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This is the second portion of a two part article comprehensively analyzing the governmental immunity doctrine in Wyoming. Professor Minge concludes that the doctrine still prevails in Wyoming even though it has been modified by governmental liability for proprietary activity and a limited authorization for governmental liability insurance in certain instances. He recommends that the judiciary, acting within its constitutional powers, abolish the governmental immunity doctrine.

GOVERNMENTAL IMMUNITY FROM DAMAGE ACTIONS IN WYOMING--- PART II*

*David Minge***

IV. GOVERNMENTAL CONSENT TO SUIT

IN the first part of this article the doctrine of governmental immunity and the common law exceptions thereto were explored. Subject to these exceptions, governmental immunity exists unless there is consent to suit, and as a general rule such consent must come from the legislature. In *Maffei v. Incorporated Town of Kemmerer*,¹⁹⁹ the court, in sustaining a demurrer to a wrongful death action against a municipality which had liability insurance, said:

We, therefore, hold it is beyond the power of a municipality to waive an immunity which it possesses by virtue of its being an arm of the state's government and that any waiver of such immunity must come by direct action of the legislature or through the clear and unmistakable implication of its legislative acts.²⁰⁰

*The first part of this article was published in 7 LAND & WATER L. REV. 229 (1972).

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199. 80 Wyo. 33, 338 P.2d 808 (1959).

200. *Id.* at 59, 338 P.2d at 817.

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Similarly in *Price v. State Highway Commission*, the court noted that the Commission could not waive immunity by purchasing liability insurance on its vehicles.²⁰¹ Since in both cases the immunity defense was being raised by the governmental entity or its insurer, the cases do not necessarily mean that claims cannot be paid absent legislative consent. Failure to raise governmental immunity is a type of consent so long as the court does not raise the issue *sua sponte*.²⁰² However, such ad hoc assumption of liability occurs outside the law of immunity. Any imposition of governmental responsibility in areas where the courts have found immunity must come from the legislature.

A. Express Consent

Express legislative consent to governmental liability can take several forms, two of which are special legislation and statutes authorizing municipalities and school districts to purchase liability insurance and waiving immunity to the extent of insurance coverage.²⁰³ Both types of consent will be considered separately below.²⁰⁴ At this point our concern is with the various statutes of general application which provide for actions against or for compensation to be paid by governmental entities.

Several statutes of general application authorize suit against the state in special areas. Section 11-610 authorizes suits against the Wyoming Farm Loan Board "on any mortgage, contract of sale or lease issued by the board."²⁰⁵ Section 23-117 gives land owners a right to claim compensation from the state for damage done by game animals and game birds and to appeal a decision on the claim to the district court.²⁰⁶

201. 62 Wyo. 385, 167 P.2d 309 (1946).

202. 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).

203. WYO. STAT. § 15.1-4 (1957), §§ 21.1-42 to -46 (Supp. 1971).

204. See *infra*, pp. 622-25 discussing special legislation and pp. 631-50 discussing insurance.

205. WYO. STAT. § 11-610 (1957).

206. WYO. STAT. § 23-117 (Supp. 1971). That the damage done by wild animals and birds could be imputed to the state absent a statute is unlikely. Perhaps this statute should be viewed as a type of insurance funded by hunting license fees.

Section 24-29 authorizes suits against the State Highway Commission "upon any contract executed by it."²⁰⁷

Similarly damage actions are allowed by statute against certain public officials. Section 15.1-358 provides that the purchaser of land for delinquent municipal assessments may recover the amount he paid plus interest from the municipal treasurer and his surety if the assessments had actually been paid and a receipt issued.²⁰⁸ However, the same section explicitly exempts the municipality itself from such liability. Although Section 19-112 provides that the state and its political subdivisions are engaged in a governmental function when undertaking civil defense and disaster responsibilities and thus immune from liability, it does provide that civil defense or disaster workers may be personally liable for their "willful misconduct, gross negligence, or bad faith."²⁰⁹ Section 34-26 allows parties aggrieved by the recording of unrecordable documents to recover up to \$100 damages from the county clerk.²¹⁰ It is not clear, however, that this last statute actually creates any new liability. One Wyoming case indicated that since the recording of instruments is a ministerial, not a governmental, function, errors by a recording officer might give rise to liability even without a statute.²¹¹ To the extent this is correct, Section 34-26 could be construed as limiting to \$100 what would otherwise be an unlimited liability.

The Wyoming workmen's compensation law covers all state, state agency, county and municipal employees engaged in "extra-hazardous" work, as well as certain other public officials and employees.²¹² The liberal definition of the term "extra-hazardous" results in rather extensive coverage of

207. WYO. STAT. § 24-29 (1957).

208. WYO. STAT. § 15.1-358 (1957). The immunity of a governmental entity for damages done to or the use of private property commandeered during an emergency might be limited by the constitutional prohibition against taking or damaging private property without compensation. See VAN ALSTYNE, A STUDY RELATING TO SOVEREIGN IMMUNITY 77 (Calif. Law Revision Comm'n 1963).

209. WYO. STAT. § 19-112 (Supp. 1971).

210. WYO. STAT. § 34-26 (1957).

211. *Spaniol Ford, Inc. v. Froggat*, 478 P.2d 598 (Wyo. 1970). For a discussion of the ministerial-discretionary and governmental-proprietary distinctions in tort liability of public employees see the first installment of this article at pp. 245-47.

212. WYO. STAT. §§ 27-56 to -61 (1957, Supp. 1971).

public employees by the workmen's compensation scheme.²¹³ Although immunity is not expressly waived as to those officials and employees, the governmental entities are required to contribute to the workmen's compensation fund,²¹⁴ claims for compensation are authorized against the fund,²¹⁵ and appeals by the injured workmen to the Wyoming Supreme Court are allowed.²¹⁶ Although not technically covered by workmen's compensation, most peace and correctional officers in Wyoming are entitled to compensation from the Wyoming Peace Officers' Indemnity Fund.²¹⁷ The state and counties are required to make payments into the Fund,²¹⁸ and the same principles and procedures apply to recovery from the Fund as apply under workmen's compensation.²¹⁹

Another compensation scheme indemnifies the owners of livestock which are slaughtered by the State Veterinarian for having or having been exposed to epidemic disease.²²⁰ Funds for such indemnification are appropriated by the state legislature and recovery is limited to appropriations.²²¹ However, instead of any right to court appeal, the owners are required to arbitrate their claims.²²² To the extent that such animals constitute a public nuisance or have no value this compensation is not required by the constitution.²²³ The creation of such liability for animal destruction is anomalous in a state which by-in-large rejects liability for injuries to individuals.

An express statutory waiver of immunity would appear to be contained in Section 18-63, which provides that an action

213. WYO. STAT. § 27-56 (Supp. 1971).

214. WYO. STAT. §§ 27-49 II(a), -57 (B) and (C), -63 (1957, Supp. 1971).

215. WYO. STAT. § 27-105 (1957); *cf.* § 27-50 (1957).

216. WYO. STAT. §§ 27-130 and -132 (1957). *See* Wyoming State Treasurer *ex rel.* Workmen's Comp. Dept't v. Boston, 445 P.2d 548 (Wyo. 1968).

217. WYO. STAT. §§ 27-183 to -191 (1957).

218. WYO. STAT. §§ 27-186 to -187 (1957).

219. WYO. STAT. § 27-185 (1957).

220. WYO. STAT. §§ 11-279 to -288 (1957). *See also* WYO. STAT. §§ 11-292.1 to -292.4 (Supp. 1971) and WYO. STAT. § 11-306 (1957) respectively providing for the indemnification of the owners of destroyed swine which had or had been exposed to hog cholera and of the owners of cattle having tuberculosis or Bang's disease.

221. WYO. STAT. § 11-288 (1957). However, the appropriations for this purpose appear to be generous (*See, e.g.,* Ch. 259, § 50, WYO. LAWS 1971) and special appropriations are not unknown (Ch. 72, WYO. LAWS 1967; ch. 146, § 27, WYO. LAWS 1961).

222. WYO. STAT. §§ 11-285 to -286 (1957).

223. Annot., 67 A.L.R. 208 (1930).

may be maintained on the surety bonds of county officers "to the use of any party aggrieved. . . ." ²²⁴ In *Lynch v. Burgess*, liability was thus imposed upon a sheriff's surety for mental anguish resulting from an illegal search of the plaintiff's premises. ²²⁵ On the other hand, in the recent case of *Spaniol Ford, Inc. v. Froggatt* the county clerk's immunity was extended to the surety when the clerk negligently issued a new certificate of title upon a stolen car. ²²⁶ The court reasoned that the surety could not be liable unless the county clerk was liable. The *Lynch* and *Spaniol Ford* cases are not necessarily inconsistent. Since peace officers are liable at common law for a wide range of wrongful acts, ²²⁷ it is possible that the sheriff in the *Lynch* case would not have had any defense of immunity had he been sued. However, if the sheriff had had immunity, the surety would perhaps also have been shielded from liability. ²²⁸ Such a limitation on the *Lynch* case would make it reconcilable with *Spaniol Ford*, and as a result Section 18-63 would not contain any waiver of immunity. Although there is precedent for such a conclusion, ²²⁹ it does not seem to be required by the law of suretyship. ²³⁰

In Wyoming the state, counties, municipalities and school districts are by statute liable and subject to garnishment . . . in the same manner and for the same causes as private individuals. . . ." ²³¹ Another statutory provision authorizes garnishment proceedings to reach the salaries and wages due officers and employees. ²³² It is doubtful the former statute allows more than making the governmental entity a garnishee. To the extent a governmental entity is protected from liability by the immunity doctrine, it could not become a judgment debtor. Thus there would be no occasion for its assets in the

224. WYO. STAT. § 18-63 (1957).

225. 40 Wyo. 30, 273 P. 691 (1929).

226. 478 P.2d 598 (Wyo. 1970).

227. See *Symposium Police Tort Liability* 16 CLEV.-MAR. L. REV. 397 (1967); Greenstone, *Liability of Police Officer*, 6 TRIAL LAWYER Q. 56 (Spring-Summer 1969); Annot., 60 A.L.R.2d 873 (1958).

228. This is certainly the position the Wyoming Supreme Court took in *Spaniol Ford*.

229. See Annot., 90 A.L.R. 1423 (1934); cf. *Bynum v. Western Surety Co.*, 323 P.2d 972 (Okla. 1958).

230. *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 173 S.E.2d 18 (1971); 10 WILLISTON, CONTRACTS § 1214 (3d ed. 1967).

231. WYO. STAT. § 1-434 (1957). See also WYO. STAT. §§ 1-236 and -433 (1957).

232. WYO. STAT. § 1-433 (1957).

hands of a third party to be subject to garnishment. Even if the governmental entity is not protected by immunity, the justifications for resorting to garnishment are not applicable to the government as a principal debtor.²³³ Furthermore, an application of the statute in situations where the governmental entity is the principal debtor would in effect permit execution upon public funds, something that is usually not allowed even by statute.²³⁴ Such is not the case, of course, where the governmental entity is merely a garnishee because as garnishee the government is holding moneys or property due someone else.

It should be noted that the statutes consenting to garnishment only name the state, counties, municipalities and school districts. Whether the consent would also extend to other special districts is not certain. As a general rule states and their political subdivisions cannot be garnished absent a statute so providing.²³⁵ It is possible, however, to say that as special districts are creatures of the state legislature, they are subject to being made a garnishee just as the state is. In addition it is noteworthy that in 1909 when the statutes permitting garnishment proceedings against the state were enacted special districts were virtually unknown and that this is perhaps the reason for the failure of the legislature to use more inclusive language.²³⁶

B. Special Legislation

On occasion the Wyoming legislature has passed special acts authorizing suit against the state to quiet title to property.²³⁷ Similarly, bills have been passed appropriating funds for the relief of persons who would have had a cause of action but for governmental immunity²³⁸ or who would have re-

233. See WYO. STAT. § 1-226 (1957).

234. See note 358 *infra*.

235. *E.g.*, *Landman v. Du Bois*, 191 Okla. 428, 133 P.2d 193 (1942); *Home Owner's Loan Corp. v. Hardie & Coudle*, 171 Tenn. 43, 100 S.W.2d 238 (1936); *Willacy County Water Control & Impr't Dist. v. Abendroth*, 142 Tex. 320, 177 S.W. 2d 936 (1944).

236. Sections 1-433 and -434 were passed as ch. 140, WYO. LAWS 1909.

237. Ch. 40, WYO. LAWS 1961; ch. 178, WYO. LAWS 1955.

238. Ch. 116, WYO. LAWS 1927; ch. 165, § 10, WYO. LAWS 1925; ch. 103, § 50 WYO. LAWS 1907; *cf.* ch. 32, WYO. LAWS 1939; ch. 159, § 1, WYO. LAWS 1929.

covered under the workmen's compensation scheme had it been in effect.²³⁹ What would have been contractual claims have been satisfied by special appropriation on many occasions.²⁴⁰ Until included in the general appropriation, virtually each legislative session also passed special appropriations giving individual owners of diseased livestock the assessed or part of the assessed value of those animals destroyed by the State Veterinarian.²⁴¹ Only if these animals did not in fact have the alleged disease could there be any liability.²⁴² It is possible that the resulting liability would only be that of the State Veterinarian.²⁴³

Both special waivers of immunity and special appropriations are apparently attempts to ameliorate the harshness of governmental immunity without disturbing the basic doctrine; the legality of such attempts may, however, be questioned. Thus in *State ex rel. McPherren v. Carter*,²⁴⁴ the legality of a special appropriation²⁴⁵ for the relief of the wife of an under-sheriff killed in the line of duty was challenged by the State Auditor on the ground that it violated several constitutional provisions. These included the prohibition against "donations to or in aid of any individual . . .,"²⁴⁶ and the prohibition against the passage of special laws in cases where a general law can be made applicable.²⁴⁷ The court concluded that the appropriation was not invalid as a donation. It was of the opinion that although parties do not have legally enforceable claims against the state, they may have moral claims which the legislature is entitled to recognize.²⁴⁸ With respect to the argument that the legislation was invalid as a special act the court said:

239. Ch. 33, WYO. LAWS 1949; ch. 54, WYO. LAWS 1941; ch. 135, WYO. LAWS 1937; ch. 28, WYO. LAWS 1935; chs. 152, 153, WYO. LAWS 1929; chs. 115, 121, 134, 135, WYO. LAWS 1927; chs. 104, 105, 109, 110, WYO. LAWS 1923; ch. 151, § 59, WYO. LAWS 1909; ch. 103, §§ 17, 18, WYO. LAWS 1907.

240. *E.g.*, ch. 165, §§ 9, 11, 12, 16, WYO. LAWS 1925; ch. 170, §§ 18, 20-22, WYO. LAWS 1921.

241. *E.g.*, ch. 99, §§ 7-15, WYO. LAWS 1905; ch. 110, §§ 17-22, WYO. LAWS 1903; *see* ch. 146, § 27, WYO. LAWS 1961; ch. 29, WYO. LAWS 1917.

242. *See* note 223 *supra*.

243. *Compare* *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891) *with* *Spillman v. Beauchamp*, 362 S.W.2d 33 (Ky. 1962).

244. 30 Wyo. 22, 215 P. 477 (1923).

245. Ch. 110, WYO. LAWS 1923.

246. WYO. CONST. art. 16, § 6.

247. WYO. CONST. art. 3, § 27.

248. 30 Wyo. at 29-39, 215 P. at 479-83.

For the court to hold that a general law must be passed, if any, under which all claims of a general class of this kind could be presented and paid would, we think, unduly interfere with the legislative discretion to determine what is and what is not, in its judgment, a moral, just, and equitable obligation which demands payment at its hands. The Legislature might hesitate, and refuse, to pass a general law of that kind, and to that extent change the general principle of nonliability of the state. It may, however, be willing to give compensation in special cases, which demand special relief, and we are not warranted in holding that it cannot be permitted to do so in a case presenting facts like those in the case at bar.²⁴⁹

The Wyoming Supreme Court has not had occasion to deal specifically with special legislation authorizing suit against the state, although the above quoted paragraph appears to approve such a course. In addition it can be argued that if it is proper to appropriate state moneys to compensate someone with only a moral claim as was done in the *Carter* case, *a fortiori* it should be proper to allow a person with a moral claim to bring suit on his claim. When suit is being brought, the claim must be one which, absent immunity, would be compensable. The moral claims recognized by a special appropriation may, on the other hand, simply be a claim which even absent immunity is not legally recognized. Such indeed was the case in *Carter* where the widow was compensated for her husband's death, which had occurred in a gun battle. Further, in waiving governmental immunity the legislature is merely referring the work of a legislative committee to the courts. It has been suggested, however, that since appropriations cannot be made general they do not constitute special legislation in the same way as waivers of immunity, which could be general, and that for this reason courts are more apt to strike special waivers of immunity in torts cases.²⁵⁰

249. *Id.* at 42, 215 P. at 484.

250. 6 Wyo. L.J. 261 (1952). This case note contains a useful discussion of the *Carter* case.

Both special appropriations and special waivers of immunity are piecemeal attempts to deal with the basic injustices of governmental immunity and can generate annoying, time consuming work for the legislators.²⁵¹ It is a job which the legislature with limited time and investigative resources is poorly equipped to handle. In addition, both types of legislation favor those persons who either have a good relationship with a legislator or are sophisticated enough to know how to press their claims through the legislature. Further, the time and expense necessary to secure special legislation undoubtedly discourages people with smaller bona fide claims from even seeking compensation. Perhaps these problems with special legislation are why the state constitution limits it; perhaps the reasoning of the *Carter* court should be re-examined. If special acts are but ways to deal with some cases which bother the state's conscience, the state might be better off without any special acts—just a general statute waiving governmental immunity.

In the last five legislative sessions no special acts waiving immunity or appropriating moneys for parties damaged by state actions appear to have been passed. Very few claims have in fact been presented.²⁵²

C. Implied Consent

1. *Power to be sued*

What constitutes legislative assumption of or consent to governmental liability is not always easy to recognize. Several political subdivisions in Wyoming are created with the power to sue and to be sued.²⁵³ Although on its face the legislative

251. Although recent session laws indicate that no special relief is being granted, many people with substantial claims might seek compensation. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1970) was apparently the result of dissatisfaction of the Senate and House Committees on Claims with their chores. Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795. 823.

252. Interviews with Sterling Case, Deputy Attorney General for State of Wyoming in Cheyenne, Wyo., Aug. 3, 1971, and with State Senator Richard R. Jones, Chairman of Wyoming State Senate Ways & Means Comm., in Cody, Wyo., Jan. 19, 1972.

253. WYO. STAT. § 15.1-3(a) (1) (municipalities), § 15.1-119 (towns), § 18-48(1) (counties), § 18-330.10 (special museum dist.), § 21.1-27(a) (school dists.), § 21-475(a) (community college dists.), § 35-116 (hospital dists.), § 37-5 (Public Service Comm'n), § 41-389 (drainage dists.), § 41-479.13(3) (water and sewer dists.) (1957, Supp. 1971).

authorization "to be sued" may seem like a waiver of governmental immunity, the Wyoming court has held that language does not constitute any such waiver.²⁵⁴ This illustrates the traditional tendency of courts to construe strictly any statute waiving immunity so as to preserve the immunity,²⁵⁵ and it is in accordance with the weight of case law elsewhere.²⁵⁶ However, at least two states have abandoned the school of strict construction and have used this language as a basis for imposing governmental responsibility.²⁵⁷

2. Contracts

It has also been argued that in granting the state or a political subdivision the power to enter into contractual relationships and to sue for breaches of such contracts, the legislature by implication grants the other contracting parties the power to sue for breaches of contract. This is a type of mutuality argument. It raises the troublesome and seldom discussed question of how the governmental immunity doctrine applies to claims based upon contract.²⁵⁸

In *Harrison v. Wyoming Liquor Comm'n*, a liquor supplier sued the Commission for breaching a contract to purchase 4,800 cases of brandy.²⁵⁹ The Commission had been created by statute and given a public monopoly over the wholesaling of liquor within the state.²⁶⁰ The contract was obviously within the authority of the Commission, and the Commission had explicit power to sue for its breach.²⁶¹ Since the court deemed the Commission's purchasing program a governmental, not a proprietary, activity and thus immune from suit; it dismissed the authority of the Commission to con-

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

255. *Harrison v. Wyoming Liquor Comm'n*, 63 Wyo. 13, 117 P.2d 397 (1947).

256. *Annots.*, 86 A.L.R.2d 489, 527-28 (1962) and 25 A.L.R.2d 203, 224-25 (1952); 57 AM. JUR. 2d *Municipal, School, and State Tort Liability* § 64 (1971).

257. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Herrin v. Perry*, 254 La. 933, 228 So. 2d 649 (1969).

258. See *Jenkins, Public Contract Remedies in the United States at the State and Local Level*, 1 PUBLIC CONTRACT L.J. 44 (1967); cf. Note, *The Sovereign Immunity of the States*, 40 MINN. L. REV. 234, 257-58 (1956).

259. 63 Wyo. 13, 177 P.2d 397 (1947).

260. WYO. STAT §§ 12-38, -39 (1957).

261. Ch. 77, WYO. LAWS 1935; omitted in 1945 by compiler of statutes as being superseded by ch. 66, WYO. LAWS 1937 (WYO. STAT. §§ 1-1019 to 1023 (1957)).

tract for the brandy as irrelevant. As for the argument that the power to sue on a contract implied a correlative or reciprocal right to sue the Commission, the court said:

The state may sue; it has an inherent power to seek to enforce its rights and its interests in the courts . . . but it does not thereby surrender its immunity as a sovereign from suit by others. "The right of the state to sue in its own courts has always stood side by side with its right not to be sued."²⁶²

That a general legislative appropriation for the purchase of liquor might have led to a different result is unlikely. The Commission would still have had discretion as to what and how much to buy.

Why the state should be able to assert its immunity in an action for breach of a contract that it was authorized to enter into and that was made in conformity with law is hard to understand. Unauthorized or improperly executed contracts are of course invalid.²⁶³ But valid contracts ought to bind the state. To say that one contracts with the state knowing the risks inherent in its immunity may make the private party's plight less appealing, but it does not explain why immunity ought to be applied. It would seem that by authorizing the state to contract, the legislature is by implication waiving immunity with respect to contracts within the authorization.²⁶⁴ For goods or services already received, the legislature has occasionally passed special acts appropriating moneys to pay claims.²⁶⁵

At the local level of government the rigidity of the state's immunity on contract claims yields to the concept of implied consent to suit as long as the contract is authorized by law and is entered into in compliance with statutory require-

262. 63 Wyo. at 26, 177 P.2d at 399 (citations omitted).

263. See *Town of Worland v. Odell & Johnson*, 79 Wyo. 1, 329 P.2d 797 (1958); *Tobin v. Town Council*, 45 Wyo. 219, 17 P.2d 666 (1933).

264. See *Ace Flying Service, Inc. v. Colo. Dept. of Ag.*, 136 Colo. 19, 314 P.2d 278 (1957); *George & Lynch, Inc. v. Delaware*, ___ Del. ___, 197 A.2d 734 (1969); *Regents of Univ. of Georgia v. Blanton*, 179 Ga. 210, 176 S.E. 673 (1934); *Derby Road Bldg. Co. v. Commonwealth*, 317 S.W.2d 891 (Ky. 1958); *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. 1964).

265. *E.g.*, ch. 165, §§ 9, 11, 12, 16, Wyo. LAWS 1925; ch. 170, §§ 18, 20-22, Wyo. LAWS 1921. Of course, if the legislature has authorized suit upon contracts, there is no immunity if the procedure is followed. See notes 205, 207 *supra* and note 341 *infra*.

ments.²⁶⁶ By authorizing the contract the legislature by implication has apparently authorized the private party to enforce the contract. However, when a contract is in excess of the authority or the manner of its execution does not substantially comply with statutory conditions, the private party may not enforce it or even require payment for services rendered or goods received on a quasi-contract theory.²⁶⁷ The courts have reasoned that the legislature would not have consented by implication to suit if the contract was outside the powers it had granted, and furthermore, that if there is no valid contract, to permit implied contract theories to constitute a basis for recovery would be an easy method of circumventing the law.²⁶⁸

3. Duty

In *Fanning v. City of Laramie*, the court determined that the state legislature had waived by implication the usual municipal immunity in a situation where the city had failed to maintain a stop sign.²⁶⁹ The court classified the maintenance of the stop sign as an "imperative municipal duty"

266. *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304, 80 P. 155 (1905).

267. *Twitchell v. Bowman*, 440 P.2d 513 (Wyo. 1968) (School board members at irregular and invalid meeting had superintendent's contract purchased. In taxpayer's action, the purchase was held invalid and the money paid was ordered returned to the school district.); *Town of Worland v. Odell & Johnson*, 79 Wyo. 1, 329 P.2d 797 (1958) (Developer advanced funds to Board of Public Utilities to finance water and sewer improvements in a subdivision; such sums to be repaid from net revenues produced by providing water and sewer service to the subdivision. Since Board had no authority to borrow money, the developer was not allowed to recover the money from the municipality.); *Tobin v. Town Council*, 45 Wyo. 219, 17 P.2d 666 (1933) (Without advertising for competitive bids or appropriating money as required by statute, the Town Council had streets improved and made partial payment; therefore the court refused to require payment of balance.); *School Dist. No. 3 v. Western Tube Co.*, 5 Wyo. 185, 38 P. 922 (1895) (Contract void because it was not within district's budget and exceeded debt limit). See also *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972), where the question of the validity of a contract provision in which a county as lessee agreed to indemnify and hold the lessor harmless from all liability was presented to but not answered by the court. But see *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304, 80 P. 155 (1905) (Absence of minutes in school board records authorizing warrant or record in clerk's warrant stubbook for warrant, does not necessarily invalidate warrant. Liberal construction of board's powers plus ability to ratify contracts that might have been invalid when made led court to find an enforceable obligation.). See Antieau, *The Contractual and Quasi-Responsibilities of Municipal Corporations*, 2 ST. LOUIS U. L.J. 230 (1952).

268. See *Town of Worland v. Odell & Johnson* and *Tobin v. Town Council*, *supra* note 267.

269. 402 P.2d 460 (Wyo. 1965) noted in 1 LAND & WATER L. REV. 532 (1966).

which was "legislatively ordained."²⁷⁰ Historically a legislatively imposed duty has been the basis for immunity, not liability.²⁷¹ A political subdivision of the state which performed such a duty was thought to be acting as an agent for the state and thus entitled to its broad immunity.²⁷² The *Fanning* case appears to represent a break with this rather arid basis of immunity. The question is how far the court will be willing to go to find "imperative duties" which are "legislatively ordained." It is noteworthy, however, that the defect in the *Fanning* case, an obstructed stop sign, was arguably within the traditional municipal obligation to maintain public ways and that the *Fanning* opinion discussed both the public ways and the nuisance exceptions to immunity²⁷³ without indicating how important these theories were in the decision. If the statutory duty theory which was developed in the case is thus tied to defects in public ways or nuisance, *Fanning* does not expand governmental responsibility. On the other hand if *Fanning* is not so limited, it could be the basis for liability of a governmental entity wherever a duty is imposed. That the *Fanning* decision should not be read too broadly is indicated by a subsequent case in which the court conceded that a statutory duty—the issuance of certificates of title on motor vehicles—was present but refused to impose liability on the ground that the duty imposed was governmental in nature.²⁷⁴ If the statutory duty doctrine in the *Fanning* case is thus limited to activities which are proprietary or ministerial, the doctrine is meaningless since liability apparently exists in those areas even without a statutory duty.²⁷⁵

270. *Id.* at 467.

271. Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214, 221 (1942).

272. *Id.*

273. See the first installment of this article at pp. 256-61.

274. *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970). Cf. *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972) (Statutory power under § 18-149, Wyo. Stat. (1957), to keep buildings in repair does not constitute a statutory duty to do so). It is interesting to note that the author of the majority opinion in *Denver Buick* also distinguished *Fanning* on the ground that he had dissented in *Fanning*. With such reasoning, the theory of governmental responsibility for the performance of statutory duties has a precarious future indeed.

275. See the first installment of this article at pp. 249-56. See also pp. 245-49 of the first installment discussing *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970).

4. *Compensation for Damage*

Article I, Section 33 of the Wyoming Constitution promises that: "Private property shall not be taken or damaged for public or private use without just compensation." If any governmental entity intentionally takes private property, uses the property for public purposes and refuses to make payment, there is clearly a right to damages notwithstanding governmental immunity.²⁷⁶ Courts have reasoned that the constitutional guarantees against taking or damaging property are self-executing and that the property owner can initiate a claim for damages in "inverse" or "reverse" eminent domain.²⁷⁷ However, as observed in the first installment of this article, Wyoming and most states have determined that damages caused by negligent performance of public functions are not included within the constitutional guarantee.²⁷⁸ Whether the guarantee might obligate a governmental entity which has received property pursuant to a void contract to make payment if the property cannot be returned is a problem that the courts apparently have not been asked to decide.

In sum, although the Wyoming court has rejected the use of the constitutional provision guaranteeing compensation for taking or damaging of property as a basis for imposing governmental responsibility, the potential of the implied waiver in connection with statutory duties, the recognition of implied waiver in connection with local government contracts, and the express waivers cited in the preceding discussion constitute some noteworthy exceptions to governmental immunity in Wyoming. In addition it should be recalled that the federal law limits the immunity defense of public officers and employees in civil rights cases.²⁷⁹

276. See VAN ALSTYNE, A STUDY RELATING TO SOVEREIGN IMMUNITY 102-08 (Calif. Law Revision Comm'n 1963); Note, *The Sovereign Immunity of the States*, 40 MINN. L. REV. 234, 255-56 (1956).

277. *Id.*

278. See the first installment of this article at p. 238. For the Wyoming view see *Chevez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964). Whether taking or damages resulting from commandeering private property during an emergency are compensable is apparently covered by statute. See note 208 *supra* and accompanying text.

279. See the first installment of this article at p. 248.

V. INSURANCE

The basic unfairness of the doctrine of governmental immunity has led to a search for effective alternatives. The purchase of liability insurance is one such alternative.²⁸⁰ In Wyoming municipalities,²⁸¹ school districts,²⁸² community college districts,²⁸³ hospital districts²⁸⁴ and possibly the state²⁸⁵ have legislative authorization to purchase such insurance. Coverage is apparently extensive.

A. Insurance as a Waiver of Immunity

In Wyoming it is established that liability insurance has no effect on governmental immunity absent legislative authorization. The first Wyoming case so holding was *Price v. State Highway Commission* in which a motorist was injured in an accident with a snowplow.²⁸⁶ The Court held that the defendant was protected from liability for the accident by the governmental immunity doctrine. In response to the plaintiff's argument that since the Commission carried insurance covering the liability he sought to impose, immunity ought not to apply; the court cryptically answered: "[t]he Commission cannot give consent to what the law does not permit"²⁸⁷

In *Maffei v. Incorporated Town of Kemmerer*, the effect of liability insurance on immunity in the absence of any statute was discussed at length.²⁸⁸ In that case the plaintiff's decedent had been fatally shot by a burglar whom he and the town constable were tracking. Since the town carried comprehensive liability insurance which contained a clause requiring the insurer to waive the defense of immunity, the plaintiff argued that the public treasury would not be affected by the

280. For valuable discussions of governmental purchase of liability insurance see Gibbon, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588; Notes, 33 MINN. L. REV. 634 (1949); 34 NEB. L. REV. 78 (1954); 18 WYO. L.J. 220 (1964).

281. WYO. STAT. § 15.1-4 (1957).

282. WYO. STAT. §§ 21.1-42 to -46 (Supp. 1971).

283. WYO. STAT. § 21-475(k) (Supp. 1971).

284. WYO. STAT. § 35-136.7 (Supp. 1971).

285. WYO. STAT. § 9-276.18:69(1), (m) (Supp. 1971).

286. 62 Wyo. 385, 167 P.2d 309 (1946).

287. *Id.* at 395, 167 P.2d at 312.

288. 80 Wyo. 33, 338 P.2d 808 (1959).

outcome and the very existence of the insurance constituted a waiver of municipal immunity. The court rejected this argument saying that even though insurance might protect the public treasury, the immunity doctrine was too firmly imbedded in the common law to enable its circumvention by the mere purchase of liability insurance.²⁸⁹ The court continued that even if it conceded that the immunity doctrine should be waived in situations where the public treasury was saved harmless, this was not such a situation. The court argued that in the present litigation there was no guarantee that the judgment would not exceed policy limits. It also claimed that even if the judgment were within the policy limits, the municipality might not be able to recover from the insurer either due to legal defenses or insolvency of the insurer. Thus the opinion concluded that only with statutory authorization could liability insurance limit governmental immunity.²⁹⁰

The plaintiff in *Maffei* had also argued that since the insurer had agreed to waive the defense of immunity, the insurer ought to be liable on either an estoppel, waiver or third party beneficiary theory notwithstanding the municipality's immunity. The court declined to pass on the question due to the absence of the insurer as a party to the litigation.²⁹¹ In *Spaniol Ford, Inc. v. Froggatt* an action against a surety was also dismissed on the ground that the surety shared in the principal's immunity from liability; however, the case is not directly in point since there was no indication the surety had agreed to waive the defense of immunity.²⁹² No other reported Wyoming cases have dealt with this issue of insurer liability. It appears that in the absence of a statute allowing an action directly against the insurance company without joining the tortfeasor, such recovery from the insurer would not be allowed.²⁹³

289. *Id.* at 55, 338 P.2d at 816.

290. *Id.* at 59, 338 P.2d at 818. This holding in the *Maffei* case was cited and reaffirmed in the recent case of *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972), where the court rejected the argument that a county should be liable for torts because of the existence of liability insurance.

291. *Id.* 59-60, 338 P.2d at 817-18; *rehearing denied*, 80 Wyo. 61, 340 P.2d 759 (1959).

292. 478 P.2d 598 (Wyo. 1970).

293. *Gibbon*, *supra* note 280, at 597-99. The continuing immunity of the governmental entity may indicate that it has paid insurance premiums without

Even if the legislature authorizes the purchase of liability insurance, governmental immunity is not necessarily waived. An explicit statutory waiver of immunity to the extent of insurance coverage is, of course, effective. However, absent such an explicit waiver courts have tended to construe the purchase of insurance pursuant to mere authorization for such purchases as having no effect upon immunity.²⁹⁴ Although the problem appears to have been considered by the Wyoming court,²⁹⁵ it is not certain how it would be resolved. In *Maffei* the court allowed that insurance purchased pursuant to a statute which did not waive immunity might permit a suit against the government if certain conditions are met:

[E]ven though the purchase of insurance should be authorized by statute, the desired [liability] cannot be assured, unless the insurance company is joined in the action as a co-defendant and made solely responsible to answer to any judgment rendered, or in the absence of such joinder, any judgment authorized to be rendered is limited to be recovered only from moneys made available by the insurance company and not otherwise.²⁹⁶

If a plaintiff could so structure his pleadings as to limit recovery to insurance proceeds actually collectable from the carrier, he could apparently recover. Hopefully courts would allow plaintiffs to so structure their pleadings. Unless this is allowed, those statutes which permit the purchase of liability insurance will be rendered meaningless. Insurance

receiving any consideration. The courts have decreed restitution of premiums in such situations. See cases cited in Gibbon, *supra* note 280, at 595 n.24. See also 6 COUCH, INSURANCE § 34.21 (2nd ed. Anderson 1961).

294. Gibbon, *supra* note 280, at 601-03. See cases cited in Annot., 68 A.L.R.2d 1437, 1441-44 (1959).

295. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (Wyo. 1959); cf. *National Surety Co. v. Morris*, 34 Wyo. 134, 241 P. 1063 (1924). In the *Morris* case the court indicated that as a result of legislation requiring banks to provide surety bonds to protect the state's deposits the state waived its preference in the event of bank insolvency. Governmental immunity is comparable to such a preference in that it too is intended to protect public moneys. Thus just as the surety bond requirement was said to implicitly waive the state's preference in *Morris*, so too authorization to carry liability insurance could be construed as implicitly waiving governmental immunity to the extent of the policy limits. But see *Davis v. Board of County Comm'rs*, 495 P.2d 21, 24 n.5 (Wyo. 1972), where the court implies that both authorization and an express waiver is necessary. However, the *Davis* opinion gives no indication that it intended to overrule the remarks in the *Maffei* case on this point.

296. 80 Wyo. at 59, 338 P.2d at 818.

would only be effective in those areas to which immunity does not apply—areas in which coverage could be purchased without legislative authority.²⁹⁷

It should be noted that the limited effectiveness of liability insurance absent legislative consent and waiver of immunity does not mean that the carrying of such insurance is without any justification.²⁹⁸ Those areas in which there is governmental responsibility—such as for proprietary activities—can be covered. In addition, liability insurance covering the liabilities of public employees for negligence is undoubtedly a legitimate fringe benefit; however, the limited degree of employee liability in Wyoming would limit the risk being covered. Finally, governmental entities might even want to carry liability insurance simply to protect themselves against an unexpected change in the immunity doctrine. No special legislation should be needed to purchase insurance for these purposes. Since they are liabilities to which the government and its employees are exposed absent insurance, the payment of insurance premiums is merely a prudent substitute for payment of the claims themselves, or in the case of employees they are a benefit comparable to wages. However, paying extra premiums for coverage of immune activities would seem to be an unauthorized expenditure of public moneys for which the responsible government officials might even be liable.²⁹⁹ Since only the legislature apparently has the power to authorize compensation for injured persons directly out of the public treasury,³⁰⁰ it would seem that indirect compensation through the payment of insurance premiums should also require legislative authorization.³⁰¹

297. *Travelers Ins. Co. v. Village of Wadsworth*, 109 Ohio St. 440, 142 N.E. 900 (1924). Annot., 68 A.L.R.2d 1437, 1447-48 (1959).

298. Many of the ideas which follow are more fully developed in Gibbon, *supra* note 280, at 591-95.

299. See Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 854, 854-55 (1942).

300. See 56 AM. JUR.2d *Municipal Corporations, Counties & Other Political Subdivisions*, § 804 (1971); 18 MCQUILLIN, *MUNICIPAL CORPORATIONS* § 53.28 (3rd ed. 1963).

301. See *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959). It is ironic that when the author of the *Maffei* opinion was the Wyoming Attorney General, his office issued an opinion advising the Trustees of the University of Wyoming that although both the University and its employees enjoyed immunity from liability for the negligent operation of university vehicles, it was within the discretion of the Trustees to

B. Statutes Authorizing Insurance

1. *Municipalities*

Perhaps the most important exception to municipal immunity in Wyoming is the presence of liability insurance. Section 15.1-4, Wyoming Statutes, authorizing cities and towns to purchase liability insurance and waiving immunity to the extent of coverage, reads as follows:

(a) Any city or town may carry liability insurance in an amount deemed necessary by the governing body. The insurance shall be on standard policy forms approved by the state insurance commissioner, with companies authorized to do business in Wyoming, and shall be paid out of the general fund of the city or town.

(b) Any person damaged by the claimed negligent acts of a city or town, its officer, servants, employees or agents so insured may maintain an action for damages against the city or town. The amount of damages recovered shall not exceed the limits of the policy or policies of insurance. No city or town may plead its governmental immunity as a defense in any action involving its liability insurance.

.....

(d) This section applies only to the negligent acts of the cities or towns, their officers, servants, employees or agents in the performance of governmental functions.

This statute was evidently the legislative reaction to the case of *Maffei v. Incorporated Town of Kemmerer*,³⁰² which was decided less than two years before the first version of Section 15.1-4 was enacted.³⁰³

purchase liability insurance to compensate persons injured by such negligence. *Wyo. Att'y Gen. Op. May 17, 1951* in OPINIONS OF ATTORNEYS GENERAL OF THE STATE OF WYOMING 1948-53, 541 (1953). This is contrary to an earlier opinion of the Wyoming Attorney advising a school district that it could not purchase liability insurance in the absence of liability. *Wyo. Att'y Gen. Op. Sept. 29, 1931* in BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF WYOMING 1931-1933, 136 (1932). See also Borchard, *Recent Statutory Developments in Municipal Liability in Tort*, 2 LEGAL NOTES ON LOCAL GOV'T 89, 96-97 & nn.65, 66 (1936) collecting and discussing the attorney generals' opinions from various states the majority of which advised against the purchase of insurance in that context.

302. 80 Wyo. 33, 338 P.2d 808 (1959).

303. Ch. 81, WYO. LAWS 1961.

Although Section 15.1-4 supplies the legislative consent, the lack of which had blocked recovery in the *Maffei* case, the section is obviously less than an abolition of municipal immunity. It merely authorizes the purchase of liability insurance and only waives immunity to the extent of the limits of insurance so obtained. If a municipality chooses not to purchase insurance or purchases nominal coverage, the section is of little effect. The crucial questions thus become how many municipalities are purchasing liability insurance and what are the policy limits. A survey of Wyoming municipalities tabulated in Table I indicates the nature and extent of their insurance purchases.

TABLE I

Municipal Insurance³⁰⁴

	Towns under 500	Towns between 500 and 4,000	Cities 4,000 and over
Number of municipalities	41	26	16
Number sent questionnaires	11	16	16
Number of questionnaires returned	5	12	14
Number with insurance	1	10	12
Percentage of those returned with insurance	20%	83%	86%
Average policy limits:			
Property damage*	N.A.	\$ 22,000	\$ 83,000
Bodily injury:			
One person	N.A.	\$106,000	\$127,000
More than one	N.A.	\$267,000	\$300,000

*When dual limits for property insurance were given, the lower (single person) limit was used.

304. Survey conducted by author in July, 1971.

That more than 80% of the communities over 500 population responding to the survey carried liability insurance seems remarkable in view of the voluntary nature of insurance. There are several possible reasons for this high degree of coverage. Large areas of municipal liability even without the waiver of Section 15.1-4 probably led many communities to take out insurance even before the enactment of that section simply to protect against existing liability. Some municipal officials feel that the community ought to reimburse those persons injured by its activities.³⁰⁵ Such officials might also desire insurance to cover their own potential liability. Insurance agencies undoubtedly promote such purchases. Although the low percentage of smaller towns with insurance is perhaps also remarkable, it is not too troublesome. Only those municipalities over 500 are apt to have full time employees, own vehicles, provide municipal services and thus injure persons or damage property.

Since Section 15.1-4 only waives immunity to the extent of policy limits, the amount of coverage purchased is crucial. The average limits shown on Table I are barely adequate for private risks. It is not hard to imagine incidents in connection with municipal utilities (or even automobile accidents) which give rise to claims exceeding one million dollars. If the purpose of the insurance is to make possible recovery equivalent to that available from a private business, insurance adequate for this purpose should be secured. If municipalities intend to provide limited compensation for injuries arising from *governmental* functions only, whatever coverage they feel is humane compensation would be adequate.³⁰⁶ However, in view of the unlimited liability of municipalities for proprietary functions even with insurance, the purchase of policy limits that are low could be considered an abuse of discretion by municipal officials.

The survey questionnaire asked what exclusions from coverage were contained in the insurance policies. While it is impossible to identify any patterns in the exclusions men-

305. *Id.*

306. Compare payment schedules in Workmen's Compensation schemes which provide modest benefits as contrasted to jury verdicts.

tioned, they include false arrest, libel, slander, airport accidents, and products liability. The first three are in the nature of intentional torts which liability insurance possibly cannot cover.³⁰⁷ The fourth exclusion, airport accidents, is questionable since most courts have classified airports as proprietary³⁰⁸ and thus municipalities are exposed to a liability which they ought to consider insuring against. The fifth exclusion, products liability, is curious. It apparently is the insurance industry's reaction to an expansive area of liability, but its use in the municipal as opposed to manufacturing area is inappropriate. What, for example, does it mean with respect to the municipalities' liability for street maintenance or the purity of water?

In discussing insurance, the *Maffei* case pointed out the hazards to municipalities of insolvent insurers and insurers who though solvent refuse to pay a claim.³⁰⁹ Presumably the fact that Section 15.1-4(b) only prohibits the municipality from pleading the defense of immunity in an "action involving its liability insurance" means that if an insurer cannot or will not pay a claim, governmental immunity can be invoked. Thus the hazards which bothered the *Maffei* court are hopefully avoided. However, in allowing the immunity doctrine to be thus invoked two possible problems are created for the injured person. First, since the insurer is only secondarily liable, such inability or legally justified refusal to pay might not be known until after litigation has been concluded. Although raising the immunity defense at that point would be procedurally awkward, courts would probably be required to permit it. Since municipal liability is apparently limited to what the insurer can be compelled to pay, the statute should perhaps authorize a direct action against the insurer. The second problem is that municipalities might defeat recovery by purchasing coverage from financially unsound companies or by refusing to comply with policy requirements such as

307. 9 COUCH, INSURANCE § 39:15 (2d ed. Anderson 1962). Annot., 20 A.L.R.3d 320, 331 (1968).

308. 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.96 (3d ed. 1963). Cf. *City of Cheyenne v. Board of Comm'rs*, 484 P.2d 706 (Wyo. 1971), holding certain leased airport buildings proprietary for tax assessment purposes but not reaching the question of whether the airport itself was proprietary for tax assessments or liability purposes.

309. 80 Wyo. at 56, 338 P.2d at 816.

notifying the insurer of accidents within a specified time or co-operating in litigation. Since the purchase of insurance is voluntary, it would be harsh to place the risk of carrier insolvency upon the municipality. However, to allow the municipality to defeat recovery by intentional or negligent noncompliance with policy requirements would be even more unfair to the injured person. Either the municipality ought to be responsible for such wrongful acts of its employees or the carrier should not be allowed to escape liability—perhaps on the theory that since the policy is solely for the benefit of third parties, actions by the municipality cannot defeat recovery.

Another problem area is presented by the fact that Section 15.1-4 is limited to “governmental functions.” It is clear that the section does not limit recovery to the amount of insurance coverage for proprietary activities. In *Town of Douglas v. York* a judgment in excess of policy limits was entered by the court on a claim rising out of an activity which was classified as proprietary.³¹⁰ Thus the governmental-proprietary distinction with all of its shortcomings is maintained. It is not clear, however, that liability is necessarily confined to policy limits for all governmental functions. As the previous discussion pointed out, there have been exceptions to immunity for governmental functions.³¹¹ These exceptions include statutory duty, defects in public ways, and perhaps ministerial acts and nuisance. That what had previously been unlimited liability for certain types of governmental functions should now be limited by insurance coverage would be inappropriate. The apparent purpose of Section 15.1-4 was to permit an expansion of, not to impose limitations on, governmental responsibility for governmental activity.

In addition, Section 15.1-4(d) speaks of “negligent activities.” At least in the case of nuisance, negligence is not always necessary for liability. It is doubtful that the act intended to abolish municipal responsibility for nuisances occurring in connection with governmental functions.

310. 445 P.2d 760 (Wyo. 1968).

311. See the previous installment of this article pp. 255-62.

Although liability arising from proprietary functions and perhaps nuisance, defects in public ways, breach of statutory duty and other such theories is not covered by Section 15.1-4, that does not necessarily mean that insurance coverage against such liability cannot be purchased. As noted previously municipalities have the implied power to insure against liabilities arising out of proprietary activities.³¹² The important point to note is that Section 15.1-4 only deals with liability insurance and waiver of immunity for negligence in the performance of governmental functions—presumably those for which there would have been immunity but for the statute.

One issue on which the statute is silent concerns the traditional and probably necessary rule of granting immunity for discretionary activities. Discretionary acts of municipal officials may occur in the course of governmental functions.³¹³ If simply because insurance coverage has been purchased there is to be liability for negligence in the exercise of discretion in connection with governmental functions, perhaps too much immunity has been waived as a matter of public policy. It would seem preferable to allow discretionary immunity except for situations involving abuse of discretion.³¹⁴

A mechanical problem with liability limited to insurance is the situation involving several injured parties with aggregate damages in excess of policy limits.³¹⁵ It is necessary to join all plaintiffs in one action or some of the potential plaintiffs may recover nothing. Perhaps plaintiffs should be required either to interplead others with possible claims growing out of the same occurrence or to allege that there are none. Presumably if there are several claimants with claims exceeding policy limits, they should share ratably in the insurance funds according to their relative damages.³¹⁶

312. See note 297 *supra*.

313. See the previous installment of this article p. 246.

314. See 3 DAVIS, ADMINISTRATIVE LAW § 26.04 (1958, Supp. 1970).

315. This has apparently already occurred. See *Town of Douglas v. Nielsen*, 409 P.2d 240 (Wyo. 1965); *Town of Douglas v. York*, 445 P.2d 760 (Wyo. 1968).

316. Of course, if the act of the municipality which gives rise to the cause of action is not governmental but proprietary in nature, there would be general municipal liability for damages exceeding policy limits.

2. *School Districts*

A series of sections in the statutes authorize, and in one situation require, school districts to have liability insurance.³¹⁷ The key section, Section 21.1-45, provides as follows:

(a) The board of Trustees of each school district within the state may procure a policy or policies of comprehensive liability insurance which would save the school district harmless from financial loss arising out of any claim, demand, suit or judgment for personal injury or death occasioned by the alleged tort of any officer, employee, or agent of the school district. The policy or policies shall specify a maximum amount of fifty thousand dollars (\$50,000.00) or more payable for injury to any one person and a maximum amount of five hundred thousand dollars (\$500,000.00) or more payable for any one accident regardless of the number of persons injured.

(b) The defense of governmental immunity is expressly waived to the extent of any insurance coverage of the district involving any such alleged tort. All defenses which would be available to a private corporation in an action against such corporation for the torts of its officer, employees, or agents shall be available to a school district in any action against it arising under this section.

(c) This section shall not apply to any insurance on school vehicles or transportation of children.

Several aspects of Section 21.1-45 require comment. As with municipalities, coverage is optional. Only if school districts purchase liability insurance will there be any waiver of immunity. Table II indicates that more than 80% of the districts carry liability insurance. It is interesting that this incidence of coverage is approximately the same as was found in the survey of municipalities. It is, however, even more remarkable than the high incidence in the case of municipalities because school districts have historically enjoyed a much greater degree of governmental immunity than municipalities;³¹⁸ in fact the Wyoming Supreme Court has not yet been asked to decide a case involving the immunity of a school district.

317. Wyo. STAT. §§ 21.1-42 to -46 (Supp. 1971).

318. See first installment of this article at pp. 232-33, 241-42.

Since immunity is only waived to the extent of insurance coverage, policy limits are also important. The limits shown on Table II are comparable to the limits in policies carried by municipalities and are subject to the same criticisms.³¹⁹

TABLE II

School District's General Liability Insurance³²⁰

	Number of pupils		
	Under 75	76-500	501 and over
Number of districts in state	24*	40	32
Number of districts answering questionnaire	4	28	32
Number with general liability insurance	3	24	27
Percentage with general liability insurance	75%	86%	84%
Average policy limits for general liability insurance:**			
Property damage***	N.A.	\$ 28,333	\$ 27,000
Bodily injury:			
One person	N.A.	\$100,000	\$100,000
More than one	N.A.	\$383,333	\$340,000

* Many of the small districts have no pupils or no facilities.

** Questionnaire did not ask for data on policy limits; however, 9 districts supplied this information anyway. All had approximately the same limits.

***When dual limits for property insurance were given, the lower (single person) limit was used.

The significance of the dollar figures in the last sentence of Section 21.1-45(a), and their relationship to coverage that is

319. See p. 637 *supra*. Of course since motor vehicle coverage for school districts is separate and the policy limits are generally somewhat higher, the astronomical claims that could result from a serious school bus accident are not of concern at this point in the discussion. See Table III, p. 645 *infra* and the accompanying discussion of school district motor vehicle insurance.

320. Survey conducted by the Wyoming School Boards Ass'n, Laramie, Wyo., Oct., 1971. The general liability policies in this table do not include coverage of motor vehicle accidents. Such coverage is separate and is detailed in Table III at p. 645 *infra*.

actually being purchased as indicated on Table II is uncertain. The \$50,000/\$500,000 figures could either represent the maximum or the minimum amount of insurance school districts are authorized to purchase. This writer would suggest they set a minimum. The dollar amounts seem to be only the maximum payable to one person or in one accident under the lowest permitted bodily injury coverage. Such a construction of the last sentence in the section would give effect to both the phrases "maximum amount" and "or more" which are otherwise irreconcilable. However, such a construction would mean that school districts are required to choose between no coverage (and no waiver of immunity) and \$50,000/\$500,000 coverage—which is evidently more than they want. The disparity between the coverage being purchased and the apparent requirement of the section is probably of no significance. In view of the ambiguity of the statute it would be petty indeed for any school district, insurer or court to claim that policies with limits less than \$50,000/\$500,000 are void. Whether these minimum policy limits have discouraged some school districts from purchasing insurance because of the amount of the premium is unknown.

It is noteworthy that Section 21.1-45 only authorizes insurance against liability for personal injury or death caused by officers, employees and agents of the district. Property coverage is not authorized. Since there is no apparent reason for this omission, it would seem advisable to include property. As Table II reveals, school districts with liability insurance have purchased such property coverage. As noted above, the effectiveness of such unauthorized coverage as any waiver of immunity is doubtful and premiums paid therefor are perhaps improper expenditures of district funds.³²¹

It is also hard to understand why coverage must be limited to torts caused by officers, employees and agents. It would seem that injuries could arise from situations such as the condition of buildings for which a district ought to be liable but which are not attributable to the tortious acts of officers, employees and agents.

321. See p. 634 *supra*.

The Wyoming Supreme Court has not yet dealt with the liability of school districts for damages. Assuming, however, that even in the absence of Section 21.1-45 a school district could be held liable in some situations for torts, does this statute limit liability to the policy limits even in those situations in which liability would otherwise have been unlimited? Since the statute was apparently intended to expand the area of liability, not limit it, it would seem that such a limitation on recovery would be unjustified.³²²

The clause in Section 21.1-45(b) saving the defenses of a private corporation to school districts is probably superfluous. That the district ought to enjoy these defenses should be beyond dispute.³²³

Section 21.1-45 does not, by virtue of the language in subsection (c), authorize insurance on school vehicles or the transportation of children. That matter is covered in Section 21.1-42, which requires that either school districts or the owners of vehicles *contracted* for use by school districts must carry liability insurance

. . . covering any vehicle used for the transportation of school children or used in the operation of the school district The defense of governmental immunity is expressly waived in any action to the extent of any insurance coverage of the district involving such an insured vehicle.

Two problems with this section should be noted. First, it requires no minimum policy limits. The value of the insurance requirement can thus be nullified by nominal purchases. Table III indicates that, in fact, the coverage being purchased is quite substantial and exceeds the coverage purchased by school districts for liability insurance, other than for motor vehicles (Table II), and by municipalities for comprehensive liability insurance (Table I). However, one cannot help but wonder if a \$500,000 policy would be adequate in case a school bus full of students had a serious accident.

322. Cf. discussion of comparable problem with regard to section 15.1-4 of the Wyoming Statutes authorizing insurance for municipalities, pp. 635-40 *supra*.

323. Compare with section 15.1-4 of the Wyoming Statutes which does not explicitly save defenses. Surely defenses of a private corporation are not waived under section 15.1-4.

TABLE III
 School District's Motor
 Vehicle Liability Insurance³²⁴

	Number of pupils		
	Under 75	76-500	501 and over
Number of districts in state	24*	40	32
Number of districts answering questionnaire	4	28	32
Number with motor vehicle liability insurance	4	28	32
Percent with auto liability insurance	100%	100%	100%
Average policy limits for auto liability insurance:			
Property**	\$ 28,000	\$159,000	\$ 98,000
Bodily injury:			
One person	\$ 70,000	\$231,000	\$145,000
More than one	\$273,000	\$450,000	\$506,000
Policies excluding vehicles not owned by the district	2	10	5
Percent of policies excluding vehicles not owned by school district	50%	36%	16%

* Many of the small districts have no pupils or no facilities.

**When dual limits for property insurance were given, the lower (single person) limit was used.

The second problem with Section 21.1-45 is that it only requires insurance on and waives immunity with regard to vehicles owned by the school district or private vehicles used by the school district *under contract*. Undoubtedly school

324. Survey conducted by Wyoming School Boards Ass'n, Laramie, Wyo., Oct., 1971.

district personnel frequently use their cars for district business on an informal basis yet there is no provision to require that they carry insurance or even to authorize the school district to carry such blanket coverage and waive immunity. In fact, however, Table III indicates that a large percentage of the districts' policies do cover any vehicle, even privately owned ones, used for school district purposes.

Finally, when Section 21.1-42 is compared to Section 21.1-45, it is of interest that property damage coverage is evidently required, tortious acts need not be those of an "officer, agent or employee," coverage is mandatory and defenses are not explicitly saved. The presence of two sections on liability insurance with such conflicting provisions is not desirable.

Section 21.1-44 authorizes insurance to protect school districts' board members, teachers and other personnel against

financial loss arising out of any claim, demand, suit, or judgment by reason of alleged negligence or other act resulting in accidental bodily injury or death to any person within or without the school building; provided, such board member, teacher, or other personnel at the time of the accident was acting in the discharge of his duties within the scope of his employment. Each board of trustees may procure appropriate policies of insurance to maintain this protection, or it may elect in its discretion to act as a self-insurer. This section shall not be construed as creating or tending to create a liability of the school district so protecting or insuring board members, teachers, or other personnel, nor shall the failure to procure such insurance as is authorized by this section be construed as creating any liability of the school district.

If the principles developed in the Wyoming cases regarding individual liability are relevant to the school district situation, there are few situations in which school district personnel would be liable if the district itself was not liable.³²⁵ To the extent this is the case, the statute does little but perhaps permit the purchase of insurance in the limited area of individual liability. Assuming, however, that the section was intended

325. See the first installment of this article at pp. 243-49.

to authorize coverage of acts for which personnel are not normally liable, that would not necessarily mean that there would be a waiver of immunity to the extent of coverage. Mere authority to carry insurance may not be a waiver of immunity.³²⁶ Thus the school district or the insurer could probably still assert the governmental immunity defense. In fact, the section concludes by saying it is not in any way to be construed as creating liability on the part of the school district. In this connection note also that the section authorizes self insurance. To be a self-insurer and yet immune from suit is incongruous indeed. Finally, the section omits any provision authorizing property damage coverage.

Section 21.1-43 authorizes school districts to provide accident insurance to students or make it available for their purchase. It has only a tenuous relationship to governmental immunity since it is not clear that the insurance is a substitute for what would normally be the liability of a private organization. Perhaps it is more analogous to a workmen's compensation scheme both in that recovery would be independent of fault and in that the payment schedule is less than the typical jury verdict for comparable injuries. In any event, the section is worded similarly to Section 21.1-44; there is the same doubt over whether it waives any immunity, and it disclaims the creation of liability—even when the district is a self insurer.

3. *Community College Districts and Hospital Districts*

Section 21-475(k) of the Wyoming Statutes authorizes the boards of community college districts to:

Insure against public liability or property damage concerning the facilities authorized by the governing board, and insure and hold harmless from liability all administrative and teaching personnel, and all other employees of the community college district.³²⁷

Similarly in authorizing hospital districts to issue revenue bonds, Section 35-136.7 of the Wyoming Statutes authorizes

326. See pp. 633-34 *supra*.

327. WYO. STAT. § 21-475(k) (Supp. 1971).

the board of trustees of the district to insure facilities acquired or improved with the proceeds of such bonds against public liability.³²⁸ Neither of these statutes contains any waiver of immunity. Whether the statutes would be construed as authorizing the purchase of insurance for immune activities is uncertain. The earlier discussion of this problem in connection with the *Maffei* case would govern.³²⁹

4. *The State*

The only statutory provisions for the purchase of insurance by the State of Wyoming and its boards, agencies, commissions and other constituent bodies is contained in legislation passed by the 1971 legislature which authorizes the newly created State Department of Administrative and Fiscal Control to:

(l) Secure and maintain insurance or otherwise protect against fire and other perils on all buildings and structures and the contents thereof, and other properties owned by the State of Wyoming or any of its agencies. The insurance so to be secured and maintained shall be in an amount which, in the judgment of the department, shall be adequate to protect the interest of the State of Wyoming and, where appropriate, the interest of the United States.

(m) Secure and maintain insurance against the risks of fire and theft and such other insurance as shall be deemed necessary on all motor vehicles and trailer attachments owned by the State of Wyoming or any of its agencies. The insurance so to be secured and maintained shall be in an amount which, in the judgment of the department, shall be adequate to protect the interest of the State of Wyoming. The department shall not, however, under the mandate of this section, purchase any policy insuring against the risks of collision or upset.³³⁰

It is not clear that either of these paragraphs authorizes the purchase of *liability* insurance or waives governmental

328. WYO. STAT. § 35-136.7 (Supp. 1971).

329. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959). See pp. 633-34 *supra*.

330. Ch. 203, § 21, WYO. LAWS 1971 codified as WYO. STAT. § 9-276.18:69 (Supp. 1971).

immunity. In fact neither paragraph even mentions liability insurance. The phrases "other perils" and "such other insurance" constitute the only basis for buying liability coverage. Both phrases are highly ambiguous and follow references to particular types of insurance which are designed to compensate for damage to state property. Also, both paragraphs only authorize coverage adequate to protect the interests of the State of Wyoming. To the extent the state has immunity from suit, it has no legal interest which would be protected by the purchase of liability insurance. It is doubtful the moral responsibility that public officials may rightfully feel to compensate injured parties would constitute any insurable interest.

It should also be noted that paragraph (m) prohibits the purchase of insurance "against the risks of collision or upset." Since collision insurance is a particular type of policy which only covers damage to the insured's vehicle,³³¹ a prohibition against only this type of insurance would simply mean that the state would absorb the damages to state owned vehicles. "Risks of collision or upset" is, however, a much broader phrase and would seem to include all liabilities arising out of an accident. Although such a broad construction of the phrase could be justified on simple word analysis, a narrow construction which limited the prohibition to collision insurance would be more in keeping with the insurance industry's understanding of the term and probably with legislative intent. In any case, even if this is not a prohibition against the purchase of automobile liability insurance, it certainly is not an explicit authorization for such insurance.

Assuming that one or both of the paragraphs authorize the purchase of liability insurance, they only deal with limited areas—real estate and motor vehicles—and there is no indication that governmental immunity would be waived. The earlier discussion of the *Maffei* case points out the uncertain effect of mere authorization to purchase insurance on the immunity question.³³²

331. 11 COUCH, INSURANCE § 42:192 (2d ed. Anderson 1963).

332. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959); see pp. 633-34 *supra*.

Notwithstanding the uncertainties surrounding the authority of the state and state agencies to carry liability insurance, virtually all state vehicles are covered by liability insurance, with the named insured including both the state and employees.³³³ The University of Wyoming has purchased comprehensive liability insurance in addition to liability insurance on motor vehicles.³³⁴ All of these state policies include clauses in which the insurer waives the defense of governmental immunity.³³⁵ Unless claims exceed policy limits or there is some question of negligence, injured parties evidently recover under these policies as a matter of course. No litigation occurs and the doctrine of governmental immunity is ignored. It would seem, however, that the payment of premiums for insurance which is not authorized and cannot be legally enforced is improper and might subject those officials responsible for authorizing such payments to liability for an improper expenditure of public funds.³³⁶ These uncertainties surrounding the state's insurance deserve prompt legislative attention.

VI. PRACTICE

In trying to secure compensation from the state and its political subdivisions for injuries caused by their activities, the primary concern may well be the question of whether or not the particular governmental entity enjoys immunity under the circumstances. However, the manner in which the claim is presented is frequently no less important.

Once it is determined that a person has been damaged by the activities of a governmental unit, the first formal step should be to present the claim to that unit. The Wyoming Constitution forbids the disbursement of public moneys "un-

333. Interview with Lee Galeotos, Director of Department of Administration and Fiscal Control of State of Wyoming, in Cheyenne, Wyo., Aug. 3, 1971.

334. See policy on file in the Office of the Division of Finance & Budget of University of Wyoming, in Laramie, Wyo. The University has been told by the Wyoming Attorney General that it has the discretion to purchase such insurance. *Wyo. Att'y Gen. Op. May 17, 1951* in OPINIONS OF ATTORNEYS GENERAL OF THE STATE OF WYOMING 1948-53, 541 (1953).

335. *Id.*; Galeotos, *supra* note 333.

336. See notes 299-301 *supra* and accompanying text. An additional problem raised by the doubtful propriety of the state's liability insurance purchases is what ought a court to do when the state or any other governmental entity declines to raise the immunity defense. See p. 653 *infra*.

til a full itemized statement in writing, certified to under penalty of perjury, shall be filed"³³⁷ For some levels of government, statutes have been enacted reiterating this requirement³³⁸ and in some cases adding further qualifications.³³⁹ One should check the laws relating to the governmental body against which a claim is being presented. Failure to present a claim in the proper form may result in loss of a right to sue,³⁴⁰ even in a situation where the legislature has consented to suit.³⁴¹ In addition presentation of the claim to the proper accounting officer of the governmental body may be necessary.³⁴² This presentation requirement cannot be met by first obtaining a judgment and then presenting the verified judgment as a claim,³⁴³ except that once litigation has commenced on common law causes of action the failure of the governmental defendant to make timely objection to the absence of any presentation of a certified claim may result in a waiver of the requirement.³⁴⁴

In addition to the constitutional and statutory requirements for presentation of claims, it is advisable to first present one's claim to the appropriate governmental entity because it is apparently a widespread practice for meritorious claims to be paid even if the doctrine of immunity would have barred courtroom recovery. Municipalities have indicated that they paid modest claims even when they did not carry

337. WYO. CONST. art. 16. § 7.

338. WYO. STAT. §§ 15.1-158, -196, -275 (municipalities); § 18-143 (counties); (1957).

339. See WYO. STAT. § 9-71 (1957) which provides that evidence in support of claim must be included and claims must be submitted within one year after they accrue and WYO. STAT. § 15.1-275 (1957) which provides notice must be submitted within 30 days of injury or damage and actions thereon must be commenced within one year.

340. Price v. State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309 (1946); Board of Comm'rs v. Denebrink, 15 Wyo. 342, 89 P. 7 (1907); Houtz v. Board of Comm'rs, 11 Wyo. 152, 70 P. 840 (1902) (But as dicta the court indicates that tort claims may not have to be so presented.)

341. Utah Constr. Co. v. State Highway Comm'n, 45 Wyo. 403, 19 P.2d 951 (1933); accord Beiber v. City of Newcastle, 242 F. Supp. 457 (D. Wyo. 1965).

342. Price v. State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309 (1946); Utah Constr. Co. v. State Highway Dept., 45 Wyo. 403, 19 P.2d 951 (1933).

343. Utah Constr. Co. v. State Highway Comm'n, 45 Wyo. 403, 19 P.2d 951 (1933).

344. Town Council v. Ladd, 37 Wyo. 419, 263 P. 703 (1928). *But cf.* Houtz v. Board of Comm'rs, 11 Wyo. 152, 70 P. 840 (1902) (Failure to object during prelitigation negotiations to the lack of any proper claim presentation does not constitute a waiver of the requirement.).

insurance.³⁴⁵ State agencies, which enjoy broad immunity, carry liability insurance with doubtful legislative authorization.³⁴⁶ Since these policies prohibit the carrier from raising the immunity defense, claims are regularly paid notwithstanding the fact that the state could prevent courtroom recovery by pleading governmental immunity. Finally, there is a statutory procedure whereby the State Auditor can pass upon claims and allow them.³⁴⁷ Should he lack the appropriations to pay the claim or if the claimant is not satisfied, the Auditor is to present the matter to the next session of the legislature.³⁴⁸ Although the legislature may by special act then compensate the injured party, it has not done so in any of the last five legislative sessions. Very few people have pursued this procedure or presented their claims to the legislature.³⁴⁹

If the governmental entity refuses to pay the claim, the injured party may initiate an action in court. Although one statute indicates that the action is in the nature of an appeal,³⁵⁰ the cases hold that it is not.³⁵¹ The government's denial of the claim is not given any evidentiary weight; the claimant is entitled to a trial *de novo*.³⁵²

In litigating the liability of the governmental entity, the burden of proof on the immunity issue is important. It has been held that the plaintiff has the responsibility of alleging and the burden of proving that the defendant governmental unit was acting in a proprietary capacity.³⁵³ This would place the burden on the plaintiff of proving that his action is not barred by immunity. Apparently the immunity issue would

345. Survey, note 304 *supra*.

346. See pp. 648-50 *supra*.

347. WYO. STAT. §§ 9-71 to -73, -75 to -77 (1957).

348. WYO. STAT. §§ 9-75 and -76 (1957).

349. Interviews with Sterling Case, Deputy Attorney General of State of Wyoming, in Cheyenne, Wyo., August 3, 1971, and with State Senator Richard R. Jones, Chairman of Wyoming State Senate Ways & Means Comm. in Cody, Wyoming, Jan. 19, 1972.

350. WYO. STAT. § 15.1-255 (1957).

351. *Fanning v. City of Laramie*, 402 P.2d 460 (Wyo. 1965); *State v. Patterson*, 47 Wyo. 416, 38 P.2d 617 (1934); *Boswell v. County Commissioners*, 1 Wyo. 235 (1875); *cf. Van Buskirk v. Red Buttes Land & Live Stock Co.*, 24 Wyo. 183, 156 P. 1122 (1916).

352. *Id.*

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

not have to be raised as an affirmative defense. It has been held that the issue is raised by a general denial.³⁵⁴

Suppose a governmental unit decides not to assert immunity but a dispute arises on another issue such as negligence or the amount of damages and the injured party initiates litigation. Either the court must itself raise the immunity issue and if appropriate dismiss the action or it must defer to the judgment of the governmental unit as to whether or not the issue should be considered. The former position would be granting an uncommonly active role to the court, perhaps an undesirable one since the court would be interfering without request in the judgment made by other competent units of government—in some cases the executive branch of state government. However, the latter position would allow the apparent intent of the legislature to retain immunity to be violated willy nilly by any governmental unit that saw fit. It would seem that the absence of cogent reasons for preserving immunity and the availability of taxpayer actions to protect the public treasury³⁵⁵ would indicate that there is little need for judicial initiative in this matter. To date the Wyoming court has declined to dispose of a case on the ground of immunity unless requested to do so by the government entity before it.³⁵⁶

Assuming, however, that the government has declined to pay, raising the immunity defense, and that it has lost on that issue, the next problem is establishing liability. The burdens of proof and going forward and the rules of evidence ought to be the same in this area as in any similar trial between two private litigants. It is of interest that on the evidentiary question of whether the fact of insurance coverage is admissible in a jury trial, the Wyoming court followed the usual rule requiring the exclusion of such evidence.³⁵⁷

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

355. *See Twitchell v. Bowman*, 440 P.2d 513 (Wyo. 1968); *cf. Stratton v. City of Riverton*, 74 Wyo. 379, 287 P.2d 627 (1955); *Quackenbush v. City of Cheyenne*, 52 Wyo. 146, 70 P.2d 577 (1937).

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

357. *Miller v. City of Lander*, 453 P.2d 889 (Wyo. 1969).

At the point a judgment is entered against a governmental unit, the plaintiff may face problems. If the public defendant cannot or will not pay, some device to enable and enforce payment must be found. Since public property is generally exempt from execution,³⁵⁸ that is not the answer. One possible source of funds is judgment bonds, *i.e.*, obligations issued to raise moneys to pay off judgments. Wyoming municipalities³⁵⁹ and counties³⁶⁰ are authorized to issue them without regard to debt limit restrictions.³⁶¹ Presumably a writ of mandamus could be secured ordering both the issuance of such bonds and payment of the judgment out of bond proceeds.³⁶² If there is no statutory authority for judgment bonds, as is the case with the state and all special districts, including school districts, but there are available funds to satisfy the judgment, a writ of mandamus might be available to compel the issuance and honoring of a warrant to pay such a judgment.³⁶³ But since there are both constitutional and statutory requirements for legislative appropriations prior to the disbursement of state funds³⁶⁴ and since it is unlikely prior appropriations could be construed to make money available for a particular judgment, the writ would have to be directed also to the state legislature. Obviously this would be such an extraordinary writ that its issuance, to say nothing of its enforcement, would be highly unlikely.³⁶⁵ Perhaps the

358. See *Special School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304, 356, 80 P. 155, 179 (1905) (dicta). See also 30 AM. JUR. 2d *Executions* § 195 (1967); 2 ANTIEAU, LOCAL GOVERNMENT LAW 16.28 (1971). There may be exceptions to the general rule prohibiting execution on government property. See WYO. STAT. § 18-55 (1957) implying that execution may issue against counties. Also municipal property not held for governmental or public purposes may be subject to execution. *Id.* ANTIEAU. Of course, a judgment against a public officer or employee might be satisfied by execution on his private property or by garnishment of his salary. See note 232 *supra* and accompanying text with respect to garnishment.

359. WYO. STAT. § 15.1-484 (Supp. 1971).

360. WYO. STAT. § 18-55 (1957).

361. WYO. STAT. § 39-62 (1957); see also WYO. STAT. § 15.1-254 (1957). WYO. STAT. § 21-76 (1957) (Repealed by Ch. 111, § 292, WYO. LAWS 1969) had authorized school districts to issue judgment bonds. The 1969 recodification of the school code omitted any provision for judgment bonds. Compare WYO. STAT. § 21-76 with § 21.1-253 (Supp. 1971).

362. 2 ANTIEAU, LOCAL GOVERNMENT LAW § 16.23 (municipalities); see 4 ANTIEAU, LOCAL GOVERNMENT LAW § 40.05 (counties).

363. See *Commonwealth v. Circuit Court*, 365 S.W.2d 107 (Ky. 1963); *Raleigh County Bank v. Sims*, 137 W. Va. 599, 73 S.E.2d 526 (1952). Cf. Antieau, *supra* note 362.

364. WYO. CONST. art. 3, § 35; art. 16, § 7. WYO. STAT. §§ 9-57, -59 (1957, Supp. 1971). See *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 33 P. 125 (1893); but cf. *Donnellan v. Nicholls*, 1 Wyo. 61 (1872).

365. See Annot., 136 A.L.R. 677 (1942).

only possible remedy would be to try to enforce the judgment against state assets in another jurisdiction. But this too is an uncertain remedy. Even in the case of school districts, the provisions of the Municipal Budget Act³⁶⁶ impose requirements akin to an appropriation and whether the writ of mandamus would be available to compel the school board to make such an appropriation is questionable. Absent available funds or a statutory scheme for satisfying judgments, a judgment against a governmental entity is worth no more than the good will of the officials who control the government.

VII. CONCLUSION

The doctrine of governmental immunity in Wyoming is an imbroglio. Although the governmental-proprietary distinction is sometimes blurred or even violated, it appears to draw the basic line between immunity and liability for government in this state. Yet the lack of any cases actually imposing liability upon the state, its agencies or employees for proprietary activities makes the relevance of the distinction to that area a promise based upon dicta. Also, exceptions to immunity for governmental activities may be found in municipal liability for defective public ways, possibly for nuisance and in one case for the violation of a statutory duty to maintain a stop sign. Statutory authority exists for both municipalities and school districts to purchase liability insurance and to waive immunity for governmental functions to the extent of insurance. In both areas coverage is extensive. State agencies are also purchasing liability insurance on their vehicles, although the authority is questionable at best and the impact on immunity is doubtful. In addition, piecemeal legislation authorizes suit and provides for state responsibility in certain areas and on occasion for particular claims.

Apart from the legislature's authorizing insurance, the immunity doctrine in Wyoming is as strong as it has ever been. Why this doctrine, with its admitted injustices, is still law is hard to understand. The Wyoming Supreme Court has recognized the unfairness of governmental immunity in

366. WYO. STAT. § 9-525, -531, -539 (1957, Supp. 1971); § 21.1-41 (Supp. 1971). Cf. *School Dist. No. 3 v. Western Tube Co.*, 5 Wyo. 185, 38 P. 922 (1895).

several of the cases in which it has upheld the doctrine.³⁶⁷ The court places responsibility for change upon the legislature.³⁶⁸ Except for modest steps in certain areas, the legislature has apparently not yet found the immunity question compelling enough to consider.

Although the legislature admittedly has the power to abolish or limit governmental immunity, the court shares this power and therefore must share the responsibility for the perpetuation, as well as the origin, of the doctrine. Despite the entrenched nature of the immunity doctrine in other states, in the last fifteen years courts in seventeen jurisdictions have stopped echoing the excuse that they were without power to change the doctrine and have judicially abolished immunity for some and in a few cases for all levels of government.³⁶⁹ Although courts in eleven other states, not including Wyoming, have reiterated their reluctance to abolish immunity,³⁷⁰

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367. *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972); *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970); *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 119 (1948); *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948); *cf. Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925).
368. *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972); *Denver Buick, Inc. v. Pearson*, 465 P.2d 512 (Wyo. 1970); *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 119 (1948); *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119 (1948); *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 P. 710 (1925); *Hjorth Royalty Co. v. Trustees of Univ. of Wyoming*, 30 Wyo. 309, 222 P. 9 (1924).
369. *Spencer v. General Hosp.*, 425 F.2d 479 (D.C. Cir. 1969); *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Evans v. Board of Comm'rs*, _____ Colo. _____, 482 P.2d 968 (1971); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Smith v. Idaho*, 93 Ida. 795, 473 P.2d 937 (1970); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Klepinger v. Board of Comm'rs*, 143 Ind. App. 155, 239 N.E.2d 160 (1968); *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968); *Willis v. Department of Conserv. & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970); *Becker v. Beaudoin*, _____ R.I. _____, 261 A.2d 896 (1970); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); *cf. Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963). *See also City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962); *Hamilton v. City of Shreveport*, 247 La. 783, 174 So. 2d 529 (1965); *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Kelso v. City of Tacoma*, 63 Wash. 2d 913, 390 P.2d 2 (1964). For discussions of the trends in these states see 3 DAVIS, ADMINISTRATIVE LAW § 25.00 (Supp. 1970); Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 918.
370. *Boyer v. Iowa High School Athletic Ass'n*, 256 Iowa 337, 127 N.W.2d 606 (1964); *Nelson v. Maine Turnpike Authority*, 157 Me. 174, 170 A.2d 687 (1961); *Duncan v. Koustenis*, 260 Md. 98, 271 A.2d 547 (1970); *Clark v.*

it is clear that American courts legitimately possess the prerogative of excising governmental immunity from the common law and that the trend is in that direction. Perhaps it is simply a case of differences of opinion on the proper role of the judiciary. However, when all concede the unfairness of immunity and the need for reform, the protestations of the reluctant judges in the face of action by their counterparts in other states are difficult enough for the lawyer, much less the layman, to appreciate. The hope that legislators will take up the task is belied by the fact that of the nine states that in the last ten years have moved toward a policy of governmental responsibility by legislation, seven did so only after a judicial decision abrogating the doctrine, while only two did it without such prompting.³⁷¹ The lesson seems to be that without judicial abrogation of immunity the problem does not command that degree of attention which prompts legislative action.

To date the Wyoming court has refused to take the initiative even in restricting governmental immunity. It has explained this refusal on two grounds: 1) by pointing to the state constitutional provision permitting the legislature to provide for suits against the state³⁷² and 2) by finding that the doctrine was a part of the English common law prior to 1609 and thus by statute became a part of Wyoming's law.³⁷³ As for the first ground, the suggested construction of the

Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963); *Fette v. City of St. Louis*, 366 S.W.2d 446 (Mo. 1963); *Gossler v. City of Manchester*, 107 N.H. 310, 221 A.2d 242 (1966); *Petzer v. Minot Park Dist.*, 138 N.W.2d 601 (N.D. 1965); *Hyde v. City of Lakewood*, 2 Ohio St. 2d 155, 207 N.E.2d 547 (1965); *Chicago, R.I. & P.R.R. v. Board of County Comm'rs*, 389 P.2d 476 (Okla. 1964); *Conway v. Humbert*, 82 S.D. 317, 145 N.W.2d 524 (1966); *State v. Parker*, 13 Utah 2d 65, 368 P.2d 585 (1962); *cf. Vendrell v. School Dist.*, 226 Ore. 263, 360 P.2d 282 (1961); *Cunningham v. County Court*, 148 W. Va. 303, 134 S.E.2d 725 (1964).

371. *DAVIS, ADMINISTRATIVE LAW*, § 25.00 (Supp. 1970). In only one state, Arkansas, has the legislature restored immunity after the court abolished it. *See Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *ARK. STAT. ANN. § 12-2901* (Supp. 1971). However, even this restoration was accompanied by a requirement that political subdivisions purchase liability insurance for all motor vehicles. *ARK. STAT. ANN. § 21-2903* (Supp. 1971).
372. *WYO. CONST. art. 1, § 8*. *See* previous installment of this article at pp. 235-38.
373. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959). *WYO. STAT. § 8-17* (1957). *See* previous installment of this article at p. 241. In a decision dated after publication of the first installment of this article the Wyoming court reaffirmed this conclusion. *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972). In fact, in *Davis* the court even outdoes its reasoning in *Maffei* by suggesting that the legislature actually passed upon the immunity question.

constitution is certainly not obligatory, as decision in two other states have shown.³⁷⁴ Rather the constitution can be viewed as merely authorizing the legislature to provide procedures for suing the state if it so desires. If no procedure is provided, immunity need not be the result. In addition provisions of the state constitution guaranteeing the availability of courts to hear claims³⁷⁵ and guaranteeing compensation for damages caused by state action³⁷⁶ would certainly provide a foundation for a reformulation of the Wyoming position.

The second ground is also subject to criticism. Whether governmental immunity was a part of the English common law in 1609 and thus is, by statute, the law in Wyoming is an interesting historical question. The fact that legal scholars have without exception been unable to trace the common law origins of governmental immunity back as far as 1609,³⁷⁷ makes the Wyoming accomplishment all the more singular. Even assuming that the research of the Wyoming court is correct, at the very least this would seem to be an example of the type of common law precedent from which a court would be free to depart. It is usually held that the common law is only adopted to the extent it is in harmony with the genius, spirit and objects of local institutions.³⁷⁸ That immunity is not so in harmony with local institutions has been admitted by the Wyoming court on many occasions.³⁷⁹ Although the Wyoming court has claimed the immunity doctrine is too firmly established in common law to allow its judicial abrogation,³⁸⁰ the

374. *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).

375. Wyo. CONST. art. 1, § 8.

376. Wyo. CONST. art. 1, § 33.

377. In *VAN ALSTYNE, A STUDY RELATING TO SOVEREIGN IMMUNITY*, 205 n.36 (Cal. Law Revision Comm'n 1963) the author lists three sources of background information on the case of *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1778). None of the three found any clear prior common law precedent for the immunity doctrine. See *DAVID, MUNICIPAL LIABILITY FOR TORTIOUS ACTS AND OMISSIONS* 30-45 (1936); *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); *Borchard, Governmental Liability in Tort*, 34 YALE L.J. 1, 41-45 (1924).

378. *Fuchs v. Goe*, 62 Wyo. 134, 163 P.2d 78 (1945); *State v. Foster*, 5 Wyo. 199, 38 P. 926 (1895); *accord*, *Johnson v. Union Pacific Coal Co.*, 28 Utah 46, 76 P. 1089 (1904) (construing the Wyoming statute).

379. See cases cited note 367 *supra*.

380. *E.g.*, *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959).

actions of courts in sister states, as noted, make this claim hollow. In addition, the apparent willingness of the Wyoming court to abolish charitable immunity makes the claim appear arbitrary.³⁸¹

When a court does take the initiative to change a common law principal of long standing it faces a problem of how to announce its decision.³⁸² Two considerations have been particularly troublesome. First, the abrupt change of a doctrine upon which many have relied can be unfair unless a period of time is given to plan for the change. This is particularly true of a change such as abolition of governmental immunity where even the purchase of liability insurance may require legislative appropriation. Thus several of the courts which have abolished immunity have done so prospectively, even allowing for a considerable lapse between the date of decision and the effective date of change.³⁸³ Although such changes are similar to legislation, the technique of prospective overruling is accepted in American jurisprudence.³⁸⁴ This is not to say that prospective overruling does not create problems. How should the plaintiff in the landmark case be treated? If he is not rewarded for his efforts, there is little incentive to challenge outdated concepts and the decision is mere dicta.

381. *Lutheran Hosp. & Homes Soc'y v. Yepsen*, 469 P.2d 409 (Wyo. 1970). Although the rationale and history of charitable immunity and governmental immunity are not identical, the one-time strength of the doctrines in American common law is comparable.

382. For an excellent discussion of this problem which is the basis for many of the subsequent comments in this paragraph see Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888 (1964).

383. *E.g.*, *Evans v. Board of County Comm'rs*, _____ Colo. _____, 482 P.2d 968 (1971) (decided March 22, 1971; applied only to plaintiffs in that case, companion cases and causes of action arising after June 30, 1972); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) (only applied to causes of action arising after the adjournment of the next regular session of the legislature); *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) (only applied to causes of action arising 30 days after the date of the opinion); *Willis v. Department of Conserv. & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970) (decided April 20, 1970; only applied to the plaintiff and to causes of action arising after January 1, 1971); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (only applied to the plaintiff and to causes of action arising 40 days after the decision). At least two courts have, on the other hand, made the abolition of immunity effective as to all actions not barred by the statute of limitations. *Stone v. Arizona Highway Comm'n*, 92 Ariz. 384, 381 P.2d 107 (1963); *Haney v. City of Lexington*, 386 S.W. 2d 738 (Ky. 1968).

384. *E.g.*, *Great No. Ry. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). See Levy, *Realistic Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); Note, *Prospectively Overruling the Common Law*, 14 SYRACUSE L. REV. 53 (1962).

Further, the unfair doctrine is allowed at least to preclude other parties injured before the effective date of the decision from recovering. What the court needs to do is balance the inconvenience to the public bodies of immediate change against the unfairness to injured individuals. It is submitted that except for allowing the plaintiff in the landmark case to recover, the interests of public bodies in planning for the change is more important. This was the approach taken by the Colorado Supreme Court in *Evans v. Board of County Comm'rs* when it allowed the plaintiffs to recover and then gave the legislature over fifteen months to deal with the problem.³⁸⁵

The second consideration is the extent to which governmental responsibility ought to be imposed. Even the most outspoken critics of the governmental immunity doctrine concede that certain areas of activity ought not give rise to liability.³⁸⁶ The problem of determining precisely what areas of activity ought not to give rise to liability is one that both the court and the legislature would face if either decided to abolish or limit the doctrine. A court in deciding the case before it is not accustomed to making detailed policy statements to guide the community as to the precise application of that case. Although a court which decides to abolish the immunity doctrine might find the task of limiting its decision difficult, governmental entities would find some guidance essential if the new liability is to be insured against. If the effective date of the decision is delayed, the legislature would undoubtedly take up the problem. One writer has suggested that:

Judicial abolition of the governmental immunity doctrine is warranted in order to press legislative machinery into operation. In its abrogating opinion, the court should balance the public policy factors involved on a case-by-case basis and attempt to establish an interim solution as to the limits of governmental liability. The objectives of such a solu-

385. _____ Colo. _____, 482 P.2d 968 (1971). In 1971 the Colorado legislature responded to the *Evans* decision by adopting a far reaching act which provides for governmental responsibility in but a few areas. See ch. 323, COLO. LAWS 1971.

386. *E.g.*, 3 DAVIS, ADMINISTRATIVE LAW, §§ 25.11 to .13, 25.16 (1958, Supp. 1971).

tion should be to provide a workable framework which will instill confidence within public entities and the legislature, thus facilitating a climate in which an orderly, comprehensive legislative solution can grow. Furthermore, it is the court's responsibility to reduce the impact of its decision on the fiscal resources of public entities. This can best be done by a selective use of the flexible and workable device of prospective abolition.³⁸⁷

In any event, the Wyoming legislature will hopefully take up the problem of governmental responsibility. If it does, it should take the time to study the experience of other states, particularly California.³⁸⁸ It is suggested that the legislation should consider the following: First, any statute should apply to all levels of government. Second, the manner in which legislation then deals with governmental liability may follow one of the several approaches adopted by other states.³⁸⁹ These approaches include a general waiver of immunity with broad exceptions, codification of the governmental immunity doctrine with certain broad categories of liability and specifically defined immunities and liabilities. Third, legislation should probably include some limits upon liability for discretionary acts where policy alternatives are actually weighed, and possibly also a limit on the dollar amount of liability in those areas where immunity is abolished.³⁹⁰ Fourth, to the extent a statute abolishes immunity it should be clear that both the immunity from suit and the immunity from liability

387. Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 900.

388. Subsequent to the decision of *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), in which the California Supreme Court abolished governmental immunity, the state legislature declared a moratorium on the litigation of claims (ch. 1404, p. 3209, CAL. LAWS 1961) during which time the California Law Revision Commission completed a study of the immunity doctrine in the state (VAN ALSTYNE, *A STUDY RELATING TO SOVEREIGN IMMUNITY* (1963)) and made detailed legislative recommendations (Recommendation Relating to Sovereign Immunity, 4 CAL. LAW REVISION COMM'N 801 (1963)). With minor changes these recommendations were enacted by the legislature as the California Tort Claims Act of 1963. CAL. GOV'T CODE, §§ 810 to 996.6 (West. 1966). See Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 937-40.

389. See generally VAN ALSTYNE, *supra* note 388, at 968-74 upon which what follows in this paragraph is based.

390. Colorado for example limits liability for injury to \$100,000 for one person and \$300,000 for two or more persons in one accident or to the limit of liability insurance, whichever is greater. Ch. 323, § 130-11-14, COLO. LAWS 1971.

are being eliminated. By construing many early statutes as merely waiving suability, courts granted plaintiffs a visit to the courthouse.³⁹¹ Finally, although most statutes are only addressed to problems of tort liability, this writer would suggest that governmental immunity in the area of contract liability also be abolished. Certainly the understandable requirements that a contract be of the type authorized by law and that the manner of its execution be in conformity with statutory requirements, if any, are sufficient to safeguard the public.

In sum, the degree of immunity from damage actions now enjoyed by government entities in Wyoming is unfair to those persons injured by such entities. It is unfair in that contrary to modern concepts of loss allocation the innocent injured party must bear the risks of governmental wrongs in a wide variety of areas. Although the harshness of the doctrine of governmental immunity has been ameliorated by liability for proprietary activities and the authorization for school district and municipal liability insurance, there remain wide areas where immunity still prevails. To date judicial obeisance to the policy of *stare decisis* and legislative inertia have prevented any substantial progress. It is suggested that the court does have the power to abrogate the immunity doctrine and that this is perhaps the most effective method of attracting legislative attention to the problem and of facilitating a comprehensive solution.

391. Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1365 (1954).