LEGAL REPRESENTATION AND FINANCIAL INDEMNIFICATION FOR STATE EMPLOYEES:

A STUDY

CORRECTIONAL LAW PROJECT
AMERICAN CORRECTIONAL ASSOCIATION

LEGAL REPRESENTATION AND FINANCIAL INDEMNIFICATION FOR SATE EMPLOYEES: A STUDY

BY

RICHARD CRANE
GINGER ROBERTS

JANUARY, 1977

This project was partially supported by Grant No. 73-ED-99-0027 awarded to the American Correctional Association by the Law Enforcement Assistance Administration through the National Institute of Corrections, U.S. Department of Justice. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

4321 Hartwick Road, College Park, MD 20740
(301) 277-3722

ACKNOWLEDGEMENTS

The authors wish to express their deep appreciation to the many persons who took time to answer our questionnaire. Without their enthusiastic support, this project could never have been completed.

The willingness of people to share their knowledge, air their problems and discuss their successes was a valuable contribution to our work. Any criticisms appearing in this report are intended only to help state officials avoid common problems. They are not intended to downgrade the efforts to implement difficult procedures in a bureaucratic environment.

Our special thanks to Lawrence Bershad, who first conceived the idea for such a study and who was unfailingly supportive and encouraging during the course of the project. Thanks also to Sandy Branch for her help in preparing the document for publication and to Susan Blanchard, Sherry Hawley and Debbi Smith who typed the many drafts.

THE AMERICAN CORRECTIONAL ASSOCIATION

William D. Leeke
President

Anthony P. Travisono
Executive Director

Raymond S. Olsen
Associate Director

CORRECTIONAL LAW PROJECT

Richard Crane
Director

Jeffrey Curtis
Assistant Director

Michael Weisz
Assistant Director

Debbi Smith
Project Secretary

CONTENTS

INTRODUCTION

Whenever an individual is sued, two questions are of paramount importance: "Who will represent me?" and "If damages are assessed, where will the money come from?" These questions are no less important to the state officer or employee who suddenly finds himself the defendant in a suit relating to his employment.

This study was undertaken to examine how the states have responded to these concerns, particularly as a result of the tremendous increase in civil rights actions. Because civil rights actions of this type have only appeared with any frequency since the mid-sixties, many states had not yet developed satisfactory solutions to these questions when they were surveyed in late 1975. In some states, each case was handled on an ad hoc basis. Others had adopted elaborate procedures, but most of these are still too new to have been adequately tested. Thus, uncertainty about their effectiveness in handling the many contingencies involved still exists.

The reader should be aware that new approaches to these problems are still being tried in the hopes of developing procedures which protect the employee without rewarding those who should bear the burden of their own actions.

Supplementing this report is a chart showing the responses of all fifty states and Canada to the survey taken in 1975. The authors drew on these responses and their own research in putting together the model statute contained in the appendix for those interested in a starting point from which to fashion their own remedies.

LEGAL REPRESENTATION

An analysis of how each state handles legal representation for state officers and employees who are sued requires that the question be broken down into a number of components: a) Which states provide legal help; b) What the source of those provisions are (statutory, Executive Order, etc.); c) What is the extent of the coverage, including which personnel are actually covered and when and what actions are covered; d) Who determines if an employee is entitled to representation; and e) Who provides the actual legal assistance.

PROVIDING LEGAL ASSISTANCE

As a general summary, all the states provide legal help to at least some employees who are sued for some acts or omissions arising out of the course of their employment. For thirty-five states, the assurance is statutory; one state relies on an Executive Order; two states on employee labor contracts with the state government; six states under a vague "attorney general discretion." The remaining six states did not specify. Several of the states operating under the "attorney general discretion" indicated that due to the rising number of law suits against correctional personnel, more specific authorization might be helpful.

In thirty-three of the states, the coverage extends to all state officers and employees. Three states mandate that officers will be helped, with two of those states allowing discretionary assistance to employees. Four states failed to say. Interestingly, thirteen states have provisions that specifically cover correctional personnel, most of which are relatively recent: Massachusetts (1957); Missouri (1967); Arizona (1968); Kansas (1970); New York (1972); Indiana (1972); Ohio (1972); New Hampshire (1973); Hawaii (1973); Oklahoma (1974); Texas (1975); and Iowa (1975). Florida's was undated. It is unclear whether these enactments are the only enactments in those thirteen states relative to representation of state employees or whether these specific authorizations are in addition to more general rules elsewhere in their statutes covering all state employees. Either way, the more specific enactments demonstrate those states' awareness of the serious and particular vulnerability of prison employees to civil law suits.

TYPES OF LEGAL ACTIONS COVERED

Most of the states (40) purport to cover at least all civil actions in their legal assistant guidelines. Eight states specifically state they will defend employees in criminal actions as well. However, eight other states, at least on the surface, appear to limit their coverage to tort actions but indications are that they would cover 1983 actions as well. Four of those eight list the guidelines under such headings as "Tort Defense Fund" (Missouri) and "Defense of tort actions. . ." (Ohio), but the description beneath is general enough to cover civil rights suits. New Jersey's provisions come under their "Tort Claims Act" but the cover letter from the Division of Correction and Parole stated that the same guidelines applied to 1983 suits as well. In addition, the jurisprudence has tended to analogize the two actions, although they are not, by any means, identical. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 484; 5 L.Ed.2d 492 (1961) ruled that civil remedies under 1983 "should be read against the background of tort liability. . ."; Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972) stated that a 1983 action is analogous to a state tort "personal injury" claim.

DETERMINING WHO WILL BE REPRESENTED

Of vital importance to the prison employee is what guidelines the state uses in deciding what kind of behavior, or rather misbehavior, they will consent to defend. Twenty-eight states indicate a liberal standard – only that the employee's act or omission occur during the scope of his employment.

Eighteen states require, in addition to the scope of employment test, that the employee be acting with some form of "good faith." Many of the states define good faith in negative terms – rather than specifying what it is, they indicate what it is not. Some states, for instance, say they won't defend an employee if his behavior was "willful or wanton" or "grossly negligent." This is fairly protective of the employee as it's saying that as long as his actions were not particularly reprehensible, he will be defended. Other states specify nothing but "good faith" without any further clarification. Three states require that the employee not have violated any rule, law or policy of the state. The strictness of this standard would naturally vary with the rules of each state.

Also of importance to a sued employee is who determines whether he is covered or not, and how he may appeal an adverse decision on that question. While this is an important determination, twenty of the states failed to specify who makes the decision. Twenty-three states rely on the judgment of the attorney general; three states on the decision of the employing agency; three states on the mutual decision of the employing agency and the attorney general; and in one state, it is up to the governor and the attorney general.

DENIAL OF LEGAL ASSISTANCE

Only two states mentioned a procedure whereby an employee could appeal the state's refusal to defend him. California, by statute, permits the employee to seek a writ of mandamus to compel the state to help him. In Vermont, the employee can appeal to the state employees' labor relations board, whose judgment is final.

Nine states allow the employee to be reimbursed by the state for his costs and attorney fees if the state has refused to defend him and he subsequently wins the suit. In some states, the reimbursement is almost automatic; in others, it requires an additional law suit, this one against the state.

On the other hand, three states have provisions that permit the state to demand reimbursement from the employee if the state does defend him and loses. In each case, the employee has to be adjudged by the court to have acted either outside the scope of his employment or with bad faith, malice or willful or wanton neglect before the state can demand repayment.

The fact that so many states leave the decision in the hands of the attorney general's discretion stirs up some questions of denial of due process. Only one state, California, seems to require a judicial determination, at least on appeal, of whether the employee is entitled to state legal assistance. In addition, an employee may have to deal with the prejudicial impact caused by the state's refusal to defend him. Only two states, Maryland and Oklahoma, clearly stipulate that evidence of that refusal is inadmissible in any court proceeding. Oklahoma goes so far as to require that "any mention of said fact shall be deemed grounds for mistrial." 74 O.S. §20d. Oregon, while not specifically saying the evidence is inadmissible, states that the Attorney General's refusal to defend "shall not prejudice" the employee's rights in his own defense. The vast majority of the states (47), make no apparent provision regarding this potentially damaging item of evidence.

SOURCE OF REPRESENTATION

If the employee is deemed to come within the guidelines of the state rules, the attorney general serves as the initial representative in every case. Twenty states indicate no other provisions for representation. Ten states mention that if the particular act or omission comes under an applicable insurance policy (i.e. injuries resulting from automobile accidents), the insurer's counsel may defend. Five states specifically allow the employee to hire his own lawyer at his own expense. Maryland authorizes the Attorney General to enter an appearance to protect state interests, even if the employee has hired his own lawyer.

Eighteen states have provisions that permit an outside lawyer to be hired at state expense to defend an employee. This includes the nine states which allow reimbursement by the state for lawyers' fees and court costs if the employee wins his suit after the state has refused to defend him. It also includes several states which permit outside counsel at state cost if a "conflict of interest" occurs within the attorney general's office. One case where this might happen would be if the charges against the employee involved criminal liability, in which case the state would be the prosecutor.

FINANCIAL INDEMNIFICATION

Thirty-two states indicated in their replies that they provided some sort of financial aid to employees held liable for judgments. Twenty-two states rely on statutory authority; two on an Executive Order; one on an employee contract; the other eight states were unclear as to the source of the authority. Several other states noted that indemnification was possible through a special act of the legislature. Presumably this is true of all the states and unless some additional procedure was cited, those states were not included in the thirty-two. This means, of course, that absent a special act of the legislature, eighteen states have no means of helping an employee pay a judgment.

MONETARY LIMITATIONS ON REIMBURSEMENT

Thirteen states set no limit on the amount of money which they will pay in a suit against a state employee. Two states did not indicate if they had a limit or not. Of the remaining seventeen, the range was from $10,000 (Massachusetts) to $100,000,000 (Alaska), with the majority of the states approximating $100,000 recoverable per cause of action. In setting these financial limits, the states were merely asserting the maximum that it would pay, regardless of the actual damages awarded. If the award was larger than the ceiling, the difference would presumably be borne by the employee.

As far as the source of the fund is concerned, fifteen states have insurance policies that cover at least part of the liability. Seven states process the claims through the state treasurer; four through the legislature; two states cited a "contingency fund" and four states had special liability appropriations to cover civil damages. Three states intimated that they money would come from the budget of the employing agency.

LIMITING EMPLOYEES LIABILITY

Only nine of the thirty-two states referred to federal civil rights actions in their replies; thus, for most of the states, eligibility for financial assistance in a judgment falls under the general provisions on civil liability. The vague contours of culpability are similar in 1983 and tort actions and the resulting damage is often the same; but, the two actions are distinctively different in terms of viable defenses. A generalized statute covering all civil actions may be adequately protective of an employee in a state tort action but may be inadequate in a federal civil rights case. For example, state attempts to immunize state employees from liability in prisoner filed suits, have been held not to cut off or hamper federal causes of action. In McLaughlin v. Tilendis, 398 F.2d 287 (1968), a defendant claimed immunity from Section 1983 under a state tort immunity act and the court held "(u)nder the Supremacy Clause, that statute cannot protect against a cause of action grounded, as here, on a federal statute." at 290. See also Smith v. Losee, 485 F.2d 334 (10th Cir. 1973). Since the whole purpose of the Federal Civil Rights Act was to circumvent attempts by the state to deny constitutional rights of individuals, it is logical that the federal court would be suspicious of state attempts to limit liability. See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Several states require that a claimant who wishes to sue an employee in a civil action name the state as co-defendant. Again, superficially, this seems comforting to an employee. However, a 1983 action is personal; it cannot be brought against the state. The requirement of bringing the state in as co-defendant is only appropriate in tort situations where the doctrine of respondeat superior applies.

State officials are aware of these gaps in the general statutes on civil liability. Nevada, for example, has a law requiring the state be named as co-defendant in a civil suit. In the cover letter, a spokesman for the Attorney General's office said "there is some question in my mind whether efforts by state law will be held binding on cases filed in the federal courts."

DETERMINING ELIGIBILITY FOR INDEMNIFICATION

In spite of the nonapplicability of these types of protection, an employee, in thirty-three of the states, can call on his state to help pay the judgment if the act on which liability is based arose within the scope of his employment. Most of those states also require that the employee has performed the actions with a good faith belief that they were permissible. "Within the scope of employment" may mean different things in a state statute than in a court interpretation. None of the states defined the limits of the term. One state, however, did say that their procedure in defending an employee was to assert that he was acting outside the scope of his employment. Since 1983 requires that the employee act "under color of state law" this type of defense, if valid, would effectively bar the suit.

The courts have felt, however, that a strict interpretation of "under color of state law" would emasculate the purpose of the Civil Rights Acts. A prison guard, for instance, could severely punish an inmate, then defend himself by saying that he did it in a personal rage rather than by state orders or authority. A state immunity doctrine could perhaps absolve him in a state court, and his defense to the civil rights violation would be that it was not under color of state law. Conceivably, the most reprehensible actions by the state employee would be considered outside the purview of 1983 under this type of rationale.

In 1941, the Supreme Court said that the Civil Rights Statutes were meant to protect against "(m)isuse of power, possessed by virtue of state law and made only because the wrongdoer is clothed with the authority of state law." U.S. v. Classic, 313 U.S. 299, 326; S.Ct. 1031, 1043; 95 L.Ed. 1368 (1941). Classic dealt with a criminal statute similar to 1983. In Monroe v. Pape, 365 U.S. 167; 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), the Supreme Court extended the definition to 1983 actions. This definition has regularly been reapplied in finding activities by state employees to be covered by the "color of state law." Waits v. McGowan, AJSC, 516 F.2d 203; Van Horn v. Lukhard, 392 F.Supp. 384 (1975); U.S. v. Jackson, 235 F.2d 925 (8th Cir. 1956).

The definition is broad and is perhaps more tailored to a prison situation than to other state activities. Other state employees frequently spend working hours with persons not related to their employment; acquaintances may drop by, the employee may go out for lunch or leave the office on a personal errand. Whether his behavior is to be considered "under color of state law" under these circumstances is questionable, even with the broad definition of Classic. Prison employees, on the other hand, are usually restricted to the actual confines of the prison; in addition, security requires that unauthorized personnel be barred from entering the grounds. More so than other state employees, prison personnel can be considered "clothed with the authority of state law" virtually at all times while on the job. It is not surprising, therefore, that the question of whether the employee was acting within or outside the scope of his employment has rarely come up in prison litigation. That defense is more relevant to other state employees whose behavior, at times, is arguably outside the scope of employment by Classic standards.

DEFINING "GOOD FAITH"

Twenty-one of the thirty-two states that provide some financial payment towards employee judgments require some element of "good faith" as well as stipulating that the act occur within the scope of employment. Most of the states define good faith in negative terms. Eleven states will not indemnify employees for conduct which is "willful" or "wanton"; four states include "gross negligence" as behavior not covered. Other states, relying on less subjective standards, require that the employee not have violated any rules or regulations by his act or failure to act. Additional categories not covered include behavior that involves malice, fraud, corruption or malfeasance. Several states, thinking more in terms of court decisions, state that they will not reimburse an employee for punitive or exemplary damages.

"Good faith" is probably the most common defense asserted by a state employee in 1983 actions to avoid liability in the first place. The Supreme Court has said that a person sued under 1983 can assert a viable defense if he can show that he reasonably believed in good faith that his conduct was lawful.

Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The courts define bad faith behavior in terms similar to those used by the states. Practices that are "willful and in gross disregard" of the inmates' rights will lead to liability. Urbano v. McCorkle, 334 F.Supp. 161, 170 (D. N.J. 1971). So will behavior that is done "intentionally, willfully and recklessly." See Curtis v. Everette, 489 F.2d 516, 521 (3rd Cir. 1973). The most common definitions used by the courts to distinguish culpable from nonculpable behavior, however, does not refer to the employee's intention, but rather to the nature of his conduct. An employee is held liable for 1983 damages if his conduct was shocking to the general conscience or intolerable to fundamental fairness. Jordan v. Fitzharris, 257 F.Supp. 674, 679 (N.D. California 1966); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965); Dewell v. Lawson, 489 F.2d 877, 882 (10th Cir. 1974).

The general conclusion that can be drawn from these comparisons is that those states which require a showing of "good faith" before paying an employee judgment will probably never have to pay a judgment resulting from a 1983 action, as the employee won't be held liable in the first place. The kind of behavior he is likely to be held liable for is the kind of behavior deliberately omitted from the indemnification coverage. Lest the provisions seem futile, it is worthwhile to note that these various indemnification provisions would probably cover other civil liability, such as ordinary tort liability.

The courts have been hesitant to find against state employees under Civil Rights Statutes, perhaps because of the personal liability that attaches. Several courts have emphasized specifically that an inmate must show more than ordinary tortious behavior before he can recover damages from a prison official under 1983. "Mere negligent failure of a jailer to protect a prisoner does not constitute a violation of the federal civil rights act." Vun Cannon v. Breed, 391 F.Supp. 1371, 1374 (N.D. California 1975). "(A) plaintiff must show more than that he has suffered an intentional tort at the hands of a defendant who was acting under color of state law; he must prove acts which amount to shocking or brutal conduct." Davidson v. Dixon, 386 F.Supp. 482, 488 (D. Del. 1974). The court, in James v. Murphy, 392 F.Supp. 641 (M.D. Ala. 1975) analyzed various Fifth Circuit decisions dealing with whether simple or gross negligence was the criterion for action in an Eighth Amendment, 1983 action. They concluded that the plaintiff "must allege acts which amount to, at least, gross negligence." Supra, 644. See also Shefley v. Greer, 391 F.Supp. 1044 (E.D. Ill. 1975).

It appears, therefore, that similarly to those states which have sovereign immunity provisions, the "good faith" requirement in civil actions is designed to protect against traditional causes of liability in state tort and negligence. They do not appear to be designed to protect employees who would be held liable under federal civil rights actions, at least not based on the present interpretation of culpable behavior given by the courts. This is not due so much to any restrictiveness on the part of the statutes, but rather to the bend-over-backwards attitude of the courts in holding an employee liable only when his behavior is particularly shocking or outrageous.

WHO DETERMINES GOOD FAITH

An important point procedurally for an employee is by whose definition of "good faith" his eligibility for indemnification will be bound. If the state declares that the judgment of the court will be determinative, then the employee will not be indemnified if the court finds him in bad faith. If, on the other hand, the states make a pretrial investigation of its own, for instance to decide if the employee is eligible for state representation, and determines he acted in "good faith," that determination may bind the state to indemnify even though the eventual court conclusion is that the employee was in bad faith.

Ten of the states that have "good faith" requirements indicated that the final court determination will have some bearing, at least, on whether or not the state indemnifies the employee. Six states flatly refuse to pay punitive or exemplary damages. Four states will not pay the judgment if the court finds that the employee's behavior was willful or wanton. Colorado not only will not pay the judgment but will demand reimbursement for the attorney fees from the employee if the court finds that he acted outside the scope of his employment or his behavior was willful or wanton. Oregon indicated that it would not pay a judgment for willful or wanton neglect, and would require attorney fees to be assessed against the employee if the court finds his actions outside the scope of his work. The implication, by omission, is that the employee would not be held for attorney fees if the court rules that he acted within the scope of his work, even though his behavior was willful or wanton.

Wisconsin, apparently, has recently loosened its rules in favor of the employee. Previous to 1973, the court had to rule that the employee had "acted in good faith" before the state would pay a judgment entered against him. That statute was subsequently amended so that now the court only needs to determine that the employee was "acting within the scope of his employment." Of the remaining twelve states which require some "good faith" showing before an employee is indemnified, seven were unclear about who made that determination. Four others said that it was made by the attorney general or the employing agency, the implication being that the state was then bound by its initial assessment, regardless of what the court decided. However, no state specifically asserted that to be true.

Of the fifty states, only eight expressly referred to 1983 actions in their reply; of these, five made mention of it in their actual statutory authority. However, only one state, Louisiana, has a particular provision designed solely to cover liability under the Federal Civil Rights Act. Thus, even though the other seven states referred to 1983, either in their statutes or in their cover letters, they still combine that action with their general provisions on civil liability of state employees. The effectiveness of these general provisions in covering employees held under 1983 has already been discussed.

Louisiana's statute is thorough, covering both substantive and procedural requirements for indemnification. The law declares that it is the "public policy" of the state to "save harmless and indemnify" those employees who are sued under 1983. However, the employee must have been acting within the scope of his employment at the time of the alleged violation and his behavior must not have been willful and wrongful or grossly negligent.

No indemnification occurs until the case is finally decided in court, and the judgment states that the employee was acting within the scope of his employment and that the damages did not arise out of any wrongful and willful or grossly negligent act on his part. The Attorney General's office then files suit against the legislative auditor for reimbursement of the judgment cost.

Although this statute specifically covers only civil rights actions, its requirements are similar to some of the other states' statutes on civil liability in general. Good faith is a necessity and the court determines whether or not the employee was in good faith. Since the courts have, so far, required a showing of bad faith before an employee will be held liable in the first place, the statute runs into the same problems as the other states' civil liability provisions – the statute indemnifies for behavior that is unlikely to be held culpable in the first place. Secondly, the employee is at the mercy of the court in its determination of whether he was in good faith or not. Since juries and judges are not presumably as familiar with the day to day workings of the prison, their judgment of good faith behavior may well differ from that of the prison authorities. The employee, on the job, has to rely on comments made in past court decisions to determine if his behavior is adequate. Those court judgments frequently change, as prison litigation is relatively new and amorphous. This is true in general of those states that rely on the court conclusion as to good faith before they will indemnify.

Up until recently, for instance, the courts have held prison employees not liable for damages even when their behavior was adjudged by the court to be unconstitutional, as long as they believed at the time that it was valid. See Skinner v. Spellman, 480 F.2d 539 (4th Cir. 1973); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975). The Supreme Court, referring to valid defenses in general for state personnel in 1983 actions, has found good faith where the employee sincerely and reasonably believed his behavior was constitutional. See Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

In 1975, however, the Supreme Court handed down another decision, dealing with the liability of school board members in a 1983 action filed by students. The court cited its Scheuer test, and added that the school board "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975). Four justices dissented from the standard, saying it was stricter than Scheuer, and that "one need only look to the decisions of this Court–to our reversals, our recognition of evolving concepts, and our five-to-four splits–to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.' " (420 U.S. at 329, 95 S.Ct. at 1004.)

While Wood was restricted to the context of school board members, the implication of a new standard points up the changing nature of 1983 litigation. What an employee relies on today as fulfilling

his obligation of good faith may be adjudged invalid when his case goes to court tomorrow. He may, therefore, be held to pay punitive damages even though at the time the action arose, he was behaving in line with the jurisprudential standards of good faith.

"The prospect of punitive damages is one which is of great concern to many state employees," says a Deputy Attorney General in California, ". . .by including punitive allegations, a plaintiff may well be able to jawbone a greater settlement than he would otherwise be able to obtain since we do not wish to subject state employees to the prospect of punitive damages where we and the public agency have determined that the employee was acting in good faith." He suggests that perhaps the law could be changed whereby the public entity rather than the jury would decide if punitive damages would be indemnified.

A corrections employee, when served with a 1983 action, faces a myriad of details and regulation. Depending on what state he lives in, he may only be able to ask the state for legal assistance, and even then he may have to comply with various time limitations and other procedural stipulations. If the state has some kind of indemnification process, he will be filtered through several layers of officialdom, each level perhaps determining if he was in good faith, by their varying definitions; and even then that determination may be wiped out by the court ruling against him. Even if he wins to the extent that only compensatory damages will be awarded the plaintiff, the employee may find a financial ceiling on what the state will pay so that the judgment will come out of his pocket, at least in part. On top of all this, the employee must keep abreast of the latest court decisions on standards for 1983 liability, although that changes so often that the seemingly latest criterion may be irrelevant by the time his case goes to court.

Perhaps in only one state of the union, New Hampshire, can an employee rest easy when it comes to civil liability. In 1973, the legislature there passed a sweeping statute, apparently designed to cover everything: "(T)he General Court declares that the state shall defend, indemnify and hold harmless any trustee, official or employee of the state prison from any and all losses, costs, or damages arising from any liability or obligation to any inmate imposed by any court for any cause whatsoever, including but not limited to any liability which may be imposed under the federal civil rights act, so called, 42 U.S.C. sections 1981-1986. The governor with the consent of council is authorized to draw his warrant for such sums as may be necessary to accomplish the purposes of this paragraph from any money in the contingency fund." (emphasis added)

INSURANCE

Aside from moving to New Hampshire, liability insurance would appear to be the best protection available to state correctional employees. One policy, prepared through the efforts of Anthony Travisono, Executive Director of the American Correctional Association, provided that correctional employees would be reimbursed for all sums which they became legally obligated to pay as damages for breach of their professional responsibilities. Unfortunately, the policy was cancelled by the insurer when too few members of the ACA sought coverage to justify the insurer's risk.

The main reason for this lack of interest seemed to have been the discovery by some states that their employees were covered by state insurance policies. There was also a feeling by a few states that insurance coverage would only encourage more suits.

CONCLUSION

It is apparent there are no simple solutions to the many problems associated with providing legal representation and financial indemnification for state employees who find themselves defendants in legal actions. The setting of criteria for determining who should be represented and who should be reimbursed are particularly vexing problems. However, these problems must be dealt with if those who enter state service are to be provided with a measure of security.

Hopefully, this review of the efforts of many states to deal with these issues will be of help to others and the focusing of attention on this complex subject will result in efforts to develop procedures in those states which have not yet done so.

APPENDIX A

State	Legal Assistance	Indemnification	Comments
Alabama	Yes	No	
Alaska	Yes	Yes	Limit: $100,000,000.
Arizona	Yes	No	
Arkansas	Yes	No	
California	Yes	Yes	Punitive damages not covered
Colorado	Yes	Yes	Covers tort and §1983
Connecticut	Yes	Yes	Immunity law
Delaware	Yes	No	Bills in drafting stage
Florida	Yes	Yes	
Georgia	Yes	No	
Hawaii	Yes	No	Provided by collective bargaining agreement
Idaho	Yes	Yes	
Illinois	Yes		
Indiana	Yes	No	
Iowa	Yes	Yes	Bill passed in 1975
Kansas	Yes	No	
Kentucky	Yes	No	
Louisiana	Yes	Yes	Indemnification limited to §1983 actions
Maine	Yes	Yes	Ad hoc determination
Maryland	Yes	No	But may apply to Board of Public Works for help
Massachusetts	Yes	Yes	Limited to $10,000
Michigan	Yes	Yes	Not required to indemnify
Minnesota	Yes	No	Limited to tort actions
Mississippi	Yes	No	
Missouri	Yes	Yes	Limited to $100,000
Montana	Yes	Yes	
Nebraska	Yes	Yes	Ad hoc determination
Nevada	Yes	Yes	
New Hampshire	Yes	Yes	Broad protection given
New Jersey	Yes	Yes	No punitive damages
New Mexico	Yes	Yes	
New York	Yes	Yes	

State	Legal Assistance	Indemnification	Comments
North Carolina	Yes	Yes	Limited to $30,000
North Dakota	Yes	Yes	Bonding fund
Ohio	Yes	No	
Oklahoma	Yes	No	Limited to civil and civil rights actions
Oregon	Yes	Yes	
Pennsylvania	Yes	Yes	Legal help usually not provided in criminal cases
Rhode Island	Yes	Yes	Decided on case by case basis
South Carolina	Yes	Yes	Limited to $350,000
South Dakota	Yes	No	Provides up to $3,000 for legal assistance
Tennessee	Yes	No	
Texas	Yes	Yes	Bill enacted in 1975
Utah	Yes	Yes	
Vermont	Yes	Yes	Indemnification limited to $100,000 and discretionary
Virginia	Yes	Yes	
Washington	Yes	Yes	
West Virginia	Yes	No	
Wisconsin	Yes	Yes	Indemnification limited to $100,000
Wyoming	Yes	Yes	Limited to $250,000
Canada	Yes	Yes	

APPENDIX B

MODEL STATUTE

AN ACT TO PROVIDE FOR LEGAL REPRESENTATION AND FINANCIAL INDEMNIFICATION OF STATE OFFICERS AND EMPLOYEES SUED IN THE COURSE OF THEIR EMPLOYMENT.

Section 1. Representation of Officers and Employees by the Attorney General.

A. Whenever any officer of employee of the state is served with any summons, complaint, process, notice, demand, or pleading which alleges that the officer or employee is being sued because of some act or omission arising out of his state employment, he shall deliver the original or a copy thereof to the attorney general within five days. Upon such delivery, the attorney general shall assume the defense of the officer or employee unless:

1) The officer or employee states in writing that he does not wish to be represented by the attorney general, or
2) After thorough investigation, it appears the officer or employee was not acting in the discharge of his duties at the time of the alleged act or omission, or
3) After thorough investigation, it appears representation of the officer or employee would conflict with the representation of another officer or employee or of the state. In case of such a conflict, the attorney general shall secure special counsel to represent the officer or employee at state expense.

B. In any case where the attorney general does not undertake the representation of the officer or employee, he may take such actions as he deems necessary to protect the interests of the state.

Section 2. Financial Indemnification of Officers and Employees.

A. It is hereby declared to be the public policy of the state to save harmless and indemnify all officers and employees of the state from any financial loss arising out of any claim, demand, suit or judgment in any state or federal court by reason of alleged negligence or other act by the officer or employee, provided such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the willful and wrongful act or gross negligence of such officer or employee.

B. The attorney general shall institute suit against the legislative auditor on behalf of any officer or employee seeking indemnification under the provisions of this section. The suit shall be instituted in the state district court of the county in which the state capital is situated. Jurisdiction over such suit is hereby conferred on said court. The suit shall be instituted under the rules applicable to declaratory judgments to determine whether the officer or employee is entitled to reimbursement under the provisions of Section 2(A). Such suit shall be regarded as presenting a justiciable controversy between the attorney general and the legislative auditor. Any judgment rendered shall be subject to appear as in other civil matters.

C. At such time as a judgment becomes final decreeing that the officer or employee was acting in the discharge of his duties and within the scope of his employment and that the damages did not result from the willful and wrongful act or gross negligence of the officer or employee, the legislature shall appropriate a sum sufficient to reimburse him.

D. Nothing contained in this act shall in any way impair, limit, or modify the rights and obligations of any insurer under any policy of insurance.

E. All rights conferred upon officers and employees of this state by this act shall, upon his death, be inherited by his legal heirs.

END