Reform Lost in Amendment Maze*, Atlanta Const., Nov. 10, 1988, at 22A, col. 1.

63. *Id.*

64. Dyer, *supra* note 58. Consumer advocate Ralph Nader, long an opponent of governmental immunity, stated his opinion that municipalities should not be allowed to escape the liability to compensate the innocent injured or next of kin any more than corporations should. *Death of Boy*, *supra* note 59.