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## Governmental Immunity - Effect of Liability Insurance in Damage Actions against Local Governmental Units - Collins v. Memorial Hospital of Sheridan County

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**GOVERNMENTAL IMMUNITY—Effect of Liability Insurance in Damage Actions Against Local Governmental Units. *Collins v. Memorial Hospital of Sheridan County*, 521 P.2d 1339 (Wyo. 1974).**

Patricia Collins entered the Memorial Hospital of Sheridan County, Wyoming, on November 21, 1974, for out-patient treatment of an injury to her right clavicle. After discharge, and while being transported to the parking lot in a wheelchair operated by nurse's aid Bertha Anderson, the plaintiff was thrown to the ground when the wheelchair tipped over. Alleging that negligent operation of the wheelchair resulted in an aggravation of her previously existing injury, plaintiff brought this action, joining as defendants the hospital, the nurse's aid, and the St. Paul Fire and Marine Insurance Company, with which the hospital carried liability insurance. The hospital and the nurse's aid invoked the doctrine of governmental immunity and filed separate motions for summary judgment. Applying mandatory precedents holding that the operation of a county hospital is a governmental function<sup>1</sup> and that procurement of liability insurance by a municipal or quasi-municipal corporation<sup>2</sup> does not constitute a waiver of the immunity it enjoys in the conduct of governmental activities,<sup>3</sup> the trial court granted the motions of these defendants and entered final judgment for them. The insurance company also filed a motion for summary judgment, which, however, was overruled by the trial court. Plaintiff appealed and the Wyoming Supreme Court reversed the judgments for the hospital and nurse's aid, holding that procurement and coverage of liability insurance by the hospital constituted a waiver of its tort immunity, at least up to the amount of insurance coverage.<sup>4</sup>

The effect of the medieval doctrine<sup>5</sup> of governmental immunity<sup>6</sup> in contemporary Wyoming is frequently direct

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1. *Bondurant v. Board of Trustees*, 354 P.2d 219 (Wyo. 1960).
2. Municipalities are municipal corporations; counties, school districts, and special districts are quasi-municipal corporations. All are local governmental units.
3. *Maffei v. Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959); *Davis v. Board of County Comm'rs*, 495 P.2d 21 (Wyo. 1972).
4. *Collins v. Memorial Hosp. of Sheridan County*, 521 P.2d 1339 (Wyo. 1974).
5. The Wyoming Supreme Court concluded the original source of immunity for local governmental units was a 16th Century English case. *Maffei v. Memorial Hosp. of Sheridan County*, *supra* note 3, at 810-11.
6. The doctrine is variously termed governmental immunity, sovereign immunity, municipal immunity, and municipal sovereign immunity. The

and harsh. In many cases it places the full burden of loss and injury resulting from the torts of governmental bodies and their agents squarely upon the unfortunate victim, rather than distributing that burden among the taxpayers corporately. As a practical matter, the widespread use of liability insurance by state and local governmental units and agencies in Wyoming<sup>7</sup> provides a means for distributing such losses, while, at the same time, providing certainty in the financial administration of government—a particularly important consideration for local units whose revenue-generating powers may be extremely limited.<sup>8</sup> In an era in which governmental presence and activity have become widespread in Wyoming,<sup>9</sup> the legislature has taken only limited steps to alleviate the harsh effects of the doctrine,<sup>10</sup> while the supreme court has until now consistently eschewed the common law maxim of *cessante ratione legis, cessat et ipsa lex*,<sup>11</sup> in its consideration of the question. This note examines the most recent judicial development in regard to governmental immunity—*Collins*

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Wyoming Supreme Court used the latter two terms in *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4, at 1340-41. Governmental immunity appears, however, to be preferred, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971) (hereinafter cited as PROSSER), Minge, *Governmental Immunity from Damage Actions in Wyoming*, 7 LAND & WATER L. REV. 229, 229 n. 2 (1972) (hereinafter cited as Minge), and will be used throughout. For a comprehensive examination of the doctrine in all its complexity in Wyoming, see Minge, *supra*, and Minge, *Governmental Immunity from Damage Actions in Wyoming-Part II*, 7 LAND & WATER L. REV. 617 (1972) (hereinafter cited as Minge, *Part II*).

7. A survey of state and local units indicated that more than 80% of the municipalities and school districts carry liability insurance and that virtually all state vehicles are covered by liability insurance. Minge, *Part II*, *supra* note 6, at 635-50.
8. *E.g.*, counties have statutory authority to satisfy judgments by tax levy. WYO. STAT. § 18-55 (1957). However, it is questionable whether a county could levy a tax in excess of the constitutional and statutory limits, WYO. CONST. art. XV, § 5, WYO. STAT. § 39-1 (1957); to satisfy such a judgment. *Grand Island & N. W. Ry. v. Baker*, 6 Wyo. 369, 45 P. 494 (1896). See also Minge, *Part II*, *supra* note 6, at 654-55. Thus, it is conceivable that a county which had budgeted against its mill levy ceiling could have its budget and financial plans badly disrupted by a large judgment. Contrarily, through implementation of a sound liability insurance plan, costs are known and certain and may be budgeted for well in advance. J. TODD, EFFECTIVE RISK AND INSURANCE MANAGEMENT IN MUNICIPAL GOVERNMENT 63 (1970).
9. There are currently 339 governmental entities operating in Wyoming. J. RICHARD, GOVERNMENT AND POLITICS IN WYOMING 90 (3d ed. 1974).
10. The legislature provided for the purchase of liability insurance and a concomitant waiver of immunity by municipalities in 1961, WYO. STAT. § 51.1-4. (Supp. 1973), and by school districts in 1969, WYO. STAT. §§ 21.1-43 to -45 (Supp. 1973). Procurement of such insurance is, however, not mandatory.
11. Where the reason for the existence of a law ceases, the law itself should also cease.

*v. Memorial Hospital of Sheridan County*<sup>12</sup>—and assesses its significance in practical terms.

### THE RULE OF *Maffei* AND *Davis*

Prior to *Collins* the doctrine of governmental immunity constituted an almost insurmountable barrier to damage actions against local governmental entities in Wyoming.<sup>13</sup> Under the doctrines, liability could be imposed on local units of government only in those instances in which the damage action arose from proprietary activities—that is, those which a private corporation might be likely to undertake. Where the loss or injury resulted from a governmental function, local units were immunized against liability.<sup>14</sup> In Wyoming, most local governmental activities have been judicially classified as governmental, rather than as proprietary.<sup>15</sup> As to the effect of liability insurance in damage actions involving governmental functions, *Maffei v. Town of Kemmerer* governed, explicitly providing that a municipality could not shed its cloak of immunity by procurement of insurance; such a waiver could only be effected by the legislature through

12 *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4.

13. See Minge, and Minge, *Part II*, *supra* note 6. See also, Comment, *Municipal Tort Liability: Purchase of Liability Insurance as a Waiver of Immunity*, 18 Wyo. L. J. 220 (1964), and Comment, *Sovereign Immunity—A Still Potent Concept in Wyoming*, 16 Wyo. L. J. 304 (1962). For a recent survey of the status of the doctrine nationwide, see Comment, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective*, 78 DICK. L. REV. 365 (1973) (hereinafter cited as *Judicial Abrogation*).

14. *Savage v. Town of Lander*, 77 Wyo. 157, 164-65, 309 P.2d 152, 152-53 (1957). The court said:

A municipal corporation has a dual nature or capacity, one public, and the other private, and exercises twofold functions and duties. The rule is generally recognized that in the absence of statutory provision there can be no recovery against a municipal corporation for injuries occasioned by its negligence or nonfeasance in the exercise of a function which is essentially governmental in character. On the other hand, a city's actions in its private or proprietary capacity are governed by the same rules of liability for wrongful acts as apply to private corporations or individuals.

For a discussion of the exceptions to the governmental-proprietary function distinction, see Minge, *supra* note 6, at 255-62.

15. The operation of water systems, garbage removal and disposal services, and sewage systems have been held to be proprietary functions, while the operation of a hospital, the state liquor system, a fire department, and street sprinklers; the pursuit of criminals; the construction of roads, ditches, sewers and sidewalks; and the issuance, refusal, and revocation of permits and licenses, have been held to be governmental activities. Minge, *supra* note 6, at 250-55, and cases cited therein. See also PROSSER, *supra* note 6, § 131.

statutory enactment.<sup>16</sup> *Davis v. Board of County Comm'rs* affirmed the *Maffei* rule and extended it to counties and, presumably, to all other quasi-municipal corporations.<sup>17</sup>

At the time the supreme court was considering *Collins*, six categories of municipal or quasi-municipal corporations—municipalities, memorial hospitals, and hospital, community college, and weed and pest control districts—had statutory authority to insure against liability.<sup>18</sup> However, only the legislation governing municipalities and school districts contained the express language required by *Maffei* and *Davis* to effect a waiver of immunity when the function involved was governmental. Thus, not only did *Maffei* and *Davis* bar the imposition of liability in the great number of instances where insurance might have been procured in the absence of express statutory authority to purchase it, but those cases also barred liability because of inexplicit language in four instances where statutory authority to purchase insurance had been granted.

#### REJECTION OF *Maffei* AND *Davis*

The factual situation in *Collins* squarely presented a case of a quasi-municipal corporation having allegedly negligently injured an individual citizen in the conduct of a governmental function,<sup>19</sup> against a statutory backdrop which contained neither authorization to purchase liability insurance nor an explicit waiver of immunity.<sup>20</sup> Liability insurance had, however, been purchased and was in effect. The court found the time ripe to re-examine the rule of *Maffei* and *Davis*, although it expressly avoided the larger and more complex question of governmental immunity generally.<sup>21</sup>

16. *Maffei v. Town of Kemmerer*, *supra* note 3, at 817.

17. *Davis v. Board of County Comm'rs*, *supra* note 3, at 25.

18. Municipalities—WYO. STAT. § 15.1-4 (Supp. 1973); Memorial hospitals—WYO. STAT. § 18-323.7 (Supp. 1973) (note that this provision was enacted subsequent to the date of the alleged injury involved in *Collins*); hospital districts—WYO. STAT. § 35-136.7 (Supp. 1973); community college districts—WYO. STAT. §§ 21-475(k), -490(j) (Supp. 1973); weed and pest control districts—WYO. STAT. § 11-69.8(o) (Supp. 1973).

19. See note 1.

20. *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4, at 1340-41.

21. *Id.* at 1340.

*The Augean Stable*

Both the tenor and substance of the *Collins* opinion suggest that the Wyoming Supreme Court—like the highest courts in some twenty other jurisdictions<sup>22</sup>—had simply grown impatient with the incomplete manner in which the legislature had, to date, dealt with this harsh antiquated rule. Noting the modern tendency to judicially restrict the application of the doctrine and reading legislative disapproval of the *Maffei* decision in the legislature's subsequent statutory revision of the laws governing municipalities, the court found no case for hesitancy in applying the maxim that no common law rule can survive the reasons on which it is founded. In deciding to overrule *Maffei* and *Davis*, the court disposed of the argument that the rule had been judicially promulgated prior to 1607 and, as a result of the statutory enactment of the common law of England,<sup>23</sup> could only be changed by statute,<sup>42</sup> with the simple declaration that the rule was "court created."<sup>25</sup> While the court had earlier recognized the inequities which often arise by reason of the rule of governmental immunity and that such inequities tend to be more numerous with increasing governmental activities, it had doggedly adhered to the position that it could not act.<sup>26</sup> Thus, having rejected the theory that "when the courts help create an 'Aegean [*sic*] stable' the legislature has the sole responsibility for cleaning up the mess . . . .,"<sup>27</sup> the court threw open the gates to a pragmatic consideration of the logic and basis of the rule.

*Cessante Ratione Legis, Cessat Et Ipsa Lex*

Among the various bases for the doctrine—"that the sovereign is immune from suit; that it is better that the

22. As of 1973, immunity for local governmental units had been judicially abrogated in twenty jurisdictions and statutorily modified in seven more. The state's immunity has been abrogated legislatively in seven jurisdictions and judicially in three. *Judicial Abrogation*, *supra* note 13, at 368-70.

23. WYO. STAT. § 8-17 (1957).

24. *Maffei v. Town of Kemmerer*, *supra* note 3, at 811.

25. *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4, at 1341.

26. *Maffei v. Town of Kemmerer*, *supra* note 3, at 817; *Davis v. Board of County Comm'rs*, *supra* note 3, at 25.

27. *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4, at 1341. According to legend, King Augeas left 3,000 oxen in his stable for 30 years. The resulting mess was finally swept away when Hercules diverted a river through the stable.

individual suffer the injury than the public an inconvenience; and that [the absence of immunity] tends to retard the city in the performance of its duties'<sup>28</sup>—the court was persuaded that the only substantial and tenable reason for the doctrine is the protection of the public funds.<sup>29</sup> Not only did the court conclude that liability insurance and properly formed judgments<sup>30</sup> eliminate the rationale of the latter basis, but it concluded that the only party who would have been in any manner benefited by application of the rule in this situation was the insurance carrier.<sup>31</sup> In this same vein, the court questioned whether or not the taxpayers of Sheridan County would have had adequate consideration for the funds expended for the insurance if the court were to have reaffirmed the rule of *Maffei* and *Davis*.<sup>32</sup> On that line of reasoning, the court was led to specifically overrule *Maffei* and *Davis* insofar as they held that the purchase of liability insurance did not effect a waiver of tort immunity, at least to the limits of the policies in force.<sup>33</sup>

#### PRACTICAL SIGNIFICANCE OF *Collins*

*Collins* has immediate multifold practical significance. First, it ameliorates to a large degree the harshness of the governmental immunity doctrine insofar as it applies to local governmental units, in that it appears that many of these units already carry liability insurance.<sup>34</sup> Concomitantly, *Collins* will remove the decision as to which injured parties shall recover from the hands of local officials, where insurance is involved. Apparently in many past cases such officials have forced claimants to seek compensation in the courts only where they believed the claims lacked merit—knowing full well that the governmental immunity doctrine could be invoked to deny recovery. Under *Collins*, decisions in these

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28. *Id.* at 1343.

29. *Id.*

30. By "properly formed judgments," the court was referring to the problem of protecting government funds where damages exceed the insurance policy limits or where the insurance contract contains a deductible provision. It concluded that this was not an insurmountable task for a court. *Id.* at 1344.

31. *Id.* at 1340.

32. *Id.* at 1344.

33. *Id.*

34. See note 7 *supra*.

disputed cases will be placed in the hands of the judicial system to the degree that liability insurance is present.

Second, *Collins* stands for at least persuasive authority that local governmental units need not have express statutory authority to purchase liability insurance. In this instance, authority for county hospital districts to purchase such insurance was not enacted until after the date of this accident.<sup>35</sup> This issue might well be raised by a local governmental defendant, which lacked express statutory authority to insure against liability arising from a governmental function, in the context of the argument that such insurance as might be present was purchased solely for the purpose of protecting itself from damages arising from proprietary functions, as evidenced by its lack of authority to insure itself for other purposes.<sup>36</sup> This is not an unlikely eventuality considering that most quasi-municipal corporations in Wyoming presently lack such authority.<sup>37</sup>

Third, *Collins* would appear to provide strong persuasive authority for an assault upon the immunity enjoyed by the state and its agencies where liability insurance is in effect. The difficulty which such an assault might encounter resides in what the court would view to be the basis or source of the state's immunity—the constitution or the common law.<sup>38</sup> *Collins* establishes that, in the case of local governmental units, the immunity was "court created."<sup>39</sup> What is not clear from the decision, however, is the court's view of the relationship between the immunity of the state and that of local government—that is, whether the local governmental immunity was derived from the state or was separately created. If the court could be persuaded of the former view, it would appear that it might be sympathetic to the argument that the state's immunity derived from the common law, rather than from

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35. WYO. STAT. § 18-323.7 (Supp. 1973).

36. The defendants in *Collins* raised a similar argument. *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4, at 1344.

37. See note 18 and accompanying text.

38. See Minge, *supra* note 6, at 235-40.

39. *Collins v. Memorial Hosp. of Sheridan County*, *supra* note 4, at 1341.



the constitution, and thereby would be susceptible to judicial modification.<sup>40</sup>

Fourth, this decision would also seem to be strong persuasive authority for attacking the tort immunity enjoyed by charitable institutions and that imposed in tort actions between spouses and between parents and children, at least in those instances where there is liability insurance. Under present law, charities in Wyoming can only effectively invoke immunity if their activities are truly charitable in nature.<sup>41</sup> However, in that charitable immunity, like governmental immunity, rests on the "trust fund" theory, and further, in that the Wyoming Supreme Court has previously recognized that liability insurance is generally available to charities,<sup>42</sup> the court might well be moved to hold that procurement of liability insurance by a charity would constitute a waiver of its immunity.<sup>43</sup> The interspousal immunity doctrine is presently fully viable in Wyoming,<sup>44</sup> although a late member of the court at one time suggested that the doctrine ought only be recognized in the absence of liability insurance.<sup>45</sup> The Wyoming case law<sup>46</sup> on the parent-child immunity doctrine is somewhat confusing.<sup>47</sup> However, it appears that immunity will be imposed except in those instances where there has been a "willful and wanton disregard of the well-being of the child."<sup>48</sup> In that the rationale for both intra-family doctrines is based, at least in part, on the "trust fund" theory, the availability of liability insurance would appear to provide

40. For an examination of the various theories upon which immunity is granted to a state and for a discussion of the various arguments relevant to an attack upon that immunity, see *Judicial Abrogation*, *supra* note 13, at 379-95.

41. *Lutheran Hosp. and Homes Soc'y of America v. Yepsen*, 469 P.2d 409 (Wyo. 1970).

42. *Id.* at 411-12.

43. See Note, *Status of the Charitable Immunity Doctrine in Wyoming*, 7 LAND & WATER L. REV. 717 (1972), and Annot., 25 A.L.R.2d 29 (1952).

44. *McKinney v. McKinney*, 59 Wyo. 204, 135 P.2d 940 (1943); *Vossler v. Peterson*, 480 P.2d 393 (Wyo. 1971). See also Comment, *Interspousal Disability Doctrine*, 17 WYO. L.J. 267 (1963).

45. Mr. Justice Blume, *McKinney v. McKinney*, *supra* note 44, at 951.

46. *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954); *Oldman v. Bartshe*, 480 P.2d 99 (Wyo. 1971).

47. *Ball v. Ball*, *supra* note 46, was decided under Montana law. However, in *Oldman v. Bartshe*, *supra* note 46, at 101, the court relied on *Ball v. Ball* and held that "its pronouncement is the law of this jurisdiction."

48. *Oldman v. Bartshe*, *supra* note 46, at 101.

a sound basis for not imposing immunity.<sup>49</sup>

Finally, *Collins* can arguably be seen as a signal to the legislature that the court is dissatisfied with the present governmental immunity malaise and that it might well be persuaded to effect a total abrogation of the doctrine if the legislature fails to take action.<sup>50</sup>

### CONCLUSIONS

*Collins* is clearly no panacea. It leaves many of the inequities inherent in the doctrine fully intact. Most obviously, where there is no liability insurance, there can be no recovery for damages arising from a governmental function. Thus, by conscious choice, or by inadvertence, local officials can maintain a cloak of immunity. However, even where there is insurance in effect, inadequate coverage may result in less than complete compensation—a very real possibility in situations where there are numerous plaintiffs or where the loss approaches catastrophic proportions. While the court can easily proceed to modify or abrogate the doctrine, it cannot effectively deal with the multitude of complex issues involved in the immunity question nor can it easily, or with any certainty, give full effect to the many questions of public policy that reside in the area.<sup>51</sup> Clearly, the most forthright and reasonable approach is one of careful study and exami-

49. For detailed analyses of interspousal immunity, see Annot., 43 A.L.R.2d 632 (1955), of parental immunity, see Annot., 41 A.L.R.3d 904 (1972), and of the immunity of a child as against its parent, see Annot., 60 A.L.R.2d 1284 (1958).

50. See note 27. Metaphorically, if *Collins* represents the initial wash of a judicial stream, it may indicate the court's willingness to finish the task of cleaning out the stable in the event of continued legislative neglect.

An incidental practical effect of *Collins* may well be a greater return on the tax dollars local governments are currently spending on liability insurance. One study found that changes in tort liability apparently have little effect on the insurance premium rate structure. Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 718-25 (1960). To the extent that this may be true, it would also eliminate the basis, at least in part, of Mr. Chief Justice Parker's dissent in *Collins*, *supra* note 4, at 1244 n. 1.

51. In recommending against a blanket judicial abrogation of immunity the California Law Review Commission observed that: (1) "the notion that ordinary concepts of tort liability law, as developed in the context of litigation involving private persons, are readily applicable to public entities is founded upon an unacceptable premise," and (2) "The blanket waiver of immunity would actually create as many uncertainties as it would resolve." CALIFORNIA LAW REVIEW COMMISSION, A STUDY RELATING TO SOVERIGN IMMUNITY 269-70 (1963).

nation and statutory revision by the legislature—an approach that is becoming increasingly feasible as the number of legislatures which have dealt comprehensively with the problem continues to grow.<sup>52</sup>

*Collins* may well have sounded the deathknell of an antiquated and harsh rule, which recognized neither the concept of loss distribution nor the nature and pervasiveness of governmental activity in contemporary Wyoming society. To be sure, there is much left to be done before Wyoming will have achieved a comprehensively fair and just system of statutory and common law rules which adequately reflect the interests of the individual citizen as a potential victim and as a nonvictimized member of the community. It can only be hoped that *Collins* does in fact demonstrate the court's willingness to finish the task of cleaning up this Augean stable, if the legislature fails to heed the court's call for action.

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52. See note 22 and Minge, *Part II*, *supra* note 6, at 660-62.