STATE TORT LIABILITY FOR FAILURE TO PROTECT AGAINST BIOTERRORISM

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This is the way the world ends
This is the way the world ends
This is the way the world ends
Not with a bang but a whimper.[1]

I. INTRODUCTION

"From Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent [of Europe]."[2] In March 1946, the world's adversarial lines seemed clearly drawn to Winston Churchill as he spoke in Fulton, Missouri.[3] Churchill saw the communist threat, and espoused a plan for alleviating that threat: cooperation and strength.[4] For America today, as the world's only superpower,[5] the challenge of defending ourselves is not what it once was, especially since America became the target of a major terrorist attack.[6] It is no longer possible for us to merely "let *every nation* know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty."[7] Now it is the unscrupulous terrorist to whom we must make our intentions known. President Kennedy's 1961 observation that "[t]he world is very different now" seems

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1. T.S. ELIOT, *The Hollow Men*, *in* COMPLETE POEMS AND PLAYS: 1909-1950 (Harcourt Brace & Co. 1950).

2. WILLIAM SAFIRE, *Winston Churchill Warns the West of the Soviet "Iron Curtain"*, *in* LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 783, 791 (1992).

3. *See id.* at 783, 791-793, 795.

4. *See id.* at 795.

5. Nicholas von Hoffman, *European Union Emerging As a Rival Superpower*, N.Y. OBSERVER, Mar. 4, 2002, *available at* 2002 WL 5164539.

6. Paul Leavitt, *U.S. Senators Have Meeting With Karzai*, USA TODAY, Jan. 8, 2002, at A7.

7. WILLIAM SAFIRE, *President John F. Kennedy in His Inaugural, Takes Up the Torch for a New Generation, in* LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 811, 812 (1992) (emphasis added).

no less true today than it was over forty years ago;[8] the world has changed dramatically even since Kennedy gave his inaugural address.

Instead of being able to clearly see and identify the enemy against whom we must defend ourselves, the dawn of the bioterrorist threat has become a source of fear that should keep us constantly looking over our shoulder. Whereas, during the Cold War, we could rely on intelligence to detect Soviet troop movements, and could rely on the deterrent effect of our own weapons of mass destruction to protect us from theirs, America seems unwilling or unable to resort to the use of weapons of mass destruction to destroy those who would use biological weapons of mass destruction against her. Because these changes arguably leave America without an effective deterrent against bioterror attacks, the various levels of government should protect Americans with increased vigilance, even if that means holding the government liable for failing to adequately protect its citizens. If Americans refuse to accept and impose governmental liability for resulting injuries, there is little likelihood that we can rest well at night with knowledge that our local and state governments have done everything reasonable to ensure the protection of life and property against bioterror attacks.

It seems generally unreasonable to hold a state liable for a random terrorist attack and thereby make the citizens responsible for money damages incurred. The societal costs, after all, could be enormous. But what about a terrorist attack on a city that is known of by state officials many days or weeks before the attack occurred? If the state fails to warn the citizens, and if it can be established that such a warning would have saved lives, should the state still be immune from liability? Is there ever a set of circumstances under which we would determine that the state was so negligent in its acts or omissions that it should be liable in tort? This is obviously not an easy question to answer given the competing values at work. On the one hand, the state's duty to protect against specific acts of violence should not make it liable in tort. If this principle was widely adopted state and local governments could be held liable in tort for every crime in which life or property is damaged or lost. Such a result seems patently absurd. On the other hand, society generally expects governments to do everything in their powers to keep its citizenry safe. Society relies on state and local governments to protect it with well trained emergency services personnel. Thus, if a state fails to take reasonable steps to train its emergency response personnel in the identification and containment of bioterror incidents, perhaps society would reconsider the issue of liability. Consider the following:

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8. *Id.*

Joe walks into his rural doctor's office one morning. He is there because he is feeling a little dizzy, his muscles ache, he's tired, and he has a slight fever. Given that it is the middle of winter, the doctor is hardly surprised to hear that Joe probably has a case of the flu. A prescription is written and Joe is sent on his way. This was the fifth patient that the doctor had seen this morning exhibiting similar symptoms.

After a quick stop at the drug store, as he is driving home, Joe notices that his symptoms seem to be worsening. Almost home, he figures that he's better off if he just "toughs it out." Arriving safely, Joe is greeted by his wife and two children. He gives each one a kiss, and proceeds to crawl into bed. For the rest of the day, Joe lies in bed and his wife takes care of him.

Both Joe and his wife have a restless night. In the early morning hours, Joe's wife awakens to find Joe covered in sweat. Joe's fever has increased substantially. When he tries to stand, he succumbs to dizziness and hits the floor hard. After noticing the blood coming from his mouth, his wife struggles to get him into the truck so she can drive him to the hospital.

Upon arrival at the hospital, Joe is barely conscious, but he is aware enough of his surroundings to realize that the hospital is full of people, many of whom he recognizes. The hospital staff is working with patients without the basic protections of masks and gowns, despite the fact that many patients are coughing and sneezing. Joe is given the last bed in the hospital.

By this point, the hospital staff has realized that something strange is going on, and they decide to call the state health department. The department dispatches an investigator to the area, but because the department is understaffed and overworked, the investigator will not arrive until the next day. When the investigator arrives at the hospital, she immediately realizes that this is not a mere case of the common cold that has stricken these people. She knows it is something with much more dire consequences. It would have only required the staff at the hospital to take an eight hour course on bioterrorism to have been able to recognize what they were dealing with. Early recognition is crucial in preventing a bioterror attack from reaching an epidemic scale.[9]

This Note addresses to what extent states may be liable in tort for failing to protect their citizenry against losses resulting from a bioterror attack. Consideration of liability will focus primarily on the State of Iowa, although the analysis

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9. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T. OF HEALTH & HUMAN SERVS., FINAL FY 2003 GPRA ANNUAL PERFORMANCE PLAN 26 (Feb. 2002), http://www.cdc.gov/od/perfplan/2002/2002perf.pdf (last visited Apr. 22, 2004) (hereinafter "CDC, USDHS").

can be easily adopted to consider liability in other states. In Part II, this Note describes bioterrorism and provides an analysis of agents of bioterrorism and their potential targets, with added emphasis being directed toward the non-traditional, agrarian targets. These targets, such as livestock and crops, may not only be used to transmit disease over long distances, but may substantially impact the economies of states like Iowa that have a large agricultural sector. Part III discusses sovereign immunity, beginning with a discussion of how state concepts of sovereign immunity closely parallel those embodied at the federal level. This part also contains an extensive analysis of the Iowa Tort Claims Act.[10] Part IV adapts the analysis of the Tort Claims Act to specific hypothetical bioterror scenarios, analyzing the strengths and weakness of the claims at each step; the analyses begin at the point at which the claim accrues through the final stage, a trial on the merits. It is beyond the scope of this Note to hypothesize as to the success or failure of the merits of any claim, but rather this Note is intended to determine whether there are certain types of claims that can withstand pretrial motions to dismiss. Finally, Part V will conclude with an overview and summary of any areas where Iowa's Tort Claims Act may serve as a waiver of sovereign immunity, sufficiently broad enough to allow a claim in state court. A brief policy debate is also presented as to whether the Act should be amended to prevent individual recovery in cases where bioterrorism was responsible for the loss.

II. BIOTERRORISM: THE UNSEEN, UNHEARD ATTACK

A. *Defining Bioterrorism*

It was commonplace in America to associate "bioterrorism" with tactics and agents such as anthrax, especially in the months following September 11, 2001.[11] Bioterrorism is much more expansive than simply anthrax or other "really bad bugs."[12] The Centers for Disease Control and Prevention ("CDC")

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10. IOWA CODE §§ 669.1-669.24 (2003).

11. *Cf.* AM. POLITICAL NETWORK, *Poll Update Fox News/Opinion Dynamics: 76% Approve of Bush Admin Job*, 10 THE HOTLINE, (Nov. 5, 2001) (indicating that 81% of survey participants were at least a little afraid that they "or a family member or friend [would] be exposed to bioterrorism, such as anthrax") (on file with Drake J. Agric. L.).

12. *See* CDC, USDHS, BIOTERRORISM: AN OVERVIEW 11, *available at* http://www.bt.cdc.gov/roleofclinlab.asp (last visited Apr. 23, 2004); Interview by WebMD with C.J. Peters, M.D., former Chief of Special Pathogens at the CDC, and former Chief of the Disease Assessment Division at the U.S. Army Med. Research Inst. of Infectious Diseases (Oct. 24, 2001),

defines bioterrorism as "[i]ntentional or threatened use of viruses, bacteria, fungi, or toxins from living organisms to produce death or disease in humans, animals, or plants."[13] An important factor for states to keep in mind is that bioterrorism is not only limited to areas with high population densities[14] as attacks on humans are not the only possibilities.[15] With more than ninety-seven thousand farms, each producing enough food to feed at least 279 people,[16] protecting agricultural resources is as critical to the state's overall well being as is protecting its population.

B. *Human Bioterrorism Agents: A Brief Overview*

The CDC is the lead agency responsible for "protecting the health and safety of people."[17] It has also been instructed by Congress to prepare the national healthcare system for a bioterror attack.[18] The CDC is hardly equipped to handle every local health concern, thus it works closely with state and local officials in all areas as it serves its mandate.[19] In serving its role as educator, the CDC developed a list of bioterrorism agents.[20] This list prioritizes the various agents into three categories based on the national security risk.[21] The CDC has identified these agents as being those agents to which the national public health system, as well as primary healthcare providers, must be ready to identify and respond.[22]

Those agents able to wreak the most havoc on public health have been placed into "Category A."[23] This category includes smallpox, anthrax, plague,

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at http://my.webmd.com/content/article/4058.515 (last visited Apr. 23, 2004).

13. CDC, USDHS, *supra* note 12, at 2.

14. RURAL INFO. CTR., USDA, WHAT IS RURAL? DEFINING RURAL: AVAILABLE RESOURCES, *at* http://www.nal.usda.gov/ric/faqs/ruralfaq.htm (last visited Apr. 23, 2004) (noting that rural land area comprises more than 97% of U.S. land according to the U.S. Census Bureau).

15. *See* CDC, USDHS, *supra* note 12, at 27.

16. IOWA TOURISM OFFICE, IOWA FACTS & FUN, *at* http://www.traveliowa.com/iowa_facts (last visited Apr. 23, 2004).

17. CDC, USDHS, ABOUT CDC, *at* http://www.cdc.gov/aboutcdc.htm (last visited Apr. 8, 2004).

18. Lisa D. Rotz et al., *Public Health Assessment of Potential Biological Terrorism Agents*, 8 EMERGING INFECTIOUS DISEASES 225, 225 (2002).

19. CDC, USDHS, *supra* note 17.

20. *See* Rotz et al., *supra* note 18, at 225; CDC, USDHS, BIOLOGICAL AGENTS/DISEASES LIST, *at* http://www.bt.cdc.gov/agent/agentlist-category.asp (last visited Apr. 23, 2004).

21. CDC, USDHS, *supra* note 20.

22. *Id.*

23. *See* Rotz et al., *supra* note 18, at 226.

botulism, tularemia, and viral hemorrhagic fevers.[24] Agents in this category require a great deal of public planning, including the possibility of stockpiling necessary antibiotics or other medicines.[25] Furthermore, the potential that these agents could be used requires increased vigilance on the part of healthcare providers in diagnosing patients to ensure that no "Category A" agent is missed.

At the top of the "Category A" list are smallpox and anthrax. Although smallpox has been totally eradicated since 1980, laboratories in both Moscow and the CDC in Atlanta still maintain samples of the virus responsible for smallpox.[26] In the event that a sample of the virus is smuggled out of one of these laboratories and sold to a terrorist organization, which then develops and delivers mass quantities of the virus into the United States, mortality rates could reach forty percent.[27] Those who survive would be forced to deal with deep scaring, pneumonia, and kidney damage.[28]

The potential mortality rate for the bacteria, anthrax, is much worse than for smallpox.[29] If left untreated, every infected patient will die from inhalation anthrax.[30] Much more common however, is cutaneous anthrax—anthrax of the skin—which results from the bacteria entering the skin through a cut or abrasion and results in an itchy, large blister that eventually turns into a coal-black scab.[31] Although there are few symptoms from this mode of infection, ten to twenty percent of those infected with cutaneous anthrax will die.[32] Although vaccines are available to protect individuals and animals, if infection does occur it can be treated in the early stages with high doses of penicillin.[33]

The two remaining categories of agents, "Category B" and "Category C" agents, have been determined to present a much lower risk to society in terms of a possible bioterror attack.[34] Those agents placed into "Category C," including Nipha virus and hantaviruses, are not currently believed to be a bioterrorist threat, as the amount of information about these diseases within the scientific

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24. *See id.* at 226 tbl. 1.
25. *Id.* at 226.
26. CAROL TURKINGTON & BONNIE ASHBY, FACTS ON FILE: ENCYCLOPEDIA OF INFECTIOUS DISEASES 249-50 (Facts on File, Inc. 1998).
27. *Id.* at 249.
28. *Id.*
29. *Id.* at 9.
30. *Id.*
31. *Id.* at 8.
32. *Id.* at 8-9.
33. *Id.* at 9.
34. Rotz et al., *supra* note 18, at 226.

community is relatively small.[35] Although the lack of knowledge is certainly a disadvantage from a control and containment standpoint, it also indicates that no terrorist organization will have enough information to be able to successfully manufacture and distribute quantities of these diseases sufficient to pose a great threat. As more information is gathered regarding these diseases, however, they could be reclassified as "Category A" or "Category B" agents.[36]

Finally, "Category B" agents are the middlemen on the bioterror agents list. Although these agents may still be widely disseminated by a bioterror attack, mortality rates are generally lower than for "Category A" agents.[37] At the top of the "Category B" list is Q fever.[38] Q fever originated in Australia and is generally transmitted from infected animal to person.[39] The resulting illness from Q fever is mild, and is often misdiagnosed as the common flu, and can be effectively treated with antibiotics and bed rest.[40] Death from Q fever is quite rare,[41] so use of Q fever as a bioterror agent is likely to only cause a disruption in the day-to-day functioning of society.[42] This seems especially true since there is almost no risk of person-to-person transmission.[43]

C. *Agricultural Bioterrorism Agents: A Brief Overview*

The Animal and Plant Health Inspection Service ("APHIS") is the branch of the USDA responsible for protecting America's animal and plant resources.[44] APHIS derives primary authority for conducting its mission from the Plant Protection Act[45] as well as other statutes authorizing the veterinary services aspect of its mission.[46] Acting pursuant to authority and requirements under the Public

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35. *Id.*
36. *See id.* at 227.
37. *See id.* at 226.
38. *Id.* at 226 tbl.1.
39. TURKINGTON & ASHBY, *supra* note 26, at 223.
40. *Id.*
41. *Id.*
42. This is especially true if the disease is successfully distributed into a major metropolitan area whereby virtually an entire city could wind up seeking antibiotics and bed rest for two or more days. Such an attack could, for example, bring Wall Street to a standstill.
43. Rotz et al., *supra* note 18, at 227 tbl.2.
44. APHIS, USDA, WELCOME TO THE ANIMAL AND PLANT HEALTH INSPECTION SERVICE WEBSITE!, *at* http://www.aphis.usda.gov/lpa/about/welcome.html (last visited Apr. 23, 2004).
45. Plant Protection Act, 7 U.S.C. §§ 7701-7772 (2000).
46. *See generally* Animal Health Protection Act, 7 U.S.C.A. §§ 8301-8320 (West Supp. 2003) (regulating prevention of animal diseases); Agricultural Bioterrorism Protection Act of 2002,

Health Security and Bioterrorism Preparedness and Response Act of 2002,[47] APHIS developed a list of biological agents and toxins posing the greatest threat to both plants and animals.[48] This list included nine biological agents that pose a severe threat to crops and a much more extensive listing of agents selected in cooperation with the CDC that could pose a threat to both animals and humans.[49] The general method of selecting the agents appears to be similar to the method used in the Rotz article.[50] It is beyond the scope of this Note to discuss each of the animal and plant diseases identified by APHIS. Rather, it suffices to note that states have the information readily available to them and, especially in states where there is a large agricultural industry, states should be able to use much of the information disseminated by APHIS in preparing infrastructure and resources to prevent or counter bioterror attacks.

III. SOVEREIGN IMMUNITY AND BASES FOR LIABILITY

A. *Overview*

In order to understand how liability may be imposed on the states, and more specifically for failure to protect against bioterror attacks, it is helpful to examine the origins of sovereign immunity in a federal context. Furthermore, because the Federal Tort Claims Act[51] serves as the basis for Iowa's Tort Claims

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7 U.S.C.A. §§ 8401, 8411 (West Supp. 2003) (regulating prevention of introduction and spread of contagious diseases).

47. *See generally* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594.

48. 7 U.S.C.A. §§ 8401, 8411; Listing of Biological Agents and Toxins and Requirements and Procedures for Notification of Possession, 67 Fed. Reg. 52,383, 52,385 (Aug. 12, 2002) (to be codified at 7 C.F.R. pt. 331 and 9 C.F.R. pt. 121).

49. 7 U.S.C.A. §§ 8401, 8411; Listing of Biological Agents and Toxins and Requirements and Procedures for Notification of Possession, 67 Fed. Reg. at 52,385-52,386.

50. *See* Rotz et al., *supra* note 18, at 225; 7 U.S.C.A. §§ 8401, 8411; Listing of Biological Agents and Toxins and Requirements and Procedures for Notification of Possession, 67 Fed. Reg. at 52,385-52,386.

51. 28 U.S.C. § 1346(b)(1) (2000) (providing U.S. district courts exclusive jurisdiction over tort claims against the United States where a private party in similar circumstances would also be liable); *id.* § 2401(b) (providing a two year statute of limitations); *id.* § 2674 (providing that the United States is not required to pay interest or punitive damages unless statutorily required); *id.* § 2675 (requiring administrative disposition and limiting recovery to the amount claimed before the agency); s*ee generally id.* §§ 2671-2680 (defining and describing Federal Tort Claims Procedure).

Act, an understanding of federal sovereign immunity helps to understand application of the Iowa Act.[52]

One of the earliest cases in which the Supreme Court addressed the issue of sovereign immunity was *United States v. Lee*, in 1882.[53] The *Lee* case was an ejectment action brought by the eldest son of General and Mrs. Robert E. Lee to recover property known today as Arlington National Cemetery.[54] The government's basic claim was that the Court lacked subject-matter jurisdiction because the government had possessed and controlled the land for over ten years and acquired title to the property through a tax sale prior to the time the suit was filed.[55] The Court found the plaintiff's right could only be removed if the sale was invalid.[56] The Court addressed the question of whether "any action [could] be maintained against the [agents of the government] . . . however clear the legal right to that possession might be."[57] The majority in *Lee* ultimately held for the plaintiff, but did so with its justifications based primarily in the protection of Fifth Amendment rights.[58] The Court was also careful in its ruling to note that the action was (1) brought against individuals, not against the United States; and (2) those individuals acted beyond the scope of any statutory or common-law authority.[59]

In reaching its decision, the Court noted that sovereign immunity has its roots in English law.[60] Under the laws of England, the king was not liable in suit unless his consent was first given.[61] It was not until the establishment of the petition of right that individuals were able to recover for wrongs committed by the Crown.[62] In establishing the underlying principles of sovereign immunity, the Court looked to an opinion of the Massachusetts Supreme Court and found that

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52. *See* Harden v. State, 434 N.W.2d 881, 886 (Iowa 1989).
53. United States v. Lee, 106 U.S. 196 (1882).
54. *See id.* at 198.
55. *See id*. at 198-99 (stating the sale was made pursuant to taxes unpaid by Lee as per the June 7, 1862 Act entitled "An Act for the collection of direct taxes in the insurrectionary districts within the United States").
56. *See id*.
57. *Id.*
58. *See id.* at 196, 198-99; *see also* U.S. CONST., amend. V (providing that the government shall not take property without giving just compensation).
59. *See generally Lee,* 106 U.S. at 196.
60. *Id.* at 205.
61. *Id.*
62. *Id.*

the doctrine was adopted in the United States to prevent the supreme power from being forced by the courts to defend itself from assaults therein.[63]

The Court refined its view of sovereign immunity in the later cases of *Larson v. Domestic & Foreign Commerce Corp.*[64] and *Malone v. Bowdoin*.[65] In *Larson*, the dispute arose over the government's sale of surplus coal following World War II, and in *Malone*, the facts were similar to those in *Lee* insofar as the plaintiff sought to eject the government from land the plaintiff allegedly owned.[66] The Court ruled in favor of the government in both *Larson* and *Bowdoin*, signaling a restoration of sovereign immunity after its diminishment in *Lee*.[67] A main justification of the Court's ruling in both of these cases was that both plaintiffs sought specific performance for injuries suffered despite the availability of satisfactory remedies that would not have required the government to either deliver the coal or give up land it had occupied.[68]

To summarize, at the federal level the law can best be understood to proscribe government liability without government consent.[69] This doctrine applies to suits against the government directly, as well as to suits against government agents acting within the scope of their duties.[70] In order for an individual to recover when a suit is brought against the government, there must be a legislative waiver of sovereign immunity.[71] However, these waivers are generally construed

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63. *See id.* at 206-07 (citing Briggs v. Light-Boat Upper Cedar Point, 93 Mass. 157, 162-63 (1865)).

> [T]he broader reason is, that it [sovereign immunity] would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury.

Id. (quoting *Briggs*, 93 Mass. at 162). The Court's conclusion as to sovereign immunity's roots further demonstrates the importance of the fact that the suit was filed against individuals, not the government directly. *See Lee,* 106 U.S. at 206-07, 220-23.

64. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

65. *See* Malone v. Bowdoin, 369 U.S. 643 (1962).

66. *See id.* at 644-45; *Larson*, 337 U.S. at 684.

67. *See Malone,* 369 U.S. at 647-49; *Larson,* 337 U.S. at 684-85; *Lee,* 106 U.S. at 220-23.

68. *See* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 134-35 (Foundation Press 2000).

69. *See, e.g.,* Lane v. Pena, 518 U.S. 187, 192 (1996).

70. *See, e.g.,* United States v. Orleans, 425 U.S. 807, 814-15 (1976).

71. *See, e.g., Lane,* 518 U.S. at 192.

narrowly.[72] Such a narrow construction means that it will likely be difficult in many cases for a plaintiff to recover against the government where a waiver has not been *clearly* established by statute.

Sovereign immunity was doctrinally recognized as the law of Iowa circa 1864 and the Iowa Supreme Court clearly stated in 1964 that an explicit waiver of sovereign immunity is requisite to state liability.[73] Furthermore, it is a long-standing principle that the doctrine of sovereign immunity cannot be circumvented by bringing suit against an agency or employee of the state who was acting within the scope of his duties when the alleged wrong was committed.[74] Finally, waivers of sovereign immunity at the state level are construed narrowly in most instances.[75]

The United States Constitution lends support to this understanding of sovereign immunity. When viewed in its original meaning, the Constitution generally protected the states from suit in their own courts.[76] The states' reaction to the United States Supreme Court's decision of *Chisholm v. Georgia* is paramount to this view.[77] In that case, the Court explicitly held the states' sovereign immunity subordinate to the legislative enactments of the federal government.[78] To this decision, the states responded by quickly ratifying the Eleventh Amendment.[79] Iowa has asserted sovereignty in its statutes.[80] This reading of the foun-

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72. *See, e.g.,* United States v. Nordic Vill., Inc., 503 U.S. 30, 33-34 (1992).

73. Montandon v. Hargrave Const. Co., 130 N.W.2d 659, 660 (Iowa 1964) (noting that in 1964 sovereign immunity had been the law "for nearly 100 years"); *see also* 57 AM. JUR. 2D *Municipality, County, and State Tort Liability* §§ 1-655 (2002) (discussing the general applicability of the doctrine of sovereign immunity to all levels of government and its implications for local governments).

74. Wilson v. La. Purchase Exposition Comm'n, 110 N.W. 1045, 1046 (Iowa 1907). The agency relationship is important. For example, a Department of Transportation individual who damages one's car with a snow plow while on duty cannot be sued (unless the state has waived sovereign immunity in that case), but that same individual could be sued for assaulting another while off duty.

75. *See* Feltes v. State, 385 N.W.2d 544, 548 (Iowa 1986); Montgomery v. Polk County, 278 N.W.2d 911, 927 (Iowa 1979) (Larson, J. dissenting); *but see* State v. Dvorak, 261 N.W.2d 486, 489 (Iowa 1978) (noting that conduct of agencies and agents may allow for a waiver of sovereign immunity to be implied, specifically noting contract cases).

76. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 497 (2001).

77. *See id.* at 496-97; *see generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

78. *Chisholm*, 2 U.S. (2 Dall.) at 436.

79. *See Hill*, *supra* note 76, at 497.

80. IOWA CODE § 1.2 (2003).

ders' and states' original intents was validated by the Court in thorough treatment as recently as 1999 when it decided *Alden v. Maine*.[81]

In *Alden*, the Court split five to four in deciding against employees of the state of Maine.[82] The Court ultimately determined that the United States Congress could not enact legislation that would subject states to private suits when the states had not consented to such suit.[83] Careful to note the Eleventh Amendment, the Court pointed out that "immunity from suit is a fundamental aspect of the sovereignty which the States . . . retain today."[84] The Court also noted, however, that the Eleventh Amendment is not the only context in which the states may find sovereign immunity.[85] It is plain to see that although the states may not enjoy all the sovereignty of the United States,[86] a key element is present—the requirement that the state consent to suit before any suit may lie.

B. *Iowa's Tort Claims Act*

Iowa's specific waivers of sovereign immunity for torts committed by the state or its agents are found in the Iowa Tort Claims Act ("ITCA").[87] The code also governs liability in tort for municipalities and other non-state governmental entities.[88] Chapter 670, governing sub-state governmental liability, generally mirrors chapter 669, governing state liability, except in scope.[89] This Note is concerned only with chapter 669. Like its federal counterpart, the ITCA does not create new bases for tort liability.[90] Rather, there must be some existing basis for liability in order for the state to be held accountable for injuries it negligently causes.[91]

In analyzing the ITCA, one immediately notices that it contains both procedural and substantive components.[92] The procedural components of the ITCA include statutes of limitations and the various administrative steps that

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81. Alden v. Maine, 527 U.S. 706, 732 (1999).
82. *See id.*
83. *Id.*
84. *Id.* at 713.
85. *Id.* at 728.
86. For example, the states do not have many of the authorities specifically granted to the federal government by the United States Constitution, such as the authority to declare war.
87. IOWA CODE § 669.4 (2003); *see generally id.* §§ 669.1-669.24.
88. *Id.* §§ 670.1-670.19.
89. *Compare id.* §§ 669.1-669.24, *with id.* §§ 670.1-670.19.
90. *See* Graham v. Worthington, 146 N.W.2d 626, 637 (Iowa 1966).
91. *See id.*
92. *See* IOWA CODE § 669.4.

must be completed before suit is filed in a described court.[93] The substantive components of the ITCA are those "defin[ing] the remedy . . . [and] the right"[94] such as section 669.2, which describes, in part, what may constitute a claim under the ITCA.[95] In order for a claim to succeed, not only must there be a remedy defined, but all the steps must be followed.[96] With such a relatively short statute of limitations[97] it is important that each procedural step be carefully followed because the court has generally refused to toll the statute of limitations in ITCA cases.[98]

1. *General Considerations of the ITCA*

a. *What Constitutes a Claim?* While treated more thoroughly in a later section, a claim may be brought against either the state and its agencies directly, or against an employee of the state.[99] A claim against an agency is one for money damages where an injury occurs as a result of a negligent act or omission of a state employee acting within the scope of his employment *if a private party would have been liable under similar circumstances*.[100] Thus, in order for a claimant to have a claim against an agency: (1) the claim must be for money damages;[101] (2) the injury must result from a negligent act or omission of a state employee;[102] (3) the employee must have been acting within the scope of his employment;[103] and (4) a private party must have been able to be held liable under

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93. *See, e.g., id.* §§ 669.4, 669.5, 669.13.

94. JOHN SALMOND, SALMOND ON JURISPRUDENCE 461 (P.J. Fitzgerald ed., 1966).

95. S*ee*, *e.g.*, IOWA CODE §§ 669.2(3), 669.14.

96. *See id.* §§ 669.5-669.11.

97. *Compare id.* § 669.13 (setting the statute of limitations for claims against the state to be only two years from the time the claim accrues), *with id.* § 550.8 (granting a three year statute of limitations for misappropriation claims), *and id.* § 809A.20 (granting a five year statute of limitations for forfeiture claims resulting from criminal prosecutions).

98. *See* Drahaus v. State, 584 N.W.2d 270, 273 (Iowa 1998) (holding that tolling provisions found in other sections of the Code are inapplicable to ITCA claims); *contra* Harrington v. Toshiba Machine Co., 562 N.W.2d 190, 191-92 (Iowa 1997) (holding that under the Federal Act the statute of limitations is suspended while the agency considers the claim); *but see id.* at 192 (indicating that tolling of statutes of limitations must be statutorily dictated, and that judges are without discretion to alter statutes of limitations).

99. *See infra* Part III(B)(1)(d)**.**

100. IOWA CODE § 669.2(3)(a).

101. *See id.* (stating that although most tort claims include a money component, no claim against the State may include a request for specific or equitable relief under the ITCA).

102. *Id.*

103. *Id.*

similar circumstances.[104] If a claim is filed against an employee, the requirements for meeting the definition of "claim" appears to be less stringent.[105] The requirements are identical with the exception that this part of the ITCA makes no reference to private party liability under similar circumstances.[106] This implies that state employees may be held to answer to claims which would not lie in the private sector against private employees.[107]

b. *What is Statutorily Excepted?* The ITCA contains numerous exceptions to the specific waiver of sovereign immunity.[108] First, the discretionary function exception ("DFE") provides that the state and its employees may not be held liable under the ITCA when the claim arises as the result of some permitted choice made in the performance of the official's duties.[109] Although this seems like it could be used to preclude *most* state liability, the DFE has not been so broadly construed.[110] In their interpretations of the DFE, Iowa courts[111] have relied on the interpretation of the Federal Tort Claims Act's DFE[112] by the United States Supreme Court.[113]

In *Berkovitz v. United States*, the Court noted that the DFE was Congress' primary avenue for protecting the government from unfettered tort liability.[114] The Court held that a two-prong test is appropriate in analyzing DFE

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104. *Id.*

105. *Compare id.* § 669.2(3)(a), *with id.* § 669.2(3)(b). Note, however, that the requirements being discussed here go only so far as to define "claim." The ITCA requires that sued employees be defended by the agency and therefore by the state. *See id.* § 669.23. Thus, it is not unreasonable to assume that in order for a claim against an employee to meet the statutory requirements, the employee's negligence must also have some private party analogous liability. *See id.* § 669.2(3).

106. *Compare id.* at § 669.2(3)(b), *with id.* at § 669.2(3)(a).

107. *See id.* at § 669.2(3)(b) (containing no requirement that the employee would be liable if a private person).

108. *Id.* § 669.14 (enumerating fourteen exceptions).

109. *See id.* § 669.14(1).

110. *See* Shelton v. State, 644 N.W.2d 27, 29 (Iowa 2002).

111. *See id*.

112. 28 U.S.C. § 2680(a) (2000).

113. *Shelton*, 644 N.W.2d at 29 n. 1 (citing Berkovitz v. United States, 486 U.S. 531 (1988)).

114. *Berkowitz*, 486 U.S. at 536 (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984) (modifying the original DFE analysis prescribed in *Dalehite v. United States*, 346 U.S. 15 (1953), by the United States Supreme Court)); *see Shelton,* 644 N.W.2d at 29 n. 1 (stating the *Dalehite* decision had utilized a complex planning/operational dichotomy in which the Court indicated that the DFE only applies to decisions made at the planning, not the operational level. Iowa courts rejected this analysis because of the great deal of misinterpretations of the *Dalehite* analysis (citing Goodman v. City of Le Claire, 587

cases.[115] Discretionary function exception analysis first requires a determination that there was an element of choice involved in the allegedly negligent act or omission.[116] If a statute, rule, or regulation specifically requires a course of action be taken by an employee, then the DFE analysis ends, and it will not serve as a bar to liability.[117] Once it has been determined that an element of choice was involved in the act or omission, the second part of the analysis must be done. The *Berkovitz* Court noted that Congress' intent in adopting the DFE was "to prevent judicial 'second-guessing' of legislative and administrative" rules and regulations.[118] Succinctly stated, "the [DFE] insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment."[119] Iowa courts have taken the analysis further and have held that in order for the DFE defense to be available, not only must there be no policy dictating a specific course of action, but there must also be some policy permitting a state employee to make a choice.[120]

A second relevant exception to the waiver of liability is the "Quarantine Exception."[121] This type of exception to liability seems to be relatively unused in Iowa, as well as most other jurisdictions, as there is little case law on the issue. However, it is perhaps one of the most important exceptions to the ITCA in addressing potential liability for bioterrorism, as almost any bioterror scenario imaginable will at some point involve quarantine. This exception proscribes claims for damages resulting from quarantines by the state, and covers both the quarantine of persons and the quarantine of property.[122] Thus, if the state determines that a herd of cattle must be quarantined to prevent the possible spread of mad cow disease, it is impossible to recover under the ITCA.[123]

N.W.2d 232, 238 (Iowa 1998)). However, prior to the 1998 *Goodman* decision, one finds the planning/operational dichotomy widely used in DFE analysis within Iowa Courts.).

115. *See Berkowitz*, 486 U.S. at 536-37.

116. *Id.* at 536 (citing *Dalehite,* 346 U.S. at 34).

117. *Id.*

118. *Id.* at 536-37 (quoting *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. at 814).

119. *Id.* at 537.

120. *See* Hawkeye Bank v. State, 515 N.W.2d 348, 351 (Iowa 1994) (citing Stanley v. State, 197 N.W.2d 599, 603-04 (Iowa 1972)).

121. *See* IOWA CODE § 669.14(3) (2003).

122. *See id.*

123. *Id.* (proscribing suits based on the imposition of quarantines of property); *but see id.* § 163.10 (providing statutory authority for quarantine of livestock); *id.* at § 163.15 (providing that any infected animal killed at the instruction of the state is entitled to some indemnification from the state).

The final exception to the waiver of sovereign immunity to discuss is the "intentional torts" exception.[124] Under section fourteen, subsection four of the ITCA, claims may not be brought against the state for the following intentional torts: (1) assault; (2) battery; (3) false imprisonment; (4) false arrest; (5) malicious prosecution; (6) abuse of process; (7) libel; (8) slander; (9) misrepresentation; (10) deceit; or (11) interference with contract rights.[125] This exception is most easily understood when considered from a criminal prosecution perspective. Absent this provision, the ITCA would permit claims, and possibly recovery, by criminals who may have been allegedly assaulted by arresting officers. Without this exception, every person wrongly charged with a crime may have a claim for false imprisonment or arrest under the ITCA. Anyone wrongly charged with a crime could file a claim for libel or slander. Permitting recovery in any of these circumstances certainly seems an absurd result, especially if the recovery is by a convicted criminal as a direct result of being caught. Recovery notwithstanding, this flood of judicial claims against the state would cause an already busy system to expand and the economic costs to the state—not only in terms of the judiciary, but also in terms of defending against all these claims—would likely reach astronomical proportions.

c. *Statute of Limitations*. Failure to timely file a claim will cause that claim to be "forever barred" by the statute of limitations.[126] The statute of limitations is generally two years from the time the claim accrues, but it is subject to limited extension.[127] Because filing a timely claim is such an important requirement, there are two important questions that must be answered: first, what does it mean to "file a timely claim;" and second, under what circumstances may a claim lie after the two year limitation has run?

There are three requirements to filing a timely claim. First and foremost, the claim must have accrued.[128] "Accrue" simply means the process whereby something becomes an enforceable right.[129] There are at least two ways of interpreting the use of the term "accrued" within section 669.13.[130] On the one hand, the enforceable right to file a claim may come into existence when the injury actually occurs even though the injured party may have no knowledge of the in-

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124. *Id.* § 669.14(4).
125. *Id.*
126. *Id.* § 669.13.
127. *Id.*
128. *Id.*
129. BLACK'S LAW DICTIONARY 21 (7th ed. 1999).
130. IOWA CODE § 669.13.

jury.[131] On the other hand, this right may come into existence when the injured party discovers, or reasonably should have discovered, the existence of the injury.[132] Iowa courts have held that that the latter is the correct interpretation of ITCA section thirteen.[133] When a claim is brought for purposes of the ITCA, the "discovery rule" is applied and the claim accrues when the injured party ("the plaintiff") either discovers or reasonably should have discovered the injury.[134]

An easily understood illustration of the discovery rule, as applied to the ITCA, is as follows. A disastrous epidemic of mad cow disease breaks out that results in the death or extermination of over three-quarters of Iowa's cattle in June 2004. It is determined in June 2005, after an exhaustive study, that the epidemic was caused by an act of bioterrorism. That same study reveals that the state could have easily taken steps to prevent the injury, and therefore may be liable under some sort of negligence theory. Application of the discovery rule, therefore, necessarily means that the claim against the state does not accrue until June 2005, when the cause of the injury was discovered.

Second, the claimant must have exhausted all administrative remedies before any judicial claim will be allowed.[135] As a practical matter, the ITCA requires only a single administrative step be exhausted, although more than one avenue may be attempted.[136] The claim must simply have been disposed of by the State Appeal Board ("SAB"),[137] or such a time must have passed that the plaintiff can construe the SABs inaction to be constructive disposition.[138] However, during the period of time between when the claim accrues and when it is filed, it is not unreasonable to assume that the plaintiff may seek recovery directly from the "responsible" agency or employee. If such relief is sought, then the agency will probably dispose of the claim by referring the plaintiff to a more appropriate agency or directly to the SAB.[139] In the case of a tort claim made against an employee, the agency will defend or indemnify the employee when the claim falls within an ITCA section fourteen exception, and the agency, rather

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131. *See* Vachon v. State, 514 N.W.2d 442, 444-445 (Iowa 1994).
132. *See id.* at 445 (citing Chrischilles v. Griswold, 150 N.W.2d 94, 100 (Iowa 1967)).
133. IOWA CODE § 669.13; *see also Vachon*, 514 N.W.2d at 445.
134. *Vachon*, 514 N.W.2d at 445 (citing *Chrischilles*, 150 N.W.2d at 100).
135. *See* Drahaus v. State, 584 N.W.2d 270, 273 (Iowa 1998); *see also* IOWA CODE § 669.13.
136. *See* IOWA CODE § 669.13.
137. The makeup and function of the State Appeal Board is discussed *infra* section 3, part B(2)(d).
138. IOWA CODE § 669.13.
139. E-mail from Judy Meyer, Administrative Assistant, Iowa Department of Management, to author (Dec. 23, 2002) (on file with Drake J. Agric. L.).

than the employee, will again dispose of the claim by referring the plaintiff to another agency or the SAB.[140] Eventually however, all claims made against agencies or employees must be disposed of by the SAB for the plaintiff to exhaust all administrative remedies.[141]

A final note to the prerequisite of exhaustion of administrative remedies is that the administrative remedies and the judicial claim cannot be concurrent.[142] Although it seems to simply be "covering one's bases" to concurrently file an administrative claim as well as a lawsuit, Iowa courts have explicitly refused to extend the statute of limitations for ITCA claims when a claim is dismissed for failure to exhaust administrative remedies.[143] In the recent decision of *Bensley v. State*, for example, the Iowa Supreme Court held against the plaintiff when an action was initiated only a day after the claim was filed with the State Appeal Board.[144] The court determined that filing a suit does not constitute withdrawal of an already-filed claim, thereby establishing subject matter jurisdiction.[145] This error in timing resulted in the claim not being filed until after the statute of limitations had run.[146] Thus, the plaintiff's claim was entirely barred because of this mistake in timing.

The final requirement to a timely filing is that the claim must be filed within two years from the date of accrual.[147] It should be noted that filing does not mean mailing. The claim must actually be received by and filed with the SAB within two years from the date of accrual.[148] Once the claim is received by the SAB, the plaintiff enters a waiting period during which the SAB will adjudicate disposition of the claim. This ends at one of two points: (1) the SAB will mail notice of disposition of the claim—if the decision is adverse to the plaintiff, the plaintiff may then file suit; or (2) if at least six months have passed since the claim was filed, the plaintiff may view this "constructive disposition" as a denial and may begin seeking judicial relief.[149] However, if the plaintiff is forced to elect the latter option, then the plaintiff must notify the SAB in writing that the

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140. IOWA CODE §§ 669.2(3)(b), 669.14, 669.23.
141. *Id.* § 669.13.
142. *See* Bensley v. State, 468 N.W.2d 444, 447 (Iowa 1991).
143. *See id.*
144. *See id.* at 448.
145. *Id.* at 445-446.
146. *See id.* at 447.
147. IOWA CODE § 669.13 (2003).
148. McGruder v. State, 420 N.W.2d 425, 425-426 (Iowa 1988).
149. *See* IOWA CODE § 669.5; *see also id.* § 669.3 (stating that if the SAB finds the claim justifies settlement, then it may do so, and acceptance of any settlement will preclude any further relief against the state based upon that claim).

claim is being withdrawn, and only then may the suit begin; the ITCA is inconclusive as to the date that this withdrawal becomes effective.[150] Once the claim is effectively withdrawn from the consideration of the SAB, suit may then be filed.[151]

But what happens if the SAB does not render its decision, actually or constructively, until *after* the two year statute of limitations has run?[152] In that case, the ITCA provides for an extension of the statute of limitations by six months to provide time for filing the claim.[153] This extension applies whether the decision is actually or constructively rendered by the SAB.[154] Furthermore, a six month extension is permitted if a claim for relief is filed with another agency pursuant to another section of the Iowa Code, and either the agency or a court determines that the ITCA provides the sole means of relief for the claim.[155] Thus, if (1) a valid claim is brought against the state or an agency under authority of some other chapter of the Iowa Code more than two years from when the claim accrued; and (2) the state challenges the validity of the claim, arguing that the ITCA preempts the code "permitting" the recovery; and (3) the court determines that the state's argument is correct, the ITCA is the sole means of recovery given

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150. *See id.* at § 669.5. It is easy to see the procedural problem that could arise if a plaintiff mails his withdrawal to the SAB and on the same day files a judicial action in Polk County District Court; the plaintiff may end up with a claim being concurrently considered both administratively and judicially. Such a result is clearly prohibited by the ITCA. The lack of discernable case law on this issue indicates that the problem may be merely academic, or it may indicate that the state has never raised this challenge as to the validity of a suit. *See id.* However, it does not seem to be unreasonable to assume that if the issue did arise, a court would likely dispose of this procedural problem by opting for consistency and reading "notice" in a light most favorable to the state. This prediction seems more reasonable when one considers that waivers of sovereign immunity are almost always narrowly construed. *See supra* Part III.A. Under this reading, the withdrawal would not become effective until such time as the SAB receives and files it, much the same way that the claim is not made until it is filed by the SAB. *Compare* IOWA CODE § 669.5 *with* IOWA CODE § 669.13 *and McGruder*, 420 N.W.2d at 426. Therefore, from a practice perspective, any withdrawal of a claim should either be delivered to the SAB in person, if practicable, or via a delivery service such as FedEx, which will guarantee delivery dates. By knowing the precise date of withdrawal, an attorney can ensure that all administrative remedies have actually been exhausted. *See* IOWA CODE § 669.13.

151. *See* IOWA CODE § 669.5.

152. Of course, it is still required that the claim be made within the two year statutory period required by § 669.13. *See id.* at § 669.13.

153. *Id.*

154. *Id.*

155. *Id.*

the circumstances; then (4) the court will grant the plaintiff six months in which to file the ITCA claim.[156]

If a claim is timely made or filed, then it will be presented to the clerk of the district court within thirty months from the date the plaintiff discovered,[157] or reasonably should have discovered, the injury.[158] During this thirty months, the claim must have within the first twenty-four months been presented to the SAB.[159] However, a claim may also be "timely" if filed within six months of a judgment that the ITCA preempts another portion of the Iowa Code that was presumed to provide relief for injuries suffered by the plaintiff.[160]

d. *Identifying Potential Defendants*. ITCA suits may be brought against an employee who was acting within the scope of his employment or directly against the state or its agencies.[161] The distinction is subtle, but is important. To illustrate types of claims under each, consider these two scenarios: (A) an Iowa Department of Transportation employee negligently drives a snow plow into your parked car; and (B) the Iowa Department of Transportation decides not to repair a bridge this year due to lack of funds, and the bridge collapses as you cross. In scenario "A," it is clearly illogical to say that the Department of Transportation is directly responsible for the employee's actions, there was probably not a directive issued from within the department instructing the negligent employee to drive into parked cars. Still, the employee was acting within the scope of his employment because he was presumably hired and directed to drive the snow plow. Under scenario "B," it is clearly much more difficult to determine a specific employee who could be found to be negligent. Substantial discovery efforts may reveal a lone engineer who acted improperly. In the interest of efficiency for the injured party it is much more logical to bring a claim directly against the Iowa Department of Transportation.

The ITCA defines "employee of the state" very broadly.[162] Under the ITCA, employee can mean anyone from an elected or appointed official to volunteer workers to prisoners assigned work.[163] It also notes that acting within the scope of employment means that the employee must have been acting within the

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156. However, this does raise the interesting question of whether or not this "transfer" of remedies would suffice to constitute the requisite exhaustion of administrative remedies. *See id.* §§ 669.5, 669.13.

157. *See id.* at § 669.4.

158. *Cf. id.* at § 669.13.

159. *Id.* §§ 669.5, 669.13.

160. *Id.* § 669.13.

161. *Id.* § 669.2(3)(a)-(b).

162. *See id.* § 669.2(4).

163. *Id.*

employee's line of duty.[164] The intent of this requirement is probably to proscribe state liability for the private actions of its employees. Given this provision it is impossible for the state to be liable for an employee who assaults another, for example, with a likely exception being that of peace officers. This limitation to the general waiver of sovereign immunity certainly seems justified because it is ultimately the citizens of the state who must pay the price of any judgments awarded against the state. Allowing the state to be held liable for injuries caused by off-duty employees would likely result in the imposition of a tax burden that would ultimately be detrimental to the economic future of the state.

2. *Step-by-step Analysis of the ITCA*

As Figure 1 illustrates, the process of bringing a claim against the state under the ITCA is complex. In that figure, the oblong shapes represent either the beginning or the end of the process. Rectangular shapes represent processes or actions taken by a party. Diamond shapes pose questions that must be considered before continuing with the analysis. The figure has also been broken into three subsections, each of which represents the responsible governmental entity or branch that is responsible for dealing with each part of the analysis.[165]

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164. *Id.* § 669.2(1).

165. Given the intense interdependency of the various portions of the ITCA, there is an inherent "chicken-or-the-egg" problem with analysis of this type of statute. The author has attempted to present the information in the order in which it can be most beneficial, although there may be times when the reader will feel that necessary material has been omitted.

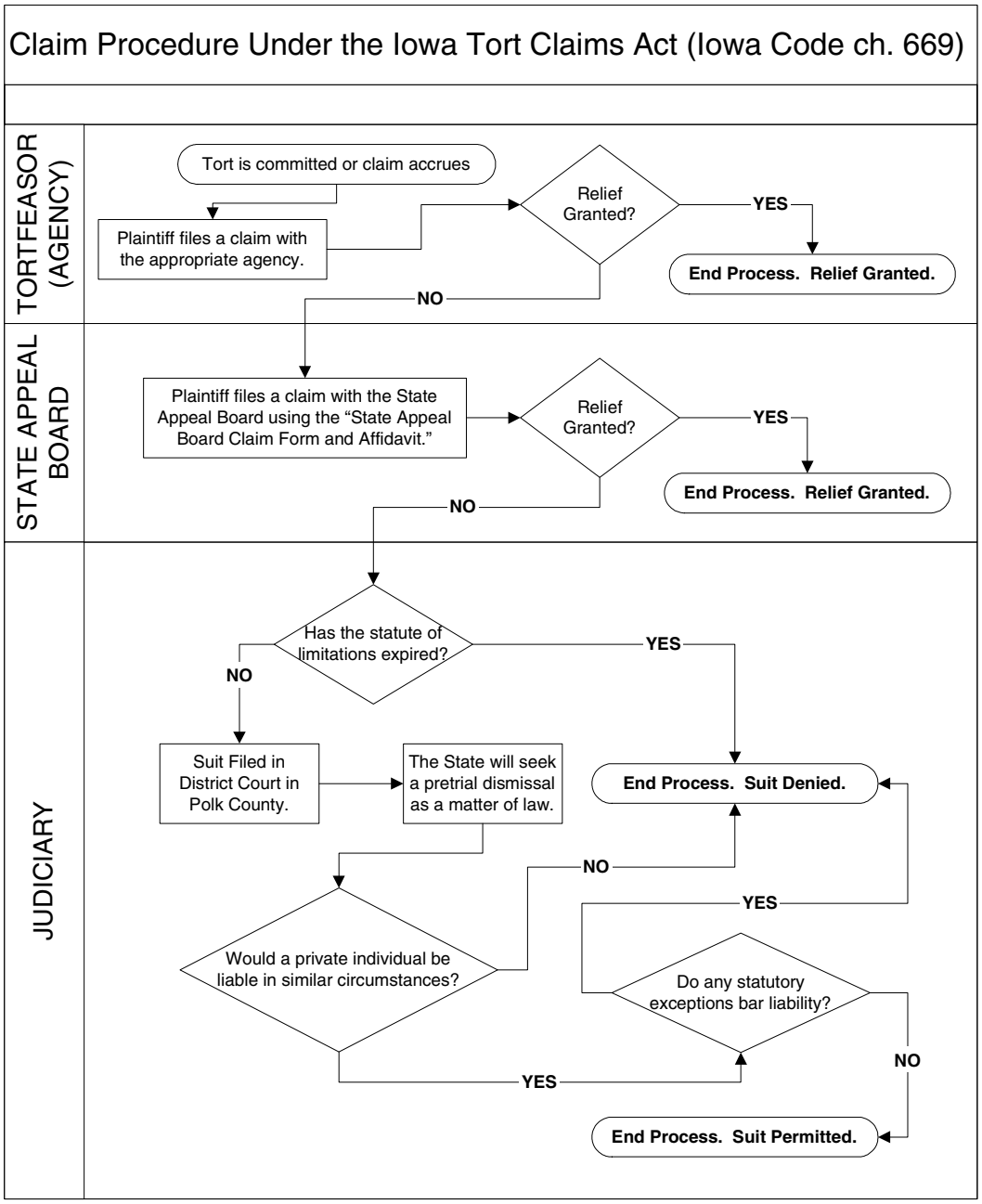
Claim Procedure Under the Iowa Tort Claims Act (Iowa Code ch. 669)
TORTFEASOR (AGENCY)
Tort is committed or claim accrues
Plaintiff files a claim with the appropriate agency.
Relief Granted?
YES
End Process. Relief Granted.
NO
STATE APPEAL BOARD
Plaintiff files a claim with the State Appeal Board using the "State Appeal Board Claim Form and Affidavit."
Relief Granted?
YES
End Process. Relief Granted.
NO
JUDICIARY
Has the statute of limitations expired?
YES
NO
Suit Filed in District Court in Polk County.
The State will seek a pretrial dismissal as a matter of law.
End Process. Suit Denied.
NO
YES
Would a private individual be liable in similar circumstances?
Do any statutory exceptions bar liability?
YES
NO
End Process. Suit Permitted.

Figure 1

a. *State Appeal Board Steps*. Prior to filing any suit under the ITCA, the plaintiff must obtain a final disposition from the State Appeal Board.[166] The SAB consists of the state's auditor, treasurer, and the Director of the Department of Management—the agency responsible for the SAB.[167] Claims are submitted to the SAB utilizing a standard form.[168] Along with the form, any supporting documentation must also be provided to the SAB.[169] Once the claim is properly submitted, the plaintiff must wait at least six months to file suit.[170] If, after the passage of six months the SAB has not mailed to the plaintiff a decision, the claimant may proceed as described in the discussion of the statute of limitations, above.[171]

In the best world for the plaintiff, the SAB would recognize the validity of the claim, and would promptly settle the suit, thereby eliminating the need for costly litigation and reducing congestion within the courts.[172] Claims in excess of five thousand dollars must be settled with the unanimous consent of the members of the SAB, the attorney general, and also the district court.[173] Other claims may be settled without the district court's approval and without unanimous consent of the SAB members, but the attorney general must still approve the settlement.[174] If relief is granted by the SAB, then this will preclude any other recovery by the plaintiff.[175] The SAB is only authorized to permit settlement prior to court proceedings, however.[176] Once a case has been filed with the judiciary, only the attorney general has the authority to authorize settlement, and the SAB remains outside the scope of settlement negotiations although the attorney general is unlikely to settle a case absent at least some consultation with the SAB.[177]

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166. *See* IOWA CODE § 669.5.
167. *See id.* § 73A.1(1); *see also id.* §§ 24.26, 669.2(6).
168. *See* STATE APP. BD., IOWA DEP'T OF MGMT., STATE APPEAL BOARD CLAIM FORM AND AFFIDAVIT, *available at* http://www.dom.state.ia.us/appeals/forms.html (last visited Apr. 22, 2004).
169. *See id.*
170. *See* IOWA CODE § 669.5.
171. *See id.*
172. *Id.* § 669.3.
173. *Id.*
174. *Id.*
175. *Id.* §§ 669.3, 669.10.
176. *See id.* §§ 669.3, 669.9.
177. *See id.* § 669.9.

b. *Judicial Steps*. Only when the SAB returns a final decision adverse to the plaintiff may a judicial action be instituted.[178] Both residents and non-residents can file suit against the state, although the selection of venue is much narrower when a non-resident makes a claim.[179] When an Iowa resident files suit the claim may be brought in the district where the plaintiff resides, or in the district where the act or omission occurred.[180] If any non-resident files a claim, however, that claim may only be filed in Polk County District Court, regardless of where the act or omission occurred.[181]

No matter where a claim is filed, and regardless of whether it is filed by a resident or a non-resident, notice must be properly served on either the state, or the employee and the state.[182] In order to commence a claim under the ITCA, the state attorney general must receive an original notice; the attorney general may also authorize someone in the Tort Claims Division to be responsible for receiving all notices of suit.[183] Commencing a claim against an employee of the state requires the additional step of serving notice on the employee as well as serving notice on the state.[184] Once notice has been properly served, however, the state and the employee are both guaranteed at least thirty days in which to make a general or special appearance before the court.[185] From this point forward in the judicial proceedings, there are no discernable procedural differences between a suit against the state and a suit against a private individual.

IV. ASSIGNING LIABILITY VIA THE ITCA

A. *Overview*

The great hurdle to overcome in finding state liability for a bioterror attack is the requirement that the injury result from a negligent act or omission of the state.[186] Thus, for this element of the claim to be present the four elements of negligence must also be present: (1) the state must have owed some duty to the

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178. *Id.* § 669.5.
179. *See id.* § 669.4.
180. *Id.* § 669.4.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *See id.* § 669.2(3)(a) (defining the term "claim").

injured person; (2) the state must have breached that duty; (3) there must be a causal connection between the injury and the breach of the duty; and (4) there must be actual damages.[187] It is to finding these four elements that the analysis must turn if liability in tort is to be imposed upon the state.

B. *State Negligence Analyzed*

1. *Is a Duty Owed?*

It is first necessary to determine whether or not the state owes to its citizens a duty to protect them from bioterror attacks. The lack of case law on the subject, either inside or outside of Iowa, makes it extremely difficult to determine whether any duty is actually owed in this context, so the best that can be done is to reason by analogy. Any case presented to a court on this issue would be a matter of first impression for both courts and administrative agencies and decisions would likely be subject to further examination by appellate courts.

a. *The "Public Duty" Doctrine*. The general rule is that where the state's duty is to the public at large, the state is immune from liability to individual plaintiffs.[188] This doctrine is perhaps the most important consideration in determining whether an act, or failure to act, by the state to protect against bioterrorism is actionable. Unless the public duty doctrine can be overcome in bioterrorism cases, the whole issue of assigning state liability is moot. Within Iowa courts, the public duty doctrine arguably lost favor in recent years, although it clearly still applies.[189]

In 1979, the Iowa Supreme Court addressed, but failed to resolve, the question of the public duty doctrine in Iowa jurisprudence.[190] The decision in *Wilson v. Nepstad* resulted from the consolidated decision of five separate cases.[191] These cases alleged negligence on the part of the City of Des Moines in its execution of certain fire code and inspection provisions; fires within the allegedly negligently inspected occupancies had led to death of the occupants and destruction of property.[192] The plaintiffs claimed both a common law duty of

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187. BLACK'S LAW DICTIONARY 1056 (7th ed. 1999).
188. Kolbe v. State, 625 N.W.2d 721, 729 (Iowa 2001).
189. *See* Donahue v. Washington Co., 641 N.W.2d 848, 852 (Iowa App. 2002).
190. *See Kolbe*, 625 N.W.2d at 729 (citing Wilson v. Nepstad, 282 N.W.2d 664, 672 (Iowa 1979)).
191. *Wilson,* 282 N.W.2d at 666.
192. *Id.*

reasonable care and that various statutory duties had been breached.[193] In responding to the allegations the city relied heavily on the public duty doctrine.[194] The ultimate question the court reached in deciding the case was whether the common law duty was "owed to the plaintiffs or their decedents, victims of the fire?"[195] It was determined that the public duty doctrine was inapplicable to this case for two reasons: (1) the common law duty established was not owed to the public generally, it benefits a limited class of persons; and (2) "the 'duty to all, duty-to-no-one' doctrine is really a form of sovereign immunity" which the court refused to expand *de facto* by applying the public duty doctrine.[196]

A few years later the public duty doctrine was revisited by the Iowa Supreme Court. In the 1986 decision of *Adam v. State*, the court again refused to accept the public duty doctrine as a bar to liability.[197] In *Adam*, the lower court found the state liable for negligent licensing and inspection of a grain elevator.[198] Specific claims brought by the plaintiff "included negligent failure to inspect as often as required, negligent inspections, and negligent failure to adopt rules."[199] To reach this conclusion, the court relied heavily on legislative intent, whether the legislature intended certain provisions to expand or constrict liability under the ITCA.[200] The court stated that it makes no difference whether the state's duty is derived from common law or from statute; a breach from either derivation is sufficient to constitute actionable negligence.[201] If the duty is created by statute, then the duty is breached when the state does not act in conformance with the statutory requirements.[202] Finally, the court concluded that the plaintiff belonged to the specific class of individuals the duty was intended to protect.[203]

Recently, however, the Iowa Supreme Court distinguished both *Adam* and *Wilson*. In its 2001 decision of *Kolbe v. State*, the court carefully noted that the public duty doctrine has not been specifically rejected in Iowa jurispru-

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193. *Id.* at 667.
194. *Id.*
195. *Id.* at 668.
196. *Id.*
197. Adams v. State, 380 N.W.2d 716, 727 (Iowa 1986) (Schultz, Carter and Wolle, JJ., dissenting in part) (stating that failure to perform statutory duties should not constitute actionable negligence).
198. *Id.* at 716.
199. *Id.* at 718.
200. *Id.* at 720-21.
201. *Id.* at 722-23.
202. *Id.* at 723.
203. *See id.* (noting that the protected class of individuals was grain producers doing business with grain dealers).

dence.[204] It was merely the nature of the statutes under review in the earlier cases that had resulted in the inapplicability of the public duty doctrine.[205] The *Kolbe* court held that the public duty doctrine is applicable because the statute under review in that case was designed to protect the public at large rather than any identifiable class of persons.[206] Public policy considerations also played a substantial role in the court's application of the public duty doctrine.[207]

Given the flux of the law, it is probably best if one can clearly avoid the applicability of the public duty doctrine in an ITCA suit. This is best accomplished when a special duty owed to a specific class of individuals can be shown;[208] of course it will also be necessary for the claimant to fall within the protected class.[209] A common law duty of reasonableness may be insufficient to hurdle the public duty doctrine.[210] However, a statutory duty which clearly identifies a protected class of individuals, and which better yet specifically provides for recovery in the event of negligence will serve to open the widest door to enable ITCA recovery.[211]

b. *Establishing a Special Duty*.There are two basic means of establishing a duty.[212] The most usual method is through affirmative conduct on the part of the defendant.[213] Another method of establishing liability is when an act is *not* done, although liability for omissions is somewhat dubious.[214] The ITCA provides for causes of action when either an act or an omission leads to injury,[215] so the state may be liable whether it acts in some way to cause the bioterror incident to come to fruition or whether its inaction is the ultimate cause of the injury.[216]

The state's affirmative acts to create a duty to protect against bioterrorism are in the form of statutes and administrative regulations. Iowa has recog-

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204. Kolbe v. State, 625 N.W.2d 721, 729 (Iowa 2001).
205. *Id.*
206. *See id.* at 729-30.
207. *See id.* at 730.
208. *See infra* Part IV.B(1)(b).
209. *See infra* Part IV.B(1)(b).
210. *See* Wilson v. Nepstad, 282 N.W.2d 664, 667 (Iowa 1979).
211. *See* Adam v. State, 380 N.W.2d 716, 727 (Iowa 1986) (noting the plaintiff's argument that had they sued a private defendant, the recovery from interest would have been greater).
212. *See* SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 398 (10th ed. 2000).
213. *See id.* (citing PETER CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW 63 (4th ed. 1987)).
214. *See id.* at 398-399 (citing PETER CANE, ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW 63 (4th ed. 1987)).
215. IOWA CODE § 669.2(3)(a) (2003).
216. The causation element of negligence as it relates to bioterrorism is discussed *infra*.

nized the need for disaster management and established the emergency management division of the department of public defense "in order to insure that preparations of this state will be adequate to deal with . . . disasters, and to provide for the common defense and to protect the public peace, health and safety, and to preserve the lives and property of the people of the state."[217] This department is also responsible for coordinating a plan with federal emergency management agencies to cope with a bioterror attack, should it ever occur.[218] The Division of Emergency Management is also responsible for all homeland security activities.[219] Given that "homeland security" is defined to include "the detection, prevention, preemption, deterrence of, and protection from attacks targeted at state territory, population, and infrastructure,"[220] as well as defining "disaster" to include attacks originating from within or without Iowa,[221] Iowa has statutorily assumed the duty to protect its citizens and their property from bioterror attacks.

However, it seems unreasonable to assume that just because a bioterror attack occurs that Iowa must have breached its duty. This type of *res ipsa loquitur* analysis is disfavored in some courts.[222] Despite the disfavor by some courts, this type of analysis is widely used in Iowa courts, even in cases where the state is a party in interest.[223] It is not unreasonable to assume that a much stronger claim would be presented when actual negligence can be shown rather than by arguing that Iowa should be held liable because bioterror attacks do not occur unless someone is negligent. Before one can argue that Iowa has breached its duty it must first be firmly established exactly what the duty Iowa owes to its citizens is. Although the statutes establishing the Division of Emergency Management[224] provide a general sense that the state has imposed a duty on itself to protect its citizens from bioterror attacks, it does little to tell us how far that duty extends.

To determine how far the duty of protection extends it is necessary to delve further into the Iowa Code and into the rules and regulations promulgated by state agencies. It is the responsibility of the Department of Public Health to

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217. IOWA CODE § 29C.1.
218. *Id.* § 29C.1(3).
219. *Id.* § 29C.8(2)-(3).
220. *Id.* § 29C.2(2).
221. *Id.* § 29C.2(1).
222. *See generally* Bruno v. Columbia Mfg. Co., 1996 WL 528482 (Mass. App. Div. Feb. 23, 1996); Ind. Lumbermens Mut. Ins. Co. v. Matthew Stores, Inc., 84 N.W.2d 755, 759 (Mich. 1957).
223. *See* Herbst v. State, 616 N.W.2d 582, 585 (Iowa 2000); Hawkeye Bank v. State, 515 N.W.2d 348, 351-52 (Iowa 1994); Forsmark v. State, 349 N.W.2d 763, 768 (Iowa 1984).
224. IOWA CODE § 29C.

maintain a statewide risk assessment of dangerous biological agents within the state.[225] If, after inspection by an employee or agent of the department, certain premises are found to be unsafe, the director is authorized, but is not required, to implement any safeguards deemed appropriate.[226] From an animal perspective, the Iowa Department of Agriculture and Land Stewardship ("Iowa Department of Agriculture") has been given, by the legislature, the task of suppressing and preventing the introduction and spread of infectious animal diseases within the state.[227] Through these two entities and their promulgated rules the state has effectively created a duty of care which it must maintain if it is to escape ITCA liability in the event of a bioterror attack.

Even absent clear statutory or regulatory requirements creating the duty, it is possible that the advertent or inadvertent actions of the state may have created the duty. The applicable doctrine, commonly referred to as the "good Samaritan" doctrine, holds that where one undertakes to perform an act, thereby causing those affected to expect the act to be performed, one has a duty to perform the act in a reasonable fashion.[228] For example, if a neighborhood parent walks his children to school every morning, and performs the function of a crossing guard for only his children, he owes to the other children no duty to perform the function. If he serves in his "crossing guard" capacity for other children, and the children come to rely on his presence to stop traffic, then he owes a duty to those children. The repercussions of this could be mixed. On one hand, a court might rule that the duty owed was the father's presence every day school was in session. It is more likely, however, that a court would rule that so long as he was performing his function, he owed a similar duty of care to all children. Thus, he owes the same standard of care to the children of his hated rival as he does to his own children.

In cases involving the Federal Tort Claims Act, the United States Supreme Court has found it appropriate to impose this type of reasoning in holding the federal government liable in tort.[229] The case of *Indian Towing Co. v. United States* is a prime example.[230] Much like the cautious father above or the federal

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225. *Id.* § 135.11(29).

226. *Id.* § 135.11(29); *compare id.* § 4.1(30)(c), *with id.* § 4.1(30)(a).

227. *Id.* § 163.1(1); *see also id.* § 163.1(2), (4) (providing for the department to establish quarantines of infected animals); *id.* § 163.1(7), (8) (providing for the department to regulate the movement of animals within the state and across state lines); *id.* § 163.1(1), (3), (6) (providing for the department to determine if, when, and how infections of animals occurred).

228. *See* Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955).

229. *See id.* at 61.

230. *Id.*

government in *Indian Towing*, the state has undertaken to protect its citizens from the threats posed by bioterrorism and has thereby imposed upon itself a standard of care.[231] Thus, although no duty may be explicitly stated in a single statute, the various statutes, taken as a whole, may be sufficient to establish a duty,[232] the breach of which may cause the state to become liable under the ITCA.

2. *What May Constitute a Breach?*

The answer to this question is not as straightforward as it first appears.[233] The ITCA does not go so far as to define what level of negligence is required,[234] so presumably even slight negligence on the part of the state is sufficient to warrant a claim being filed. Thus, although logic holds that in order to breach the duty the state must have violated a duty, either by failing to take a required action or by taking action prohibited, there may be a grey area. The greyness comes from the fact that a court is unlikely to adopt a slight negligence standard given the fact that the state would be the defendant.[235] There must be a duty owed to an individual and the injury must be foreseeable.[236] In order to determine when a breach occurs, therefore, it is necessary to determine what steps taken can meet the ordinary or gross negligence standards and also to determine whether the "citizens" can be a specific individual to whom a duty can be owed.[237] This issue is perhaps best explored through the following original hypothetical:

A rancher, Paul, raises cattle on his rural Iowa ranch. His goal is to get his stock to market as quickly as possible. He buys young steers and sells them after they mature and become more valuable. Paul has been in this business for

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231. *See generally* id.

232. *See generally* IOWA CODE §§ 29C, 669, 4.1(30)(a), (c), 135.11(28), 163.1(1)-(4) & (6)-(8).

233. It should be noted that the answer to the question offered in the following is merely speculative. Unless the sad day comes when a bioterror attack succeeds within Iowa's borders, and a negligence claim is brought against the state, there will always be a lack of precedent to guide this analysis.

234. *Cf.* IOWA CODE § 669.2(3)(a).

235. Remember from above that waivers of sovereign immunity are construed very narrowly by courts, and the adoption of a slight negligence standard would create an extremely heavy burden on the state, requiring it to exercise the care of an exceedingly diligent actor in order to escape liability.

236. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

237. Although it is somewhat unlikely that a court would adopt anything but a gross negligence standard in assigning liability against the state in cases of bioterrorism, it is not unreasonable to consider that a court might hold the state to an ordinary negligence standard given the lofty goals the state has placed upon itself.

several decades, since his father retired and transferred the business. During the course of his experience, he has never had a serious disease introduced from one of his purchased steers, so he has never thought it necessary to keep his purchased steers separated from the rest of his herds but rather has simply given his new head a series of shots and vaccines when they are tagged and then released.

One day in late Spring of 2002 Paul acquires several hundred young steers and introduces them into his herd as he always has. The next day Paul reads in the newspaper that several cattle throughout Iowa have been diagnosed with mad cow disease. There have not been reports of the disease outside Iowa. He contacts his seller, Sam, and inquires as to the origin of the cattle. Sam informs him that he purchased the cattle from a man who was passing through town and offered the cattle at a price that was "too good to pass up." Paul is now concerned that his entire herd may be infected with mad cow disease, and wishes to file a claim against the Iowa Department of Agriculture. He thinks that the state should have been monitoring the movement of cattle in and out of the state and wants the state to pay him to test his entire herd (several thousand head of cattle) and to replace any cattle required to be destroyed.

It is reasonably clear that based on the strictest interpretation of the Iowa Code, Iowa, or more specifically the Iowa Department of Agriculture, probably failed to meet its mandate. Because mad cow disease has been identified by the state to be a candidate for bioterrorism,[238] the fact that its widespread presence has been shown in Iowa makes it unlikely that its introduction and release was natural or accidental. Yet, should the state be absolutely liable if an agent is introduced, or is a less strict interpretation of the Iowa Code appropriate for finding a breach? An absolutist reading of the various provisions would likely lead to liability on such a level that the state would be liable in tort every time a person or animal contracts an infectious disease.[239] Consider, however, the following additional facts:

The Department of Agriculture issues a warning shortly after 9/11 indicating that Iowans should be on the lookout for suspect livestock that could be carrying biological agents. The warning is issued as part of the department's emergency preparedness strategy and is distributed through the news media as well as through the posting of flyers at rural veterinarians' offices throughout the state.

In this case, the state has clearly taken steps to warn the agricultural community that attacks could occur. Is this the type of care that an ordinarily

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238. IOWA ADMIN. CODE r. 21-61.4 (2002).
239. *See supra* Part IV.B(1).

prudent person would exercise in fulfilling its duty to protect against bioterror attacks? The act of warning the population at large of a general threat of an impending attack probably does little to curtail the attack. In the facts above, the state merely informed and perhaps educated the population for what to look for *after* the animals were sick. Although this may certainly help to contain a bioterror attack by keeping livestock owners from transporting or selling sick animals, it does little to keep the initial attack from happening. Still, an analysis of the various state departments' mission statements seems to indicate that the state agencies do not have such lofty goals as the legislature.[240] Many agencies are dedicated to containment and isolation of outbreaks, as well as to education of those in contact with the animals so the diseases are diagnosed early.

It is a canon of tort law that there generally exists no duty to warn another of impending harm by a third party.[241] However, where a special relationship exists between the defendant and either the third party or the plaintiff, then there exists a duty to warn.[242] The Iowa Supreme Court has recognized that in certain circumstances there may exist a duty of the state to warn of injury by a third party.[243] However, the court concluded that when victims had not been threatened or were not readily identifiable, no duty to warn was created.[244] Despite reaching this conclusion, the court acknowledged that other cases have recognized the general duty to protect the public against foreseeable harm.[245] It is certainly possible, therefore, that notwithstanding any statute or administrative rule requirement, the state's issuance of a warning was only "good Samaritan" in nature. Because the facts do not indicate that the state's warning was in some way lacking, the warning is probably sufficient to meet either an ordinary care or gross negligence standard if it was determined that the duty owed was simply based on "good Samaritan" principles rather than on black letter law. A final consideration is offered to complete the breach analysis:

Remember that Sam, the one who sold the infected animals to Paul, purchased the livestock from a man passing through town. Our terrorist, Tom, brought the cattle into the state from the Tulsa, Oklahoma stockyard. The day before the cattle crossed into Iowa, but after Tom had left the stockyard, the Tulsa stockyard is placed under quarantine. When Tom is stopped at the Iowa

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240. *See Official Home Page for the State of Iowa*, *at* http://www.iowa.gov (last visited Apr. 22, 2003).

241. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

242. *Id.*

243. *See* Anthony v. State, 374 N.W.2d 662, 668 (Iowa 1985).

244. *Id.* at 669.

245. *Id.* (citations omitted).

border, his cargo of livestock is inspected, but the agent inspecting the livestock is unaware, due to a miscommunication, that the Tulsa facility is now under quarantine. The miscommunication came as the result of the message simply being forgotten, and thus, the Iowa Department of Agriculture's staff had not distributed the message regarding the Tulsa facility. Therefore, rather than holding the livestock as he should have,[246] the border inspector permits Tom to go about his business.

The key element to the final part of the hypothetical is the miscommunication. There were procedures adopted and in place which required all cattle leaving a quarantined facility to be further quarantined before entering the state. Had this border quarantine been conducted, the illness would have been discovered and the bioterror attack would not have entered Iowa, despite the fact that the attack on the Tulsa facility had already occurred. Because of the state's failure, however, animals throughout Iowa are now infected and the costs will likely be great.

Thus, the breach of the duty actually occurs regardless of whether the statutory duty or the "good Samaritan" duty is considered. In the former case, states adopting standards will generally be held liable when they fail to meet those self-imposed standards.[247] In the later case, the fact that the state failed to do as it had always done—that is, to communicate with its employees effectively—indicates that it probably breached any non-statutory duty it owed to protect against bioterrorism.[248] In this case, the facts indicate that the duty was probably breached whether an ordinary care or gross negligence standard was adopted.

In summary, the question of when a breach occurs depends on the negligence standard adopted by a court.[249] Given the fact that waivers of sovereign immunity are to be construed narrowly, it is also most reasonable to assume that the level of care required by the state in order to meet its duty to protect Iowans and their property will be relatively low;[250] a court is likely to consider the nature of sovereign immunity and infer from the ITCA a standard of gross negligence.[251]

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246. *See* IOWA ADMIN. CODE r. 21-65.1(163) cl. 1 (2003).

247. *See, e.g.,* Collins v. Ky. Natural Res. & Envtl. Prot. Cabinet, 10 S.W.3d 122, 126 (Ky. 1999).

248. *See* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

249. Remember from above that waivers of sovereign immunity are construed very narrowly by courts, and the adoption of a slight negligence standard would create an extremely heavy burden on the state, requiring it to exercise the care of an exceedingly diligent actor in order to escape liability.

250. *Indian Towing*, 350 U.S. at 61.

251. *See generally* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

Under the standard of gross negligence, therefore, a substantial failing on the part of the state will likely have to be shown before a court will conclude that the state breached its duty in failing to prevent a bioterror attack.[252]

3. *Does a Causal Relationship Exist?*

The lack of case law in the context of terrorism and tort liability presents further problems in determining what type of causal relationship must exist in order for the state to be held liable under the ITCA. This notwithstanding:

> It is fundamental that negligence is not actionable unless it is a cause in fact of the harm for which recovery is sought. It need not, of course, be the sole cause. Negligence is a cause in fact of the harm to another if it was a substantial factor in bringing about that harm.[253]

From the proximate cause analysis in *Perkins v. Texas & New Orleans Railroad Co.*, it can be concluded that the state's conduct in causing an injury is a substantial factor if one can conclude that "but for" the state's conduct the injury would not have occurred.[254] In reaching this conclusion, it is necessary to show that the causal chain between the state's negligence and the injuries suffered are *probable*, not just *possible*.[255]

Using the same hypothetical presented in the previous subsection, it becomes difficult to show that the state's failure to effectively communicate the information regarding the Tulsa quarantine was the proximate cause of Paul's injury. Difficulty in such a showing comes from the possibility that the bioterror act was an intervening cause. Early English courts[256] held that direct causation may be sufficient to sustain an action for negligence, regardless of the non-foreseeability of either the damage or the plaintiffs.[257] American courts first rejected the direct causation analysis in the late 1920s and required a showing by the defendant that both the consequences and the injured party be the foreseeable result of the negligent act or omission in order to assign liability.[258] The English

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252. *See generally* id.

253. Perkins v. Texas & New Orleans R.R. Co., 147 So. 2d 646, 648 (La. 1962). For a more thorough treatment of causation see SCHWARTZ ET AL., *supra* note 212.

254. *Perkins*, 147 So. 2d at 648.

255. *See* Kramer Serv., Inc. v. Wilkins, 186 So. 625, 627 (Miss. 1939).

256. *In re an Arbitration Between Polemis & Furness, Withy, & Co.*, 3 K.B. 560 (Eng. C.A. 1921).

257. *See id.* at 564.

258. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) (stating "The

rule was modified in the 1960s by the *Wagon Mound* cases to require that at least the consequences of the negligent act or omission must be foreseeable in order for the defendant to be held accountable for the injuries suffered. [259] Thus, the foreseeability requirement is important in American jurisprudence, and has been adopted by courts of other nations.

It is unnecessary to devote many words to an analysis of whether Iowa, in the hypothetical above, was the proximate cause of Paul's injury if "but for" causation is applied. Clearly there is a connection between the inspector permitting the animals in and the spread of the disease. Had the inspector been properly notified, the livestock would not have been permitted into the state and the injury may have been averted. Based on this analytical framework the causation requirement is met. Furthermore, the less-strict "substantial factor" test from *Yun* is clearly met where the "but for" test is satisfied.[260] After all, if the absence of a cause will entirely eliminate an effect, then the cause was clearly a "substantial factor" contributing to the effect.

Analysis under a foreseeability framework is somewhat more complex because both the injuries and the plaintiffs generally must have been the foreseeable result of the negligent act. Using the hypothetical already presented, there are at least two possible acts of negligence to consider. On the one hand, there

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risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."); *but see id.* at 102 (Andrews, J., dissenting) (stating "Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."). Andrews' dissent here essentially applies the "but for" causation analysis established in *Polemis* and holds that foreseeability of neither injury nor plaintiffs is necessary to assign liability to a negligent actor. *See id.* at 102-03 (Andrews, J., dissenting). The rooting in American tort jurisprudence of the majority opinion of *Palsgraf* can be seen in the 1994 opinions of *Yun v. Ford Motor Co.*, in which the majority noted: "Proximate cause is any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." 647 A.2d 841, 846 (N.J. Super. Ct. App. Div. 1994), *rev'd on dissent* 669 A.2d 1378 (N.J. 1996) (citations omitted). As noted, the majority's statement of the requirement was rejected in favor of the dissent's statement, which is summarized as follows: "to be a proximate cause . . . conduct need only be a cause which sets off a foreseeable sequence of consequences, unbroken by any superseding cause, and which is a substantial factor in producing the particular injury." Showalter v. Barilari, Inc., 712 A.2d 244, 248 (N.J. Super. App. Div. 1998) (quoting *Yun,* 647 A.2d at 850 (Baime, J., concurring and dissenting) (citation omitted), *rev'd on dissent*, 669 A.2d 1378 (1996)). The substantial difference between the statements is that Judge Baime, in writing his dissent, included the foreseeability requirement alluded to in *Palsgraf* by Cardozo. *Palsgraf*, 162 N.E. at 100.

259. Overseas Tankship (U.K.) Ltd. v. Mort's Dock & Eng'g Co., ("Wagon Mound No. 1"), [1961] A.C. 388 (P.C. 1961); Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. ("Wagon Mound No. 2"), [1967] 1 A.C. 617 (P.C. 1966).

260. *See Yun*, 647 A.2d at 841.

could have been "negligent miscommunication" regarding the Tulsa quarantine. On the other hand, the act of letting Tom into the state with his infected cargo might have been negligent of the inspector. In order to meet the elemental requirements of a negligence claim, therefore, it is necessary to prove that it is foreseeable that one or both of these acts would have led to the foreseeable result of Paul's injuries.[261]

At the time the infected livestock entered Iowa, the Iowa Department of Agriculture knew of the quarantine that had been imposed on the Tulsa stockyard. Although the agency may not have had a reason to suspect that a specific shipment would be infected, it certainly seems reasonable to assume that there is a possibility that a shipment of livestock could be en route from the Tulsa yard. Given this assumption, it is only a small logical step to assume that failure to communicate the possibility of infected animals entering the state would have the consequence of livestock already in-state becoming infected as well. This being established, in order to meet the *Palsgraf* standard, the plaintiffs must also be foreseeable.[262] Given the direction that the Iowa agencies and legislature have taken regarding precisely whom they seek to protect, each and every livestock-owning citizen of the state is considered by the state to be a foreseeable plaintiff. These things considered, the state's communication failure was the proximate, although not the sole, cause of the injury suffered.

In considering whether the inspector himself acted negligently, it is relatively clear that the injury suffered was not foreseeable from his act of letting the infected livestock into the state.[263] The inspector, given the facts, had no reason to suspect infection of the livestock. Given that he acted in accordance with agency rules and standards there is little room to hold the inspector negligent in the performance of his duty. This example is different than a Department of Transportation snow plow operator who "plows" into a parked car while performing his duties, it is foreseeable that if one negligently operates a snow plow that it may damage another vehicle. Furthermore, given courts' general reluctance to determine the merit of various legislative and administrative enactments, it seems unlikely that a court would find the rules and standards adopted by the Iowa Department of Agriculture to be negligently adopted.

In summary, proximate cause must be present in order for a claim of negligence to lie. Showing proximate cause requires that a relationship be shown between the negligent conduct and the foreseeable injury and foreseeable plain-

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261. *See Palsgraf*, 162 N.E. at 99.
262. *See id.* at 100.
263. *See id*.

tiff. In order for the state to be a proximate cause of a bioterror attack, its action must have been a substantial factor leading to the injury.

4. *Can Damages Be Shown?*

The issue of damages is relatively straightforward and does not require much attention. Based upon the hypothetical, the plaintiff's damages are those resulting from vaccination or destruction of cattle as a result of the state's negligence. Under the ITCA the claim for damages must be for money only, so the plaintiff cannot seek replacement of the cattle or delivery of the vaccine, but can only seek the value of the cattle or the costs incurred in vaccinating the livestock.

V. CONCLUSION; PUBLIC POLICY; SOLUTIONS

A. *Conclusion*

Terrorism is a threat to America. Countries across the globe have been dealing with terrorism for decades. Until September 11, 2001, America had never been the victim of a major terrorist attack on its own soil. Until the anthrax scare of late 2001 and early 2002, America had never been seriously presented with the challenge of defending itself against chemical or biological terrorism. Federal and state agencies met the challenge with due diligence, and have since promulgated statutes and administrative regulations to further meet the challenge of defending our homeland against the bioterrorist threat.[264] But this preparation comes with a price.

In formulating its statutes and regulations Iowa seems to have made itself a likely candidate for tort liability in many plausible bioterror scenarios. The public duty doctrine notwithstanding, the ITCA clearly provides for the state to be held accountable for injuries suffered by the classes of persons the statutes and regulations seek to protect. The formulation of many regulations has limited application to relatively small, identified classes of persons. The Iowa Depart-

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264. *See generally* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594; *see also* Statement by President George W. Bush Upon Signing H.R. 3448, 2002 U.S.C.C.A.N. 511, 512 (in which President Bush notes that "First, the bill will enhance our ability to prevent and detect bioterrorist attacks . . . Second, the bill will strengthen the communications networks that link our health care providers with public health authorities . . . Thirdly, the bill will strengthen the ability of our health care system to expedite treatments across our country").

ment of Public Health and the Iowa Department of Agriculture have both adopted policies and regulations intended to prevent bioterror attacks against specific targets.[265] The Department of Public Defense established a committee to prepare a report specifically detailing the strengths and weaknesses of very specific portions of Iowa's infrastructure.[266]

It is precisely the specific tailoring of regulations and the identification of classes sought to be protected that may have made the public duty doctrine inapplicable. Furthermore, when the state undertakes to perform its functions and specific individuals rely on the performance of those functions, any negligent performance may be sufficient to create liability even where there is no duty established.

B. *Public Policy Considerations*

A final consideration on the issue of Iowa's liability for failing to protect against a bioterror attack is simply to ask whether such liability is actually in the public interest. Permitting state liability is certainly a double-edged sword. Those who would argue in favor of imposing tort liability on the state in the manner suggested above would likely claim that only when the state can be held accountable for its failure to act can its citizens ensure that the state is taking all the necessary steps to protect them against bioterrorism. On the other hand, opponents to liability would probably argue that it would only take one bioterror incident, for which the state was required to make an accounting, to ultimately bankrupt the state treasury. Neither of these options seems too appealing. If we do not assign liability to the state, then we ensure that the state's funds will not be depleted by the bioterror act of a third party. However, failing to assign liability may cause us to question whether the state really took all reasonable steps to prevent a bioterror attack should one occur.

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265. *See generally* IOWA HOMELAND SECURITY, BIOTERRORISM PREPAREDNESS, *available at* http://www.Iowahomelandsecurity.org/bioterrorism_preparedness.asp (last visited Apr. 22, 2004).

266. EMERGENCY MGMT. DIV., IOWA DEP'T. OF PUB. DEF., THE IOWA HOMELAND SECURITY INITIATIVE: ENVISIONING THE FUTURE 2 (2002) *available at* http://www.state.ia.us/emergencymanagement/Final%20Iowa%20Strategy.pdf (last visited Apr. 22, 2004).

C. *Possible Answers to the Liability Question*

Although one possible answer to the liability question is to do nothing but wait for an attack to occur and a claim to be brought, and then let the court decide the issue, this answer should be categorically rejected insofar as it may force the judiciary more into a legislative function than is appropriate. By preemptively addressing the issue, legislators and other policymakers can deliberatively decide the issue without the consequences of a bioterror attack freshly imprisoned into their memories. The suggestions made in the following are just that, suggestions. This Note is not intended to espouse each possible alternative, or even the "best" alternatives. Its purpose is merely to begin debate before an attack occurs and the judiciary is forced into a decision in the "heat of the moment."

A first alternative to the problem of liability would be to amend section 669.14 of the Iowa Code to include a blanket exception under the ITCA for injuries caused by bioterrorism. By enacting such an exception, the legislature can ensure that any liability for acts of terrorism is not found within the ITCA. If the legislature determines that limited state liability is appropriate, it can impose such liability through specific statutory enactments in other parts of the code. For example, if the legislature determined that state liability is the only way to ensure that the Department of Agriculture effectively controlled the introduction of infected livestock from other states, it could amend parts of the code to include a specific cause of action and even limitations on damages. Given such an enactment, the legislature removes the option of injured persons filing under the ITCA and thereby holding the state liable to the same extent as a private individual.

A second possible alternative that might resolve the question would be to require the state to purchase some type of "terrorism insurance." Terrorism risk is backed not only by private insurers, but also, in certain situations, by the federal government through the Terrorism Risk Insurance Act of 2002.[267] By requiring the state to purchase this type of insurance the problem of bankrupting the treasury as a result of bioterror liability becomes moot. Instead, the state would be covered in the event a bioterror attack actually occurs. This solution would certainly help to protect the economic security of not only the state, but also the affected citizens, following an attack.

The solutions to the potential problem of unfettered tort liability resulting from a bioterror attack are as difficult to define as the problem itself. Unfortunately, inaction and complacency may be the state's worst enemies. Although

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267. *See* Risk Insurance Act of 2002, Pub L. No. 107-297, 116 Stat. 2322.

the state is making great strides to protect the citizens from a bioterror attack, what if the unthinkable actually occurs? The debate over state liability should be resolved *before* an attack in order to ensure the most objective debate and resolution of the problem.