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The doctrine of governmental immunity from liability has been the subject of extensive study. Professor Minge has undertaken to analyze the Wyoming law of governmental immunity. After tracing the doctrine's origin and explaining the rationale, he analyzes its application to both state and local governments and treats the exceptions to the general rule of immunity.

GOVERNMENTAL IMMUNITY FROM DAMAGE ACTIONS IN WYOMING

*David Minge**

It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.¹

—Abraham Lincoln

I. INTRODUCTION

THE diversified activities of modern government inevitably result in injury to persons and damage to property. Who should bear these losses? Historically this question has been answered in favor of the state. Without its consent, the state has been immune from damage actions. It and, to a lesser extent, municipalities have been protected by the doctrine of governmental immunity.² Thus innocent persons are left to

* Assistant Professor of Law, University of Wyoming; B.A. 1964, St. Olaf College; J.D. 1967, University of Chicago; Member of Minnesota Bar.

1. *First Annual Message to Congress*, 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 3245, 3252 (1897), quoted in *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580 (1946) (dissenting opinion).

2. The phrases "governmental immunity" and "sovereign immunity" are synonymous. Since the latter connotes an independent state subject to no limitations, it will not be used. Unless otherwise indicated, governmental immunity will include the immunity of both state and local government.

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bear the losses caused by wrongs of organized society. The incongruity of this situation in a nation dedicated to protecting the rights of the individual has elicited a torrent of comment in the legal periodicals,³ and in many states has even led to the abandonment of the governmental immunity doctrine.⁴ The purpose of this article is to examine the extent to which governmental immunity shields the state of Wyoming and its political subdivisions from liability for damages—primarily damages in tort—and to make some recommendations.⁵

A. Background

Although the origin of the governmental immunity doctrine is uncertain, it has a long history in Anglo-American jurisprudence. The English maxim, "the King can do no wrong," was an early expression of the doctrine.⁶ Perhaps this immunity was developed in the drive to clothe the king with the powers of a divine-right ruler.⁷ Yet when the prerogatives of the king were eventually limited, the immunity of the crown for its torts and the torts of a crown servant remained as a part of the common law.⁸ It is one of the anomalies of legal history that in England the growth of parliamentary democracy was accompanied by the retention of a rule that placed the losses caused by the wrongful acts of the crown upon the innocent victim. This phenomenon becomes even more mysterious when compared with the trend on the

3. For the classic and most comprehensive survey and a trenchant criticism of the doctrine see Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925), *Governmental Responsibility in Tort* (pts. 4-6), 36 YALE L.J. 1, 757, 1039 (1926-1927), *Governmental Responsibility in Tort* (pt. 7), 28 COLUM. L. REV. 577 (1928), *Theories of Governmental Responsibility in Tort* (pt. 8), 28 COLUM. L. REV. 734 (1928). For excellent symposia and references to the voluminous literature see 9 LAW & CONTEMP. PROB. 179 (1942); 29 N.Y.U.L. REV. 1321 (1954); 1966 U. ILL. L.F. 795. For discussion of various aspects of the doctrine in Wyoming see 16 WYO. L.J. 304 (1962); Comment, *Municipal Tort Liability: Purchase of Liability Insurance as a Waiver of Immunity*, 18 WYO. L.J. 220 (1964).

4. DAVIS, ADMINISTRATIVE LAW § 25.00 (Supp. 1970); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919. For the most recent abandonment see *Evans v. Board of County Comm'rs*, ___ Colo. ___, 482 P.2d 968 (1971).

5. The extent to which the state, its political subdivisions, and public officials and employees may be subject to injunction actions and the extraordinary writs is beyond the scope of this article. In addition, actions to recover moneys paid as taxes or fines are not included.

6. See 1 BLACKSTONE, COMMENTARIES *246.

7. See *Evans v. Board of County Comm'rs*, *supra* note 4, 482 P.2d at 969.

8. See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 203-04 (1965); Borchard, *supra* note 3, 36 YALE L.J. at 35-38.

continent to make even autocratic governments more and more responsible in tort.⁹

Since the United States was formed in part to avoid the injustices of the English crown, one would think that the immunity doctrine would never have taken root in this country. Such was not the case. Without exception state courts followed the doctrine.¹⁰ When legislatures attempted to ameliorate the harshness of the rule, the courts neutralized their efforts.¹¹ It was not until the late 1950's that state courts began to reassess the problem and abolish what in essence was a judicially created principle.¹²

On the other hand, the immunity of the states when sued in federal courts was not always assured. Article III, Section 2 of the United States Constitution allowed federal courts to hear certain actions brought against states by private parties:

The judicial Power [of the Federal Courts] shall extend . . . to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens or Subjects.

In *Chisholm v. Georgia*,¹³ the Supreme Court held that a state could be sued for damages in a federal court by the citizen of another state. The *Chisholm* decision was upsetting to the states who were concerned that the federal courts might limit their sovereign prerogatives, particularly their prerogatives in connection with the repayment of the large debts they had contracted to finance the Revolutionary War.¹⁴ This concern led to the quick adoption of the Eleventh Amendment, which overruled *Chisholm*.¹⁵ Although sometimes unhappy with the

9. See Barry, *Governmental Tort Liability in the Soviet Union*, 20 RUTGERS L. REV. 300, 301-02 (1966); Borchard, *supra* note 3, 23 COLUM. L. REV. at 591-617, 734-72; Pock, *Systems of Public Responsibility in Switzerland, Germany, and Austria*, 1966 U. ILL. L.F. 1023.

10. Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 801-05.

11. *Id.* at 805; Borchard, *supra* note 3, 34 YALE L.J. at 9-11.

12. *Supra* note 4.

13. 2 U.S. (2 Dall.) 419 (1793).

14. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821). At the time the Constitution was being ratified Alexander Hamilton, James Madison and John Marshall had, in fact, assured the states that their immunity was inherent in their sovereignty and would not be limited by the Constitution. THE FEDERALIST No. 81, at 548-49 (Cooke ed. 1961) (Hamilton); 3 ELLIOT'S DEBATES 533, 555-56 (2d ed. 1836).

15. The Eleventh Amendment provides that

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

doctrine of governmental immunity, the Supreme Court has upheld it¹⁶ except in connection with certain actions predicated on federally created rights.¹⁷

Local units of government have also been granted immunity from damage actions.¹⁸ As political subdivisions of the state, their organization, structure, and operations are all governed by detailed legislative guidelines and many of their activities are undertaken on behalf of the state. For this reason the various local governmental entities are said to share in the state's immunity from suit. It is misleading, however, to identify them so closely with the state. These political subdivisions are individual corporate entities distinct from the state with special or local constituencies, popularly elected governing bodies, certain taxing powers, and separate treasuries. Only the state has any claim to sovereignty—the attribute which traditionally was thought to require immunity.¹⁹ Thus at least one court was willing to strip all local units of government of their immunity while retaining the state's immunity.²⁰

In addition to distinguishing between the immunity of state and local governments, it is important to distinguish between municipalities and other units of local government which collectively have been called quasi-corporations.²¹ Quasi-corporations would include counties and the special districts created by the legislature, the most significant of which are school districts. The courts have tended to identify quasi-corporations with the state and grant them the same degree of immunity as the state. Municipalities are more independent. They traditionally have been formed by the residents and they possess rather extensive powers. As compared to counties

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

16. See *United States v. Lee*, 106 U.S. 196 (1882); *Langford v. United States*, 101 U.S. 341 (1879).

17. Comment, *Waiver of State Immunity: Private Damage Actions Against the States Arising Under Federal Law*, 50 B.U.L. REV. 590 (1970). Cf. Borchard, *supra* note 3, 34 YALE L.J. at 16-22; text accompanying notes 104-05 *infra*.

18. The discussion in this paragraph and the next are based in part upon Borchard, *supra* note 3, 34 YALE L.J. at 41-45, 129-43; Kramer, *supra* note 10, at 810-21.

19. See p. 234 *infra*.

20. *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962).

21. They were called quasi-corporations because they were initially unincorporated.

and special districts they are subject to much less actual control by the state. For these reasons courts early distinguished municipalities from the state and quasi-corporations and occasionally even said they were subject to the same liabilities as private corporations.²² This uncertainty over whether and how much immunity should be accorded municipalities was resolved by the emergence of the governmental-proprietary distinction, liability being imposed only for what could be classified as a proprietary activity. In addition to liability on this ground, it also became accepted that municipalities were responsible for improper maintenance of public ways and nuisances.²³ Thus a common law of municipal responsibility developed which allowed for liability in areas where the state and quasi-corporations enjoyed immunity.

The logic of this disparate accordance of immunity to different units of local government is questionable. All are subject to legislative control; most are organized by local initiative; most have elected governing bodies; all perform services which are of particular benefit to residents. In view of the basic unfairness of the immunity doctrine, it seems unjust to grant immunity to all other units of local government in connection with activities for which municipalities would be liable. With the gradual restriction of immunity, a unity of approach is becoming the law in some states.²⁴

B. Rationale

Although Professor Borchard has shown that the governmental immunity doctrine which developed in this country was without historical parallel,²⁵ the belief that governmental immunity has the sanction of history is probably the greatest single reason why it has continued. Apparently once the first states had adopted the doctrine, others followed with little or no analysis.²⁶ Thereafter judicial inertia and hostility to

22. See Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

23. These exceptions to municipal immunity as they have been developed in Wyoming are discussed at pp. 249-61 *infra*.

24. *E.g.*, note 20 *supra*.

25. Borchard, *supra* note 3. His entire series of articles seems to be directed at proving the absence of any historical or logical basis for governmental immunity.

26. Kramer, *supra* note 10, at 801-04.

the few halting legislative attempts to reform the doctrine reinforced the initial mistake.²⁷ Only in recent years have courts recognized the scantiness of the historical justification for governmental immunity.²⁸

Varying attempts have been made to justify governmental immunity on a basis other than *stare decisis*. Mr. Justice Holmes contended:

A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.²⁹

The validity of Holmes statement has been refuted.³⁰ It rests upon a view of the state propounded in the late Middle Ages to bolster claims of divine right monarchs. In this country ultimate power and sovereignty rest with the electorate; the authority of the state is subject to their will. It is by no means clear that the people intended to clothe the state with such immunity. It should also be noted that, even assuming the validity of Holmes' statement, the immunity required thereby does not logically extend to local government because local government does not make the fundamental law which guides its actions.

It has been asserted that in addition to history and logic, practical considerations necessitate the doctrine of governmental immunity. Allegedly, without immunity the government may be subjected to disruptive and demeaning litigation and to potential liabilities which would bankrupt the public treasuries.³¹ However, the experiences of those jurisdictions

27. *Id.* at 805. Borchard, *supra* note 3, 34 YALE L.J. at 9-11; Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363, 1365 (1954).

28. *E.g.*, Evans v. Board of County Comm'rs, ___ Colo. ___, 482 P.2d 968, 969 (1971).

29. *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907).

30. Borchard, *supra* note 3, 36 YALE L.J. at 757-807.

31. See Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161 (1963); The Siren, 74 U.S. (7 Wall.) 152, 154 (1868). For Wyoming cases which suggest these reasons see Ellis v. Wyoming Game & Fish Comm'n, 74 Wyo. 226, 231, 286 P.2d 597, 598 (1955) and Wilson v. City of Laramie, 65 Wyo. 234, 250, 199 P.2d 119, 124 (1948) (Both opinions quote cases which held the government immune to prevent disruptive and vexatious litigation.); and Smith v. Town of Lander, 67 Wyo. 121, 215 P.2d 861 (1950) (Expense of keeping streets and crosswalks free of ice would be too great a financial burden.). The states concern with their debts were thought to be the reason for the passage of the Eleventh Amendment. *Supra* note 14.

which waived their immunity should allay both fears.³² The governmental machinery has not been stymied by suits. Although the liability is an additional expense, the taxing power of government and the availability of liability insurance make public bankruptcy unlikely and unnecessary. Governmental entities, like private corporations, can both function efficiently and bear the loss their operations inflict upon others.

II. BASES OF IMMUNITY IN WYOMING

A. State

In Wyoming the state has enjoyed a broad degree of governmental immunity; however, the basis of this immunity is uncertain. The first reported Wyoming decision to discuss the question of the state's immunity was *Hjorth Royalty Co. v. Trustees of the University of Wyoming*,³³ an action to quiet title to certain lands in which the University allegedly had a possible interest. Rather than litigate the validity of that interest, the University asserted that it was immune from suit. The court found that the suit actually challenged the state's, not the University's interest in the subject land³⁴ and held that under a provision of Article I, Section 8 of the Wyoming Constitution the state was immune from suit. That provision reads as follows: "Suits may be brought against the state in such manner and in such courts as the legislature may by law direct."³⁵ The court said:

The general rule appears to be that such provisions are not self-executing, and no suit can be maintained against the state until the Legislature has made provision therefor, and no consent having been given by the state it is evident that this suit could not be maintained against the state³⁶

32. See David & French, *Public Tort Liability Administration: Organization, Methods, and Expense*, 9 LAW & CONTEMP. PROB. 348 (1942); MacDonald, *The Administration of a Tort Liability Law in New York*, 9 LAW & CONTEMP. PROB. 262 (1942); Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW & CONTEMP. PROB. 363 (1942).

33. 30 Wyo. 309, 222 P. 9 (1924).

34. See *State ex. rel. Wyoming Agriculture College v. Irvine*, 14 Wyo. 318, 84 P. 90 (1906), *aff'd* 206 U.S. 278 (1907).

35. WYO. CONST. art. I, § 8.

36. *Hjorth Royalty Co. v. Trustees of the Univ. of Wyoming*, 30 Wyo. 309, 313, 222 P. 9 at 9 (1922) (citation omitted).

Although subsequent Wyoming cases followed this analysis of Article I, Section 8,³⁷ several allow that the state might be liable without legislative action if the wrongful acts which give rise to a claim occur in the course of proprietary, as opposed to governmental activities.³⁸ To say that the Constitution prohibits all suits against the state except those to which the legislature has consented and then to admit that if the state is engaged in a proprietary activity it can incur liability is inconsistent since the legislature has not codified the governmental-proprietary distinction.³⁹ Either the constitutional provision grants immunity or it does not. On its face the provision would not seem to require immunity.⁴⁰

Although eighteen other states have constitutional provisions similar to Article I, Section 8 of the Wyoming Constitution,⁴¹ most cases from those jurisdictions are of no help in resolving this matter.⁴² Even though a few courts have allowed the state to be held liable for proprietary activities, they have made no effort to reconcile this with what was supposed to be a constitutional requirement that immunity be

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37. *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964); *Ellis v. Wyoming Game & Fish Comm'n*, 74 Wyo. 226, 286 P.2d 597 (1955); *Price v. State Highway Comm'n*, 62 Wyo. 385, 167 P.2d 309 (1946); *Utah Constr. Co. v. State Highway Comm'n*, 45 Wyo. 403, 19 P.2d 951 (1933); see *Harrison v. Wyoming Liquor Comm'n*, 63 Wyo. 13, 177 P.2d 397 (1947); cf. *Osborn v. Lawson*, 374 P.2d 201 (Wyo. 1962).
 38. *Harrison v. Wyoming Liquor Comm'n*, *supra* note 37; see *Chavez v. City of Laramie*, *Osborne v. Lawson*, *Ellis v. Wyoming Game & Fish Comm'n*, all *supra* note 37. Cf. *National Surety Co. v. Morris*, 34 Wyo. 134, 241 P. 1063 (1925) where the court held that by depositing its funds in an interest bearing account at a bank the state waived any preference in the bank's assets upon liquidation on the ground that "when a state puts itself on a level with private individuals, by engaging in a business enterprise, it, to that extent, loses its character as a sovereign." *Id.* at 152, 241 P. at 1067. The proprietary-governmental distinction is discussed at pp. 249-55 *infra*.
 39. It might be argued that the court is only saying that certain types of special agencies created by the legislature are engaged in private enterprise and thus are not "state agencies" for purposes of immunity. The Wyoming court has not, however, indicated that this is its approach. Also such an approach tends to draw unrealistic distinctions between what are obviously state agencies for most, if not all, purposes. Finally it ignores the reasoning of the court in *National Surety Co. v. Morris*, *supra* note 38.
 40. In fact, rather than creating immunity, the constitution perhaps merely authorizes the legislature to regulate the procedure for and venue in actions against the state. The legislature has in fact enacted such a statute (WYO. STAT. § 1-1018 (1957)) and thus could be said to have given legislative recognition to this more restrictive construction of Article I, Section 8.
 41. LEGISLATIVE DRAFTING RESEARCH FUND, COLUM. UNIV., INDEX DIGEST OF STATE CONSTITUTIONS 988-89 (2d ed. 1959, Supp. 1965).
 42. *E.g.*, *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E. 2d 82 (1947) *cert. den.* 332 U.S. 817 (1947); *Fairclough v. Salt Lake County*, 10 Utah 2d 417, 354 P.2d 105 (1960).

waived by legislative act.⁴³ Two recent decisions have, however, recognized this inconsistency and have held that in fact these constitutional provisions do not establish the states' immunity.⁴⁴ The California court said:

It is contended, however, that [this provision] should be interpreted as also having substantive significance and establishing the rule of immunity. Such an interpretation would be contrary to [the cases] which extended the state's liability to its proprietary activities. If the section has any substantive significance, it would appear to be a waiver of immunity. On its face it seems to say that the state may be held liable when suits are brought against it in accordance with a legislatively described procedure.⁴⁵

The California Constitution provides that "[s]uits may be brought against the state in such manner and in such courts as *shall* be directed by law."⁴⁶ Since by contrast the Wyoming Constitution substitutes "may" for "shall,"⁴⁷ there is even less reason for predicating state liability upon legislative action in Wyoming. In Indiana, where the Constitution also uses the word "may" instead of "shall,"⁴⁸ the Supreme Court decided that no such legislation was needed and that the liability of that state had nothing more than a common law basis.⁴⁹

In sum, it is unclear whether the governmental immunity of the State of Wyoming is based upon the Constitution or common law. The State Supreme Court has the prerogative of answering the question. The cases indicating state liability for proprietary functions⁵⁰ would seem to indicate a

43. See *People v. Superior Court*, 29 Cal. 2d 754, 178 P.2d 1 (1947); *Gross v. Kentucky Bd. of Managers*, 105 Ky. 840, 49 S.W. 458 (1899).

44. *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Perkins v. State*, 18 Ind. 555, 251 N.E.2d 30 (1969).

45. *Muskopf v. Corning Hosp. Dist.*, *supra* note 44, 11 Cal. Rptr. at 92-93, 359 P.2d at 460-61 (1961) (citations omitted). The *Muskopf* decision went on to say that some indication of legislative consent to suit, such as a provision enabling a governmental entity with the power to sue and to be sued, was necessary. Whether the California court would have followed such a requirement in subsequent cases is not clear. See VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 3.4 (Calif. Practice Book No. 24, 1964).

46. CALIF. CONST. art. XX, § 6 (emphasis added).

47. WYO. CONST. art. I, § 3.

48. IND. CONST. art. 4, § 24.

49. *Perkins v. State*, *supra* note 44.

50. *Supra* note 38.

common law foundation. Yet despite the talk about proprietary functions, there are no reported cases in which recovery has been allowed against the State of Wyoming in an action in which the immunity defense has been pleaded. Whatever the basis, the doctrine has been effective.

Even though the state's immunity thus seems to be secure, several constitutional problems with such immunity ought to be noted. The first sentence in Article I, Section 8 of the Wyoming Constitution reads as follows: "All courts shall be open and every person for an injury done . . . shall have justice administered without . . . denial" Article I, Section 33 provides that "[p]rivate property shall not be taken or damaged for public or private use without just compensation." Article I, Section 6 as well as the Fourteenth Amendment to the United States Constitution prohibits the state from depriving any person of life, liberty or property without due process of law. The Fourteenth Amendment also guarantees persons the equal protection of the laws. Tort immunity denies justice, damages private property without compensation or due process of law, and denies persons injured by public wrongs protection equal to that afforded those injured by private wrongs. Except for holding that negligent damage is not a taking for public use within Article I, Section 33,⁵¹ the Wyoming court has not been presented with or spoken to any of these constitutional arguments. An intermediate Ohio court has recently granted recovery against the state on the basis of the equal protection clause,⁵² but neither the Fourteenth Amendment nor the right to justice arguments have been used as a basis of recovery in other jurisdictions.⁵³

51. *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964). However, it would seem that the risk of fortuitously injuring innocent persons is a risk inherent in the day to day operations of government and should be viewed as a cost of doing business. If no compensation has to be paid, the state is able to operate more cheaply and more recklessly; hence the damages are "for public . . . use." A few cases have imposed liability for negligence under identical constitutional provisions. See *Kramer*, *supra* note 10, at 806-07; *Peterson*, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 854, 868-72 (1942); *Price*, *Governmental Liability for Tort in West Virginia*, 38 W. VA. L.Q. 101, 114-16 (1932). Of course if the state intentionally takes property, uses it for public purposes and refuses to make payment there is a constitutional right to damages notwithstanding governmental immunity.

52. *Krause v. Ohio*, 40 U.S. L.W. 2196 (Ohio App. Ct. Sept. 30, 1971). This case evidently arose out of the killing of 4 students by the National Guard at Kent State University in the spring of 1970.

53. See Comment, *Governmental Immunity in Kansas*, 19 KAN. L. REV. 211, 220-26 (1971).

A word should be said about what is included in the term "state." Although the State of Wyoming is obviously the "state," it acts through agencies, departments, boards, and commissions. Should they share in its immunity? By statute any suit

against Wyoming farm loan board, board of land commissioners, state board of charities and reform, public service commission of Wyoming, state board of equalization of Wyoming, or the trustees of the University of Wyoming is hereby declared to be an action against the State of Wyoming⁵⁴

This statute was followed in the only reported case in which one of the named agencies was made a defendant.⁵⁵ Although the statute leaves unanswered the liability of other state agencies, prior to its enactment the Wyoming court quoted with approval the following language:

"A suit against a department of the State Government or a board or corporation created by the state for governmental purposes is a suit against the state"⁵⁶

In *Harrison v. Wyoming Liquor Commission*⁵⁷ the argument that the statute was exclusionary and that it thus narrowed the earlier definition of "state" was rejected and that Commission was held to be entitled to the immunity of the state. Other decisions have held that the Wyoming Game and Fish Commission and the State Highway Commission are similarly a part of the state and entitled to its immunity.⁵⁸ Any board, agency, commission, department or other body which is created by law and operates through or pays its profits into the state treasury would, according to the opinion in the

54. Wyo. STAT. § 1-1018 (1957).

55. *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971). Although the University has been a defendant in other cases and it has been accorded the state's immunity, those cases were decided before Section 1-1018 was enacted. See *Hjorth Royalty Co. v. Trustees of the Univ. of Wyoming*, 30 Wyo. 309, 222 P. 9 (1924); *Fidelity & Deposit Co. v. Trustees of Univ. of Wyoming*, 16 F.2d 150 (D. Wyo. 1926).

56. *Hjorth Royalty Co. v. Trustees of Univ. of Wyoming*, 30 Wyo. 309, 317-18, 222 P. 9, 11 (1924) quoting 36 CYCLOPEDIA OF LAW & PROCEDURE, 919 (1910).

57. 63 Wyo. 13, 177 P.2d 397 (1947).

58. *Ellis v. Wyoming Game & Fish Comm'n*, 74 Wyo. 226, 286 P.2d 597 (1955); *Price v. State Highway Comm'n*, 62 Wyo. 385, 167 P.2d 309 (1946). See *State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1929); *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964).

Harrison case, share in the state's immunity so long as its functions are governmental.⁵⁹ The fact that the body might obtain revenue from its activities would not necessarily affect this status.⁶⁰ The degree to which units of local government and individuals are considered part of the state for immunity purposes is discussed below.⁶¹

B. Local Government

In Wyoming local government includes municipalities, counties and special purpose districts. By statute cities and towns are municipalities.⁶² The remaining units have been called quasi-municipal or, in spite of the fact that they are created as bodies corporate, quasi-corporations.

Although the doctrine of governmental immunity certainly applies to local entities of government in Wyoming, its source is almost as uncertain as it is in the case of the state. The question is whether the state's immunity or the common law of municipal immunity is the basis. The problem is important since the exceptions to the immunity doctrine are much more extensive for municipalities than the state. No reported Wyoming cases have suggested that Article I, Section 8 of the state's Constitution establishes a constitutional basis for local government immunity.⁶³ There are, however, several opinions indicating that when units of local government perform governmental, as opposed to proprietary, functions for the state, or when they operate to promote the general health and welfare, they share in the state's immunity.⁶⁴

59. *Harrison v. Wyoming Liquor Comm'n*, 63 Wyo. 13, 177 P.2d 397 (1947). The governmental-proprietary distinction is discussed at pp. 249-55 *infra*.

60. *Id.*

61. See note 64 *infra* and accompanying text.

62. WYO. STAT. § 15.1-1 (1957).

63. *But cf.* *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970) citing WYO. CONST. art. I, § 8 in a suit against a county clerk.

64. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925); see *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960); *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970); *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937). *But cf.* *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965) holding that if the legislature imposes a duty upon a municipality, it is liable for the failure to comply with that duty. Although these cases deal with municipalities and counties, the rationale applies equally to special districts. School districts, for example, were created by the legislature pursuant to constitutional mandate. See WYO. CONST. art. 21, § 28.

There is a well developed body of common law on municipal immunity, and Wyoming cases⁶⁵ have cited *Russell v. Men of Devon*⁶⁶ as authority for such immunity. In fact in *Maffei v. Incorporated Town of Kemmerer*,⁶⁷ the Wyoming Supreme Court determined that since by statute Wyoming has adopted the common law as of 1609 as the rule of decision⁶⁸ and that since a sixteenth century English case digested in Medieval French in Brooke's *La Graunde Abridgment* and cited in *Russell* apparently spoke in favor of immunity, municipal immunity is such a part of Wyoming law that it can only be changed by the legislature. The necessity, to say nothing of the wisdom, of this calcification of the common law on the basis of a nameless decision, the report and digest of which are not contained in any library in the state of Wyoming, is doubtful. It is not clear that either *Russell* or the pre-1609 case involved questions of governmental, much less municipal, liability. In both cases only individuals, not any governmental entity, was being sued. In fact the only governmental entity referred to in *Russell* was an unincorporated county without any treasury. If any governmental unit had a relationship to the pre-1609 case, it too was undoubtedly no more than an unincorporated rural area without a treasury.⁶⁹ Furthermore it is ironic that both *Russell* and the pre-1609 case dealt with road maintenance for which municipalities are now responsible.⁷⁰ In any event such legal reasoning has established governmental immunity as the basic rule for municipalities in Wyoming—subject, however, to exceptions and qualifications to be discussed below.

Arguably other local units of government in Wyoming also share in this municipal common law of immunity and the concomitant responsibilities. Two Wyoming cases indicate that special districts providing municipal type services have only the limited immunity of a municipality.⁷¹ Perhaps coun-

65. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959); *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925).

66. 100 Eng. Rep. 359 (K.B. 1788).

67. 80 Wyo. 33, 338 P.2d 808 (1959).

68. Wyo. STAT. § 8-17 (1957).

69. The foregoing analysis is based upon David, *Municipal Liability in Tort in California*, 7 S. CAL. L. REV. 48, at 48-63 (1933).

70. See pp. 256-60 *infra*.

71. See *South Cheyenne Water & Sewer Dist. v. Stundon*, 483 P.2d 240 (Wyo. 1971); *Seaman v. Big Horn Canal Ass'n*, 29 Wyo. 391, 213 P. 938 (1923).

ties and special districts are entitled to either the immunity of the state or municipalities depending upon the nature of the activities giving rise to the claim for relief. In any event, the Wyoming Supreme Court has not yet discussed the matter.

III. THE TRADITIONAL PROBLEM AREAS AND EXCEPTIONS TO GOVERNMENTAL IMMUNITY IN WYOMING

A. Employees

It is well established at common law that both the principal and his agent are liable in damages for the agent's torts occurring in the course of the principal's business—the principal on the basis of respondeat superior, the agent because he was the person actually committing the wrong.⁷² These basic agency rules are, however, of limited applicability when the principal is a governmental entity.

1. *Respondeat Superior*

The doctrine of respondeat superior does not constitute an exception to the immunity doctrine; its rejection is inherent in the doctrine.⁷³ This does not mean, however, that governmental entities are never liable for agent's acts. If an exception to the immunity doctrine has been made upon one of the bases discussed below or the doctrine has been abrogated, then respondeat superior would, of course, apply to the extent of the exception or abrogation.⁷⁴ Since it is a truism that the government, like any artificial entity, can only act through its agents, this inapplicability of respondeat superior is fundamental to the existence of immunity.

Most Wyoming cases have simply ignored the respondeat superior question and have dismissed the injured party's claim on the basis of governmental immunity.⁷⁵ In some cases, however, the matter has received passing comment. For

72. RESTATEMENT (SECOND) OF AGENCY §§ 219, 343 (1957). The literature on this subject is voluminous. The more noteworthy articles are collected in 3 DAVIS, ADMINISTRATIVE LAW, § 26.01 n. 6 (1958).

73. RESTATEMENT (SECOND) OF AGENCY § 217 (1957). For a discussion of the relationship between the two doctrines see Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963).

74. See *Seaman v. Big Horn Canal Ass'n*, 29 Wyo. 391, 213 P. 938 (1923) (held that act was proprietary and that Association could be estopped by acts of its agent).

75. *E.g.* *Price v. State Highway Comm'n*, 62 Wyo. 385, 167 P.2d 309 (1946); *White v. City of Casper*, 35 Wyo. 371, 249 P. 562 (1926).

example in *Houtz v. Board of Commissioners* the court, in refusing to refund a fine imposed by a justice of the peace who was exceeding his jurisdiction, observed:

It is clear that the county would not be liable to respond in damages as for a tort for the unwarranted or illegal act of the justice [of the peace].⁷⁶

2. *Employee Liability*

In Wyoming what cases there are indicate that suits against employees are not likely to be successful. In *Price v. State Highway Commission*⁷⁷ the driver of a car involved in an accident with a snowplow sued the State Highway Commission and two individuals, the State Highway Superintendent and the driver of the snowplow, for negligent operation of the vehicle. The negligence allegedly consisted of driving too slowly and failing to have visible warning lights. With regard to the individual defendants the court determined that since they were acting within the scope of their official authority, they partook of the state's governmental immunity. It said that making officials and employees of the highway department liable for accidents resulting from poor visibility caused by snow removal operations would be comparable to holding "firemen . . . liable for water damage caused by them in extinguishing a fire."⁷⁸ Apparently the court felt that when the risk of injury to the public is inherent in the activity, employees ought not to bear that risk.

76. 11 Wyo. 152, 170, 70 P. 840, 842 (1902). See also *Osborn v. Lawson*, 374 P.2d 201 (Wyo. 1962); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959); cf. *Kingen v. Kelley*, 3 Wyo. 566, 23 P. 36 (1891) (Court refused to attribute the illegal seizure of a suspected rustler in Nebraska by a Laramie County deputy-sheriff to the county. The plaintiff was collaterally attacking his conviction on the ground that the seizure constituted the arrest which was thus illegal and left the criminal court without jurisdiction.). An interesting pair of federal cases arising out of Wyoming appear to disagree over the liability of municipalities to the holders of assessment bonds for damages resulting from the alleged wrongful reduction by municipal officers of assessments already levied. Compare *Gray v. Town of Thermopolis*, 33 F. Supp. 73 (D. Wyo. 1936) with *Blanchar v. City of Casper*, 91 F.2d 452 (10th Cir. 1936). In *Gray* liability was imposed on the ground that the municipality had a duty to the bondholders, that the municipality could only act through its agents, and that its agent breached this duty. However, in *Blanchar* recovery was not allowed on the ground that the bonds were not general obligations of the city and could not be made such by the defalcations of municipal officers and on the ground that mandamus to reassess was the plaintiff's exclusive remedy.

77. 62 Wyo. 385, 167 P.2d 309 (1946).

78. *Id.* at 398, 167 P.2d at 313. But cf. *Rayonier Inc. v. United States*, 352 U.S. 315 (1957) holding the government for negligence in fire fighting under the Federal Tort Claims Act.

In *Osborn v. Lawson*,⁷⁹ the plaintiff's decedent had been killed when he collided with a snowplow traveling west in the east bound lanes of a divided highway. The plaintiff contended that this method of snow removal was negligent and sought to hold liable the employee who was both driving the snowplow and in charge of maintaining that section of the highway. The defendant introduced evidence that the manner of operation was pursuant to instructions of the Highway Commission and was necessitated by the construction of the snowplow with which he was furnished. Although the court held the defendant driver immune from liability, how far this immunity extended was not clear. At one point in its opinion the *Osborn* court stated that "the *Price* case determined that the driver of the snowplow was immune to the same extent as the highway commission,"⁸⁰ and went on to indicate that employee immunity is co-extensive with the immunity of the governmental entity for governmental functions. However, the opinion then began to backtrack. It seemed to recognize that government officials who are guilty of misfeasance as opposed to nonfeasance are responsible for their negligent acts. And in the end the court indicated that the defendant driver's misfeasance was really not his and held him immune from liability on the following rationale:

[T]he negligence, if any, in the operation of the snowplow herein was the negligence of the highway commission by reason of the fact that it prescribed the method of operating the snowplow. The operator . . . followed in his operation the directions prescribed by his superior. He was compelled to do so or quit. He had no other choice. If the highway commission had itself performed the work which he did, it would have been immune from liability. It would be highly anomalous to hold the operator of the snowplow not immune when he followed instructions in doing the substantially identical thing in the substantially identical manner for which the highway commission would be held immune and would moreover probably hinder the highway commission in hiring men for a rather hazardous work.⁸¹

79. 374 P.2d 201 (Wyo. 1962).

80. *Id.* at 203.

81. *Id.* at 205.

Thus the *Osborn* case viewed the employee who followed instructions from his superior as being entitled to the immunity of the state even if the instructions were negligent.⁸² This does not mean, however, that if the employee made a negligent mistake which had no relationship to instructions from his superior that the employee would enjoy immunity. In fact neither the *Price* nor the *Osborn* case conceded employee negligence.

Such employee negligence was assumed by the court in the cases of *Denver Buick, Inc. v. Pearson*⁸³ and *Spaniol Ford, Inc. v. Froggatt*.⁸⁴ In these cases county clerks were sued for damages resulting from their alleged negligence in issuing duplicate certificates of title on stolen cars which the plaintiffs subsequently purchased. In both cases the court concluded that the clerk was entitled to the immunity of the state because the issuance of the certificate was a governmental, as opposed to a ministerial duty.⁸⁵ However, in both cases the court indicated that the county clerks might be liable for damages caused by their negligent ministerial acts.

Thus an area of liability of government employees was conceded. It depends upon whether the negligent act is governmental or ministerial in nature. However, neither the *Denver Buick* nor the *Spaniol Ford* opinions offered any rationale for this distinction. The only suggestions as to which duties are governmental and which are ministerial were two apparently contradictory statements. In the *Denver Buick* case the court said:

When duties are imposed upon a public officer, such as a county clerk, by law rather than by some appointing power, such duties are usually governmental and not ministerial.⁸⁶

In *Spaniol Ford* a definition of ministerial was ventured:

[A] duty is ministerial when the law prescribes the mode and occasion of its performance with such cer-

82. Compare Borchard, *supra* note 3, 34 YALE L.J. at 8 where it is noted that at common law the public employee is liable for following illegal orders.

83. 465 P.2d 512 (Wyo. 1970).

84. 478 P.2d 598 (Wyo. 1970).

85. This distinction was also drawn in *Osborn v. Lawson*, 374 P.2d 201 (1962).

86. 465 P.2d at 513.

tainty that nothing is left to judgment or discretion—a duty not involving official discretion.⁸⁷

This writer would suggest that both definitions are somewhat accurate. The problem is not with the definitions but with the attempt to draw a distinction between governmental and ministerial duties. Although the terms governmental and ministerial are a well-known part of the jargon of governmental immunity, it appears that in its haste to excuse the county clerks in the *Denver Buick* and *Spaniol Ford* cases the court confused two different methods of categorizing functions—governmental versus proprietary and discretionary versus ministerial.⁸⁸ To mix the methods and say for example that a governmental function cannot be ministerial is absurd. The filing and indexing of instruments by the county clerk is regulated in detail by statute⁸⁹ and is a governmental function.⁹⁰ In *Spaniol Ford* the court gave this as an example of a ministerial duty.⁹¹ It is both governmental and ministerial. However, in determining the liability of public officials and employees the discretionary—ministerial distinction, not the governmental—proprietary one, is customarily used by the courts.⁹² If an act is discretionary it gives rise to immunity; otherwise there is liability.⁹³

The suggestion of the *Spaniol Ford* court that ministerial acts are only those where the mode and occasion of perform-

87. 478 P.2d at 599.

88. Since immunity customarily attaches to governmental and discretionary functions and liability to proprietary and ministerial functions, one is tempted to ask what the result might be for a function which is a governmental-ministerial or discretionary-proprietary hybrid. For an example of such an analysis of the Minnesota case law see Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 293, 296-99 (1942). Courts apparently have been confused in attempts to combine the concepts. Kramer, *supra* note 10, at 820-21. It appears that traditionally the governmental-proprietary distinction has been applied to questions of municipal liability and the discretionary ministerial distinction to questions of officer or employee liability. See 3 DAVIS, ADMINISTRATIVE LAW, §§ 25.07, 26.01, 26.02 (1958). Generally speaking, the difficulty and arbitrariness of the governmental-proprietary distinction has led to its criticism by the commentators and its abandonment by several jurisdictions. However, most agree that properly applied the discretionary-ministerial distinction is useful and necessary. For the treatment of the governmental-proprietary distinction in Wyoming see pp. 249-55 *infra*.

89. See, e.g., WYO. STAT. §§ 18-123 to -140 (1957).

90. *Seaman v. Big Horn Canal Ass'n*, 29 Wyo. 391, 397, 213 P. 938, 940 (1923) (dicta).

91. 478 P.2d at 599-600.

92. See note 88 *supra*.

93. That this may result in employee liability in situations where the governmental entity might enjoy immunity and vice versa, while anomalous, does not seem to have bothered the courts.

ance are so prescribed that nothing is left to judgment would make almost everything discretionary.⁹⁴ The simple making of a decision cannot be equated with discretion. Rather, it is suggested that an employee is engaged in a discretionary function only if he is required to consciously balance risks and advantages or make policy type decisions.⁹⁵ Thus a judge in deciding matters is clearly involved in the exercise of discretion.⁹⁶ Whether the issuance of duplicate certificates of title on automobiles is discretionary or ministerial—the problem of the *Denver Buick* and *Spaniol Ford* cases—is more difficult. The statute provides that the loss of the original certificate is to be accounted for “to the satisfaction of the . . . county officer”⁹⁷ Although the statute obviously calls for the use of discretion to determine whether or not loss has been satisfactorily explained, this is the type of discretion which in practice is undoubtedly governed by a few simple rules. It does not call for the weighing of pros and cons of a policy decision; it does not call for the exercise of judicial discretion. It would seem to be a ministerial act, the negligent performance of which should result in liability. If this analysis is correct, the denial of recovery in *Denver Buick* and *Spaniol Ford* is only justified by the combination of the governmental—proprietary distinction with the discretionary-ministerial one so as to immunize the public employee unless an act is neither governmental nor discretionary.⁹⁸

Simply because a government employee performs discretionary or even governmental acts he is not assured of complete immunity. There is no immunity for acts, even judicial acts, which are clearly beyond the authority or jurisdiction of the employee.⁹⁹ There is also probably no immunity for

94. 478 P.2d at 599.

95. DAVIS, ADMINISTRATIVE LAW § 25.08 (Supp. 1970).

96. The discretionary function basis for immunity apparently had its origin in judicial immunity. Courts felt that a judge should be free from concern over vexatious litigation attempting to make him personally liable for his decisions reached in good faith. See 3 DAVIS, ADMINISTRATIVE LAW § 26.01 (1958). In Wyoming the principle of judicial immunity was recognized in the case of *Linde v. Bentley*, 482 P.2d 121 (Wyo. 1971).

97. WYO. STAT. § 31-40 (1957).

98. Although this has the virtue of limiting employee liability to proprietary activities where the governmental entity would probably also be liable, it expands immunity for employees. If consistency is important, perhaps governmental entities ought to be denied immunity except for injuries caused by discretionary acts.

99. See *Linde v. Bentley*, 482 P.2d 121 (Wyo. 1971). “[I]t has long been the rule that courts of general jurisdiction are exempt from liability of civil

acts done in bad faith, intentional torts or false imprisonment.¹⁰⁰ Although no Wyoming cases have discussed liability in these last three areas, in one case a sheriff's surety was held liable for a 22 hour, illegal search of the plaintiff's premises.¹⁰¹ Presumably the surety was only liable if the sheriff was liable and it would appear that the sheriff was guilty of false imprisonment. In another case the court said that a deputy-sheriff who effects an irregular and illegal abduction does so in his role as a private individual.¹⁰² Presumably, acting as a private individual he would be liable.¹⁰³ Finally it should be noted that under the Federal civil rights statutes any state or local officer or employee, other than a judge or a legislator, who is responsible for depriving a person of a right, privilege or immunity secured by the Constitution and laws of the United States may be liable to that person in an action for damages.¹⁰⁴ Litigation arising out of the notorious incident at the University of Wyoming involving the dismissal of fourteen Blacks from the football squad was based, in part, upon this Federal cause of action.¹⁰⁵

action for their official acts even if in excess of their jurisdiction—although a distinction is observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter." *Id.* at 123. *Cf.* Hamblin v. Arzy, 472 P.2d 933 (Wyo. 1970) (It was alleged that the defendant game wardens were individually liable when they exceeded their authority. The court remanded on other grounds.). For a general discussion of liability for acts in excess of jurisdiction see 3 DAVIS, ADMINISTRATIVE LAW § 26.05 (1958, Supp. 1970).

100. DAVIS, *supra* note 99, at §§ 26.03, 26.04. *See also* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44 (1960); VAN ALSTYNE, A STUDY RELATING TO SOVEREIGN IMMUNITY 406-11 (Calif. Law Revision Comm'n 1963) (false imprisonment); RESTATEMENT (SECOND) OF TORTS §§ 35, 41 (1965) (false imprisonment).
101. Lynch v. Burgess, 40 Wyo. 30, 273 P. 691 (1929).
102. Kingen v. Kelley, 3 Wyo. 566, 28 P. 36 (1891).
103. *Cf.* Ellis v. Wyoming Game & Fish Comm'n, 74 Wyo. 226, 286 P.2d 597 (1955), where the court declined to decide whether suits against officials in their private capacity could be sustained.
104. 42 U.S.C. § 1983 (1970). *See also* 42 U.S.C. §§ 1985, 1986 (1970). The Eleventh Amendment prevents the application of these statutes to states, and by court decision they apparently are not applicable to local government. *See* Monroe v. Pape, 365 U.S. 167 (1961). The exemption for legislators and judges was established in the cases of Tenney v. Brandhove, 341 U.S. 367 (1951) and Pierson v. Ray, 386 U.S. 547 (1967) respectively. For a general discussion of the Act and citations to leading articles see Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015 (1967). For a discussion of the act as it relates to employee liability in particular see DAVIS, *supra* note 99, § 26.06.
105. Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971). The circuit court of appeals stated that although damages may be recovered under the act from defendants as individuals, "[w]hen the action in essence is for recovery of money from the State the immunity is available even though individual officials are nominal defendants." *Id.* at 429. Since the pleadings in the case indicated that the employees and officers were being sued in their official capacity, the dismissal of the damage counts was affirmed.

Notwithstanding these exceptions, the immunity accorded to public employees in Wyoming is broad. No Wyoming cases have yet imposed liability for damages upon the agent or officer of any governmental unit. Although the *Denver Buick* and *Spaniol Ford* cases allow for liability for the negligent performance of ministerial functions, the nature of the activities in those cases seems to be ministerial yet no liability is allowed. Aside from the exceptions noted in the previous paragraph, governmental employees in Wyoming are apparently entitled to the immunity of the governmental entity for which they work.¹⁰⁶

Since public employees do not usually have large pecuniary resources, the limitation upon their liability in Wyoming does not have a significant effect upon the ability of injured parties to recover. Also this immunity of public employees is only fair to the employees themselves. This is because in the private sector employee liability for damages is invariably satisfied by the employer; therefore the traditional agency rules imposing servant liability are virtually meaningless. To make the public employee liable when his private counterpart is not, simply because governmental entities have immunity and cannot voluntarily assume liability as private corporations do,¹⁰⁷ would be an unfair burden on the public employee.¹⁰⁸ The solution to the injustices of governmental immunity should be making the governmental entity, not employees, liable for wrongs committed within the scope of employment. The retention of personal liability for intentional wrongs ought, of course, to be preserved.

B. Governmental-Proprietary Distinction

The distinction between governmental and proprietary activities was introduced into American jurisprudence in 1842

In view of the immunity of the state it is difficult to see how the state could legally assume a judgment against the individual defendants regardless of the capacity in which they were sued. To use the pleadings to resolve this problem is inadequate.

106. Although there are no reported Wyoming cases involving city or school district employees as defendants it is not likely that a court would impose liability on a different basis from state or county employees.

107. See *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959).

108. 3 DAVIS, ADMINISTRATIVE LAW § 26.02 (1958). It is of interest that under the Federal Tort Claims Act a federal employee is not liable to an injured party for negligence in driving a motor vehicle if the government is liable. 28 U.S.C. § 2679(b) (1970).

in the case of *Bailey v. City of New York*¹⁰⁹ and subsequently was adopted as a test of municipal liability in almost every state.¹¹⁰ The first Wyoming case to discuss the governmental-proprietary distinction was *Seaman v. Big Horn Canal Association*.¹¹¹ The court assumed that the defendant Association which furnished water to the public for irrigation was a public corporation but held it had the same liability a municipality would have in furnishing water. Municipalities, it observed, have

two classes of powers, the one legislative and governmental, the other proprietary or business; and that, as to the latter, while having the same powers, they are also subject to the same liabilities as private corporations or individuals.¹¹²

Since in other states municipalities were held to be acting in a proprietary capacity in furnishing water, the court concluded that the Association was responsible for the wrongful acts of its agent.

Several subsequent Wyoming cases have followed the governmental-proprietary distinction. Besides a water system, the operation of garbage removal and disposal services¹¹³ and a sewage system¹¹⁴ have been classified proprietary activities for which municipalities may be liable. Whether the maintenance of streets within a municipality is a proprietary function or an obligation the violation of which gives rise to liability on some other basis has been subject to conflicting views in the Wyoming cases.¹¹⁵ In two cases involving assess-

109. 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

110. 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.23 (3d rev. ed. 1963). The leading critical commentary on the governmental-proprietary distinction is Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VIR. L. REV. 910 (1936).

111. 29 Wyo. 391, 213 P. 938 (1923). Since the action in this case was for an injunction only, the question of damages was not at issue. The court, however, discussed the injunction question in terms which would be equally applicable to damages.

112. *Id.* at 397, 213 P. at 940.

113. *Town of Douglas v. York*, 445 P.2d 760 (Wyo. 1968). *Contra* *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937) (*dicta*).

114. *South Cheyenne Water & Sewer Dist. v. Stundon*, 483 P.2d 240 (Wyo. 1971); *Lore v. Town of Douglas*, 355 P.2d 367 (Wyo. 1960).

115. *Compare* *Town of Douglas v. York*, 445 P.2d 760 (Wyo. 1968); *Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957) (*dictum*) (*proprietary*), *with* *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965); *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948); *Opitz v. Town of City of Newcastle*, 35 Wyo. 358, 249 P. 799 (1926); *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925) (*dictum*) (*governmental*). *See* *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964). Liability for maintenance of public ways is discussed at pp. 256-60 *infra*.

ment of municipal property for taxation, a municipal electric system and certain leased buildings at a city airport have been held to be proprietary, not governmental, enterprises.¹¹⁶ On the other hand Wyoming cases have said that street sprinkling;¹¹⁷ operation of a fire department;¹¹⁸ pursuit of criminals;¹¹⁹ construction of roads,¹²⁰ ditches,¹²¹ sewers,¹²² and sidewalks;¹²³ the issuance, refusal, and revocation of permits and licenses;¹²⁴ the purchase of liquor by the Wyoming Liquor Commission¹²⁵ and the operation of hospitals¹²⁶ are governmental functions for immunity purposes.

In one case, *Ramirez v. City of Cheyenne*,¹²⁷ the court tried to escape the governmental-proprietary distinction by adopting a third category: activities traditionally done by charitable institutions, for which liability could only be imposed for certain "nondelegable duties, such as the duty of using due care in selecting . . . employees and in keeping . . . premises safe for invitees."¹²⁸ The operation of playgrounds was classified as such a charitable function and a wrongful death action was allowed when a boy was fatally injured on a defective swing. Whether this charitable function classification with limited liability is still viable even for municipalities is doubtful. In subsequently classifying a county hospital as a governmental function, the Wyoming court at least severely limited the charitable category.¹²⁹

116. *Town of Pine Bluffs v. State Bd. of Equal.*, 79 Wyo. 262, 333 P.2d 700 (1958) (electric); *City of Cheyenne v. Board of County Comm'rs*, 484 P.2d 706 (Wyo. 1971) (airport). Although in both cases the court said that the assessment question did not involve immunity from suit, the analysis and the results were similar to immunity cases in other jurisdictions involving comparable activities. 18 McQUILLIN, *supra* note 110, § 53.101 (municipal power plants), § 53.92 n. 74 (leased buildings).

117. *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937).

118. *White v. City of Casper*, 35 Wyo. 371, 249 P. 563 (1926).

119. *Maffei v. Incorporated Town of Kemmerer*, 338 P.2d 808 (Wyo. 1959).

120. *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964); *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948).

121. *McCormick v. Town of Thermopolis*, 478 P.2d 67 (Wyo. 1970); *cf. Jacoby v. Town of Gillette*, 62 Wyo. 487, 174 P.2d 505 (1947).

122. *See Town of Douglas v. York*, 445 P.2d 760 (Wyo. 1968).

123. *See Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957); *Quest v. Town of Upton*, 36 Wyo. 1, 252 P. 506 (1927).

124. *Wickstrom v. City of Laramie*, 37 Wyo. 389, 262 P. 22 (1927).

125. *Harrison v. Wyoming Liquor Comm'n*, 63 Wyo. 13, 177 P.2d 397 (1947).

126. *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960).

127. 34 Wyo. 67, 241 P. 710 (1925).

128. *Id.* at 81, 241 P. at 714.

129. *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960).

Several attempts have been made in the Wyoming cases to define the rationale for the governmental-proprietary distinction and the principles for determining into which category a particular activity fits.¹³⁰ In *Ramirez* the court gave the following explanation for the distinction:

[A]ll duties of municipal corporations are performed either as a substitute for the state and for the benefit of the public in general, or as a substitute for business corporations and for the benefit of the municipality. In the performance of the first class of duties the city is immune as the state would be, and in the other it is liable as a business corporation would be.¹³¹

Several cases have emphasized that if an activity is directed particularly at the health and welfare of the public at large, the activity is governmental.¹³² It has also been said that if the activity is undertaken at the direction of the legislature¹³³ or if it involves the exercise of legislative or judicial discretion,¹³⁴ it is governmental. On the other hand, if the activity has historically been conducted by private corporations¹³⁵ or if it generates revenues from fees,¹³⁶ it is termed proprietary.

These guides to whether an activity is governmental or proprietary do not resolve all situations. Why should the buying and selling of liquor for profit be a governmental function as it was held to be in *Harrison v. Wyoming Liquor Commission*?¹³⁷ On the other hand why should the operation of a sewer system be proprietary as it was held to be in *Love*

130. For attempts to formulate and explain the principles which determine whether an activity is governmental or proprietary see 2 HARPER & JAMES, TORTS § 29.6, at 1620-23 (1956); Borchard, *supra* note 3, 34 YALE L.J. at 130-36; Kramer, *supra* note 10, at 817; Repko, *American Legal Commentaries on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214, 219-22 (1942); Seasongood, *supra* note 110.

131. 34 Wyo. at 80, 241 P. at 714.

132. *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960); *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937).

133. *See Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960).

134. *See Wickstrom v. City of Laramie*, 37 Wyo. 389, 262 P. 22 (1927); *cf. Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957).

135. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925); *cf. Town of Pine Bluffs v. State Bd. of Equal.*, 79 Wyo. 262, 333 P.2d 700 (1958).

136. *Town of Douglas v. York*, 445 P.2d 760 (Wyo. 1968); *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925); *cf. Town of Pine Bluffs v. State Bd. of Equal.*, 79 Wyo. 262, 333 P.2d 700 (1958). *But cf. Lore v. Town of Douglas*, 355 P.2d 367 (Wyo. 1960) (Lack of separate charge for sewer service does not make activity governmental.).

137. 63 Wyo. 13, 177 P.2d 397 (1947).

v. Town of Douglas?¹³⁸ Certainly the latter is more necessary to the health and welfare than acting as a liquor wholesaler and as necessary as sprinkling streets, a governmental activity.¹³⁹ Possibly feeling that fine distinctions promote justice, courts have even split an activity between its governmental and proprietary components. Thus in one of the Wyoming cases involving tax assessments the court termed governmental only that part of a municipal power system which was necessary to light streets, operate traffic signals and light town offices.¹⁴⁰ Such narrow lines have been drawn in several states with regard to water systems.¹⁴¹ Also some activities such as the maintenance of parks have no tradition as either a business or governmental function for the court to fall back on. In *Ramirez* the court tried to create a new category to handle such cases.¹⁴²

A different problem with the classification appears in distinguishing between liability for maintenance and for construction of the same facility. If the facility is part of a proprietary activity, there is liability for damages caused by failure to exercise due care in maintaining the facility.¹⁴³ Construction of the same facility is a governmental function, apparently on the basis of the discretion involved in deciding whether to build the facility, the amount to spend and the design.¹⁴⁴ The resulting immunity for construction, however, unlike the apparent absolute immunity for most governmental functions, is qualified by the extent to which discretion may have been abused. Thus if as a matter of law the construction plan is defective, municipalities may be held liable for what is classified a governmental function.¹⁴⁵ Apparently the

138. 355 P.2d 367 (Wyo. 1960).

139. *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937).

140. *Town of Pine Bluffs v. State Bd. of Equal.*, 79 Wyo. 262, 333 P.2d 700 (1958). Distinction noted with approval for immunity purposes in *Town of Douglas v. York*, 445 P.2d 760, 762-63 (Wyo. 1968).

141. *McQUILLIN*, *supra* note 110, § 53.103.

142. 34 Wyo. 67, 241 P. 710 (1925).

143. *See South Cheyenne Water & Sewer Dist. v. Stundon*, 483 P.2d 240 (Wyo. 1971); *Town of Douglas v. York*, 445 P.2d 760 (Wyo. 1968); *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964); *cf. Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948) (streets).

144. *See Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957); *cf. Quest v. Town of Upton*, 36 Wyo. 1, 252 P. 506 (1927).

145. *McCormick v. Town of Thermopolis*, 478 P.2d 67 (Wyo. 1970); *see Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957); *cf. Quest v. Town of Upton*, 36 Wyo. 1, 252 P. 506 (1927). *See discussion of construction of public ways*, p. 259. *infra*.

courts have found the results which would flow from a strict application of the distinction between governmental and proprietary functions unsatisfactory.

Although the governmental-proprietary distinction has been used in most states only in connection with municipal liability, in Wyoming several cases involving the state and counties have indicated that those units of government may be liable for wrongs committed during the performance of proprietary functions.¹⁴⁶ How state liability for proprietary functions can be reconciled with the interpretation of the Wyoming Constitution which prohibits suits unless explicitly authorized by the legislature is a conundrum which only the courts can resolve.¹⁴⁷ If liability for proprietary functions does extend beyond municipalities, it may be, nevertheless, that the courts would be reluctant to make decisions in municipal cases determinative of whether similar state activity gives rise to liability. In *Harrison v. Wyoming Liquor Commission*,¹⁴⁸ what would appear certainly to be a proprietary function, the purchase of brandy for resale, was held to be governmental. The court felt that the state may have decided to act as a wholesaler for governmental reasons—to insure that the liquors sold were types least apt to be injurious to the health and well-being of the residents of the state or to adopt pricing policies to discourage consumption or to raise money for the state. If similar groping analyses were followed in the municipal area, many traditionally proprietary functions could be classified as governmental.

While the governmental-proprietary distinction has done much to ameliorate the harshness of the immunity rule and is easily and logically applied to certain types of activities, it has been the subject of widespread criticism by the commentators¹⁴⁹ and even by some of the courts which follow it.¹⁵⁰ The

146. *Supra* note 38. *Cf.* *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970). Presumably the same liability would be shared by school districts and other units of government, although no Wyoming cases have so indicated.

147. WYO. CONST. art. I, § 8. *See* pp. 236-38 *supra*.

148. 63 Wyo. 13, 177 P.2d 397 (1947).

149. *E.g.*, 3 DAVIS, ADMINISTRATIVE LAW, § 25.07 (1958); articles cited in note 130 *supra*.

150. *E.g.*, *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 75-76, 241 P. 710, 712 (1925); *Weeks v. City of Newark*, 62 N.J. Super. 166, 162 A.2d 314 (App. Div. 1960), *aff'd* 34 N.J. 250, 168 A.2d 11 (1961).

difficulty of classifying the myriad of municipal and state activities has given rise to inconsistencies between courts and arbitrary distinctions which offer little guidance and promote the suspicion that rationality does not prevail in this area.¹⁵¹ In *Villalpando v. City of Cheyenne*,¹⁵² it was observed that in difficult cases the courts decide whether an activity is governmental or proprietary not on the basis of the nature of the particular activity involved but on the court's view as to the desirability of the policy of governmental immunity itself. The opinion then concluded that

Only the law making bodies of the several jurisdictions can really and positively settle which policy should be followed. They seem generally not to undertake the task. Until they do, the courts must strive as best they can to follow what they deem the sounder reasoning and the consensus of opinion as announced by courts of high repute throughout the nation.¹⁵³

C. Exceptions to Governmental-Proprietary Distinction

1. *Discretionary-Ministerial*

Even where an activity is proprietary, there may yet be immunity and where an activity is governmental, there may be liability. A wrongful act occurring in connection with a proprietary function may not result in liability of the act was discretionary.¹⁵⁴ Whether the converse—a ministerial act in the course of a governmental activity—would result in governmental liability is not clear.¹⁵⁵ Although courts in other states have on occasion used the discretionary-ministerial distinction in connection with governmental as opposed to employee liability,¹⁵⁶ no Wyoming cases have explicitly attempted such an application of the distinction.¹⁵⁷ In *Wyo-*

151. See *Ramirez v. City of Cheyenne*, *supra* note 150, at 76, 241 P. at 712, noting the difficulty courts have had in classifying municipal maintenance of public parks and playgrounds. See also DAVIS, *supra* note 149.

152. 51 Wyo. 300, 65 P.2d 1109 (1937).

153. *Id.* at 317, 65 P.2d at 1115-16.

154. See note 88 *supra*.

155. *Id.*

156. Kramer, *supra* note 10, at 820-21.

157. However, for indication of implicit application of the distinction to decisions on construction plans see cases cited in notes 143-45, *supra* and in notes 175-77, *infra*. It is noteworthy that these cases only grant immunity for negligence, not negligence as a matter of law.

ming, therefore, the discretionary-ministerial distinction is only a potential limitation on the governmental-proprietary schema.

2. *Public Ways*

Although the maintenance of public ways "would seem to be a governmental or public function, . . . most of the courts of this country . . . have held cities liable for negligence in failing to keep their streets in a safe condition for travel."¹⁵⁸ Several bases have been suggested for this liability.¹⁵⁹ These include calling defects or obstructions in public ways nuisances which municipalities are responsible for abating and classifying the maintenance function as a ministerial activity for which not only employees but also municipalities themselves would be liable.¹⁶⁰ Sometimes the basis is statutory. Statutes may explicitly impose liability.¹⁶¹ Or, as one Wyoming case apparently held, the entire statutory scheme may impose such a duty upon municipalities to maintain public ways that even without a waiver of immunity persons injured by breaches of the duty are entitled to recover.¹⁶² None of these explanations is adequate. It appears that municipal immunity for public ways is an illogical exception to the rule of immunity for governmental functions.¹⁶³ Equally difficult to explain is the limitation of liability for public ways to municipalities.

158. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 78, 241 P. 710, 713 (1925). For Wyoming cases in accord and contra see note 115 *supra*.

159. See 1 LAND & WATER L. REV. 532 (1966).

160. *Id.* at 534. For Wyoming cases indicating that nuisance may be a basis for liability see note 189 *infra* and the accompanying text.

161. See WYO. STAT. § 15.1-195 (1957), repealed by Ch. 61, § 1, Wyo. Laws 1967. Two rather obscure sections of the Wyoming Statutes, §§ 15.1-274, -276, might impose liability upon city manager municipalities for streets which are insufficient or unsafe for travel. While neither section explicitly gives cause of action against such cities, Section 15.1-274 makes liable any person responsible for such conditions (presumably including city employees), and both sections by providing that the city is to recover from other defendants any payment it makes upon the judgment indicate that the city too can be made a defendant. However, these actions appear merely to assume the common law of municipal responsibility for maintenance of streets.

162. *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965). This theory could provide a basis for governmental liability in many areas where by statute certain functions are required to be performed. For an attempt to distinguish *Fanning* see *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970). The *Fanning* case will be further discussed in connection with statutory waiver of immunity in the next installment of this article.

163. 1 LAND & WATER L. REV. 532 (1966). Since in *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788), the case frequently cited as the basis for municipal immunity, recovery was denied for injuries caused by a bridge that was out of repair, the background of municipal liability for the maintenance of public ways is even more mysterious.

The common law rule, which apparently has been adopted in Wyoming, accords the state, counties and special districts immunity from liability for injuries caused by defective public ways.¹⁶⁴

In Wyoming the case of *Opitz v. Town of City of Newcastle*¹⁶⁵ appears to be the first time the court was presented with a claim against a municipality for a defective street.¹⁶⁶ There one Levi Knecht with the Opitz family as passengers was motoring through the town shortly after dark when to their surprise the street ended without warning and the car dropped into ten feet of water. A bridge had washed out a month before and the town had apparently never erected any barriers warning of this condition. The court dismissed the town's defense of immunity and stated the following rule:

[M]unicipalities, which have full and complete control over the streets within their corporate limits . . . are liable for damages for injuries sustained in consequence of their failure to use reasonable care in keeping them in a reasonably safe condition for public travel, and in safeguarding, by proper danger signals, the places of danger thereon.¹⁶⁷

Although the court recognized that the maintenance of streets would seem to be a governmental function, it felt that the liability of municipalities for defective public ways was as well established as the immunity doctrine itself and placed the responsibility for overruling municipal liability in this area on the legislature. As both an indication of the extent to which liability was accepted and of the legislature's being the appropriate branch of government to establish immunity, the court cited a statute which had qualified the liability of cities for damages sustained by reason of defective public

164. 2 HARPER & JAMES, TORTS § 29.7, at 1628-29 (1956); Borchard, *supra* note 3, 34 YALE L.J. at 229-31. In Wyoming compare *Opitz v. Town of City of Newcastle*, 35 Wyo. 358, 249 P. 799 (1926) with *Price v. State Highway Comm'n*, 62 Wyo. 385, 167 P.2d 309 (1946).

165. 35 Wyo. 358, 249 P. 799 (1926). The mixed nomenclature for the municipality in the case title probably results from a combination of the statutory definitions of city and town and puffing on the part of the town fathers.

166. Although two earlier cases raised liability questions, one was for what apparently was a nuisance created by someone other than the city. *Kent v. City of Cheyenne*, 2 Wyo. 6 (1877). The other case presented the issue of municipal liability for a defective sidewalk, but the court dismissed the appeal upon another ground and declined to rule on the liability issue. *Jenkins v. City of Cheyenne*, 12 Wyo. 79, 73 P. 758 (1903).

167. 35 Wyo. at 362, 249 P. at 800.

ways.¹⁶⁸ Presumably the legislature would not have enacted such a statute if the public way exception to municipal immunity had not been recognized as the prevailing law.

Other cases indicate that this municipal responsibility for maintenance of public ways includes not only streets but also sidewalks,¹⁶⁹ curb and gutter,¹⁷⁰ and perhaps even traffic signs.¹⁷¹ This liability for the condition of public ways is, however, not without qualification. Since liability has traditionally been only for improper maintenance, any injury arising from causes other than failure of municipalities to exercise due care in maintaining public ways in a safe condition will not give rise to liability. In *Miller v. City of Lander*,¹⁷² a go-kart which was being operated on the city's streets during its celebration of "Lander Pioneer Days" struck the plaintiff, an observer of the event. In affirming a judgment for the city, the court stated that a municipality is not absolutely liable for all injuries received on its streets—only ones resulting from dangerous conditions which it authorized or permitted to occur. If the city had authorized or permitted such an event, it would have violated its duty to maintain the streets in a safe condition.

Sometimes it is difficult to determine whether an activity which gave rise to injury is maintenance or something else. In *Villalpando v. City of Cheyenne*,¹⁷³ the city's street sprinkling truck negligently collided with the plaintiff's car. The court concluded that sprinkling streets was a governmental function since it promoted the health and welfare of all residents by keeping down dust, thus alleviating what would

168. WYO. STAT. § 15.1-195 (1957) (requiring five days prior written notice of defect as a condition of liability), repealed by Ch. 61, § 1, Wyo. Laws 1967. This repeal occurred in the legislative session next following the case of *Bieber v. City of Newcastle*, 242 F. Supp. 457 (D. Wyo. 1965), where Section 15.1-195 was held to preclude a visitor to the city from recovering for injuries sustained when she fell into a 9 foot hole in a sidewalk since the officials, who were all aware of the defect, had not received the statutorily required 5 days prior written notice.

169. *Town of Cody v. Soth*, 36 Wyo. 66, 252 P. 1021 (1927); *Bieber v. City of Newcastle*, 242 F. Supp. 457 (D. Wyo. 1965); see *Quest v. Town of Upton*, 36 Wyo. 1, 252 P. 506 (1927).

170. See *Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957).

171. See *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965).

172. 453 P.2d 889 (Wyo. 1969). Since the city was covered by liability insurance, the immunity issue was not raised. The liability of the city was not, however, affected by the presence of insurance. Municipal liability insurance will be discussed in the next installment of this article.

173. 51 Wyo. 300, 65 P.2d 1109 (1937).

otherwise be a condition aggravating to peoples' respiratory systems. However, sprinkling is also maintenance in that it keeps the roadbed intact. The court offered no standard to facilitate the distinction between activities which are bona fide street maintenance, for which there is municipal liability, and activities which are not. Although it may be suggested that the municipal responsibility for injuries arising out of negligent maintenance of public ways does not include injuries resulting from negligent operation of maintenance vehicles, some courts have rejected such a limitation.¹⁷⁴

In addition, maintenance does not include construction. Wyoming cases have limited the municipal liability for defects in public ways due to construction or engineering without, however, granting total immunity.¹⁷⁵ As in the case of construction plans in the governmental-proprietary discussion above, the plan of construction apparently must be negligent as a matter of law before municipal liability will be imposed.¹⁷⁶ Perhaps this compromise is a limited recognition of the discretionary-ministerial distinction, decisions on the construction plan being discretionary, street maintenance ministerial.¹⁷⁷

As for accidents during construction, municipal immunity has been granted without apparent qualification.¹⁷⁸ In *Wilson v. City of Laramie*,¹⁷⁹ a child was killed when a construction vehicle rolled over him after he disengaged the gears. Even assuming that the act of leaving the vehicle on an incline where children could play with it constituted an attractive nuisance, the court ruled that the immunity applied. However, if the vehicle had last been used for street maintenance, as opposed to construction, the boy's estate perhaps could have recovered.¹⁸⁰ Making the result turn on what category of work the vehicle was last used in seems arbitrary,

174. See Annot., 52 A.L.R. 524 (1928); Annot., 110 A.L.R. 1117, 1126 (1937). See also McQuillin, *supra* note 110, § 53.41.

175. *Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152 (1957) (curb and gutter); *Quest v. Town of Upton*, 36 Wyo. 1, 252 P. 506 (1927) (sidewalks).

176. *Id.* See notes 143-45 *supra* and accompanying text.

177. The language in the cases cited at note 175 *supra*, indicates such an implicit recognition.

178. *Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964); *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948).

179. 65 Wyo. 234, 199 P.2d 119 (1948).

180. See note 174, *supra*.

particularly when maintenance activities shade into construction.

Finally it should be noted that the liability of municipalities for maintenance of public ways has been limited in Wyoming in connection with accumulation of ice and snow. In *Smith v. Town of Lander*,¹⁸¹ a pedestrian was injured on an icy crosswalk. Due to the severe weather and impracticability of constant maintenance, the court determined that there was no duty to keep crosswalks free of ice. However, it indicated a greater effort might be expected on sidewalks. Apparently what gives rise to liability at least in part depends upon balancing the economics of maintenance against the hazard to the public.

With these qualifications, however, Wyoming has followed other states in creating an illogical exception to the illogical rule of governmental immunity. If it is not confusing enough that there be such qualifications or exceptions to the exception, one need only recall that aside from municipalities no other governmental entities have traditionally been held responsible for defects in or maintenance of public ways unless a statute specifically imposed such responsibility.¹⁸² Why damages caused by a defective roadway within a city's boundaries are recoverable but not if caused by an identical defect a few feet away but outside those boundaries is hard to understand. Even more difficult is the result when the defect is in a state aid road within the municipal boundary.¹⁸³ Such situations have not yet been presented to the Wyoming court. These absurdities could be avoided by holding all governmental units responsible for maintaining public ways.

3. Nuisance

Municipalities are said to be liable for nuisances even if the activity creating the nuisance is governmental.¹⁸⁴ Despite its similarities to negligence, nuisance is a separate basis of recovery and is usually limited to property damage, not per-

181. 67 Wyo. 121, 215 P.2d 861 (1950).

182. See note 164, *supra*.

183. See *Lundstrom v. Giacomo*, 194 Minn 624, 261 N.W. 465 (1935).

184. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 78-79, 241 P. 710, 713 (1925). See PROSSER, TORTS § 131, at 982-83 (4th ed. 1971).

sonal injuries.¹⁸⁵ Although a nuisance theory appears to have been the alternate ground for holding a town liable for damages resulting from a sewer back-up,¹⁸⁶ no Wyoming case has clearly relied on nuisance as a basis for liability. In *Town of Douglas v. York*,¹⁸⁷ the court refused to base liability for a fire started by sparks from the community dump on nuisance, even though a concurring opinion urged the theory. Whether municipal liability for public ways could be based on nuisance is not clear. Although one early Wyoming case apparently rejected such a theory,¹⁸⁸ the court has since mentioned nuisance with apparent approval.¹⁸⁹ Finally it should be noted that even assuming that governmental entities may be held liable for nuisance, the attractive nuisance doctrine has apparently been rejected in Wyoming as a basis for liability.¹⁹⁰

4. *Active Wrongdoing*

In at least one state, municipalities have been held liable for wanton negligence, or "active wrongdoing," in the course of governmental activities when such negligence or active wrongdoing is attributable to the municipal corporation.¹⁹¹ Although only one Wyoming case has even referred to active wrongdoing as an exception to municipal immunity for governmental activities,¹⁹² in another case the court implied that a city could be liable if its negligence is of so gross a nature as to amount to wanton infliction of injury.¹⁹³

5. *Set-Off*

By initiating suit, the government has traditionally been held to waive its immunity with regard to the subject matter of the litigation to the extent of its claim.¹⁹⁴ This means that

185. *Ramirez v. City of Cheyenne*, *supra* note 184. Repeated with apparent approval in *Miller v. City of Lander*, 453 P.2d 889, 892 (Wyo. 1969). See Borchard, *supra* note 3, 34 YALE L.J. at 138-43.

186. *Lore v. Town of Douglas*, 355 P.2d 367 (Wyo. 1960).

187. 445 P.2d 760 (Wyo. 1968).

188. *Kent v. City of Cheyenne*, 2 Wyo. 6 (1877).

189. *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965); *Wilson v. City of Laramie*, 65 Wyo. 234, 244, 199 P.2d 119, 121 (1948).

190. *Wilson v. City of Laramie*, *supra* note 189; *cf. Maher v. City of Casper*, 67 Wyo. 268, 219 P.2d 125 (1950).

191. See *Repko*, *supra* note 130, at 223-24, discussing New Jersey cases.

192. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 79-80, 241 P. 710, 713-14 (1925).

193. *Maher v. City of Casper*, 67 Wyo. 268, 219 P.2d 125 (1950).

194. Note, *Governmental Immunity from Counterclaims*, 50 COLUM. L. REV. 505 (1950); Note, *Sovereign Immunity of the States*, 40 MINN. L. REV. 234, 259 (1956).

to a limited extent liability may be imposed even for damages arising out of governmental functions. The right of set-off was recognized in Wyoming by the territorial court.¹⁹⁵ Although the right of set-off has not been discussed in any reported Wyoming decisions since, it is presumably still the law. The only limitation is statutory—there can be no right of set-off against the state unless the claim has first been presented to the State Auditor and allowed or disallowed by him.¹⁹⁶ Apparently even if the Auditor disallows a claim, it can still be presented to the court as a set-off against a state claim.

In sum, the common law doctrine of governmental immunity extends to the state of Wyoming and all of its political subdivisions and probably to public officers, agents and employees. This common law immunity is, however, qualified by the judicial doctrine of governmental responsibility for proprietary as opposed to governmental functions, the right of set-off and possibly for ministerial acts. In the case of municipalities it is also qualified by responsibility for the maintenance of public ways and possibly for nuisance and active wrongdoing. It can also be qualified by consent to liability. Although consent may take the form of voluntary payment of claims without litigation or possibly even neglecting to raise the immunity issue in litigation,¹⁹⁷ legislative consent is usually thought to be necessary.¹⁹⁸ The next installment of this article will deal with express and implied legislative consent to liability, including the purchase of liability insurance, and the practice and procedure of pressing claims against governmental bodies; it will conclude with a critique of the status of governmental immunity in Wyoming.

195. *Union Pacific R.R. v. United States*, 2 Wyo. 170, 191 (1879).

196. WYO. STAT. § 9-72 (1957). The formality of presentment is not, however, necessary in certain extenuating circumstances.

197. *See, e.g., Caillier v. City of Newcastle*, 423 P.2d 653 (Wyo. 1967); *Town Council v. Ladd*, 37 Wyo. 419, 263 P. 703 (1928).

198. *See Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959).