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## Torts - Sovereign Immunity of the State of Wyoming - Oroz v. Board of County Commissioners of Carbon County

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**TORTS—Sovereign Immunity of the State of Wyoming. Oroz v. Board of County Commissioners of Carbon County, 575 P.2d 1155 (Wyo. 1978).**

Juan Oroz filed a complaint alleging negligence against David Hayes to recover for injuries sustained in an automobile accident. Hayes asserted that Carbon County was negligent in the maintenance of a county road as an affirmative defense. Oroz then amended his complaint to name the Board of County Commissioners of Carbon County as an additional defendant. Carbon County joined a motion to dismiss the complaint on the ground that the Board of County Commissioners was immune from suit arising out of the performance of governmental functions. The trial court sustained the motion to dismiss and a final judgment was entered for the county.

On appeal Oroz urged the supreme court to abrogate the doctrine of sovereign immunity in Wyoming.<sup>1</sup> The court reversed the trial court, and held the immunity from tort liability which had been judicially conferred upon counties, municipal corporations, school districts, and other subdivisions of government, was abolished.<sup>2</sup> A footnote made it clear that the question of the state's immunity was not considered in the decision.<sup>3</sup>

In a concurring opinion Justice Raper stated: "While the whole court does not join in saying so, at this point in time, it appears to me that the handwriting is on the wall and the legislature might be well advised to prepare the State and arrange for funding of proper tort claims against it".<sup>4</sup>

The purpose of this note is to use the decision in *Oroz* as a basis to consider whether the sovereign immunity of the state can withstand a challenge in the Wyoming Supreme Court.

## SOVEREIGN IMMUNITY OF THE STATE

Most jurisdictions have made a distinction between the sovereign immunity of the state and the governmental im-

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1. Brief for appellant at 2, *Oroz v. Board of County Commissioners of Carbon County*, 575 P.2d 1155, 1158 (Wyo. 1978).
2. *Oroz v. Board of County Commissioners of Carbon County*, 575 P.2d 1155, 1158 (Wyo. 1978).
3. *Id.* at 1158.
4. *Id.* at 1161 (concurring opinion).

munity of a municipality or other similar subdivision.<sup>5</sup> State immunity is broader than municipal immunity. A state has both the governmental immunity from liability and the sovereign immunity from suit in its courts without its consent, whereas a municipality has only the governmental immunity from liability.<sup>6</sup> Thus, in order to recover on a tort claim against the state a plaintiff must overcome both the state's substantive immunity from tort liability and the state's immunity from suit without its consent.<sup>7</sup>

### *Immunity from Liability*

In the past the court has left it up to the legislature to adopt a uniform system of handling state tort liability, either by abolishing the defense of sovereign immunity or by providing for limited coverage by insurance.<sup>8</sup> In *Oroz*, the court exhibited an about-face in its thinking. Before *Oroz* the court consistently held that any change in the doctrine of municipal immunity would have to come from the legislature, through abrogation of municipal immunity<sup>9</sup> or authorization for the purchase of liability insurance.<sup>10</sup> Yet in *Oroz* the court took the ball away from the legislature by judicially abolishing municipal immunity from tort liability.<sup>11</sup> There is no reason why the court cannot do likewise in the area of state immunity.

The same reasons the court used in abrogating municipal immunity in *Oroz* apply with equal force to the question of state immunity. In *Oroz* the court recognized that municipal immunity is not a legislative rule by virtue of Section 8-1-101 of the Wyoming Statutes,<sup>12</sup> which adopts the common law of England as the rule of decision in Wyoming.<sup>13</sup> The doctrine of state immunity from liability in tort is also

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5. *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618, 625 (1962).

6. *Id.* at 625.

7. *See, Jivelekas v. City of Worland*, 546 P.2d 419 (Wyo. 1976), a noteworthy case which presents a thorough history of the development of sovereign immunity and presents the arguments for abrogation of both the state's immunity from tort liability and its immunity from suit. The court purportedly abolished the sovereign immunity of the state. But, the opinion did not annul the state's sovereign immunity because the case was disposed of on grounds other than the immunity question, and the case was heard by a panel of three justices rather than by the entire court.

8. *Awe v. University of Wyoming*, 534 P.2d 97, 107 (Wyo. 1975).

9. *Lutheran Hospitals & Homes Society of America v. Yepsen*, 469 P.2d 409, 410 (Wyo. 1970).

10. *Collins v. Memorial Hospital of Sheridan County*, 521 P.2d 1339, 1344 (Wyo. 1974).

11. *Oroz v. Board of County Commissioners of Carbon County*, *supra* note 2, at 1158.

12. WYO. STAT. § 8-1-101 (1977).

13. *Oroz v. Board of County Commissioners of Carbon County*, *supra* note 2, at 1157.

decisional law and the court has the authority to alter it.<sup>14</sup> In *Oroz*, the court refused to use the doctrine of stare decisis "as a justification for the continuance of an unfair and improper rule which operates to the detriment of those who may suffer tortious injury."<sup>15</sup> The doctrine of state immunity from tort liability is also causing a great deal of injustice by shielding the state from liability for its torts, and stare decisis should not be used "to perpetuate the harsh and unjust results which blind adherence to sovereign immunity rules mandates."<sup>16</sup>

Moreover, several of the cases cited with approval in *Oroz* were cases in which the state's immunity from tort liability was annulled.<sup>17</sup> By basing the abrogation of municipal tort immunity on the reasons set forth in these cases one could argue the court implicitly approved of the abrogation of the state's immunity from tort liability.

Another reason suggesting that the court might not hesitate to abolish state immunity from liability if faced with the question can be gleaned from Justice Raper's opinion in *Jivelekas v. City of Worland*.<sup>18</sup> In an opinion designed to point out the problems in abrogation of governmental immunity, Justice Raper stated that the legislature should have a first adequate opportunity to establish a plan of compensation for those injured by the tortious conduct of the state.<sup>19</sup> He also warned that legislative action may be well advised.<sup>20</sup> The legislature has had time to act and has failed to do so.<sup>21</sup> Perhaps in saying the handwriting is on the wall, Justice Raper meant that the legislature's time to act has expired; and the court should now take action.

This theory is supported by the situation in Minnesota. In 1970 the court was asked to abolish the state's sovereign immunity.<sup>22</sup> The court declined and left it up to the

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14. *Jones v. State Highway Commission*, 557 S.W.2d 225, 228 (Mo. 1977).

15. *Oroz v. Board of County Commissioners of Carbon County*, *supra* note 2, at 1157.

16. *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153, 1156 (1975).

17. *E.g. Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); *Holytz v. City of Milwaukee*, *supra* note 5; *Hicks v. State*, *supra* note 16; *Jones v. State Highway Commission*, *supra* note 14.

18. 546 P.2d 419 (Wyo. 1976).

19. *Id.* at 433 (concurring in part and dissenting in part).

20. *Id.* at 434 (concurring in part and dissenting in part).

21. Wyoming does not have a comprehensive State Tort Claims Act. One was enacted in House Bill No. 186 of the Forty-fourth Legislature, 1977 Session, but was vetoed by the Governor.

22. *Johnson v. Callisto*, 287 Minn. 61, 176 N.W.2d 754 (1970).

legislature to implement a change.<sup>23</sup> After five years of legislative inaction the court elected to re-examine the question and abolished the tort immunity of the State of Minnesota.<sup>24</sup>

Furthermore, judicial action in the area of state tort immunity often prompts legislative action.<sup>25</sup> If the court annuls the state's defense of immunity from tort liability the legislature may be pressed to devise a comprehensive plan to pay for tort claims against the state.

### *Immunity from Suit*

A more difficult question to answer is whether or not the State of Wyoming will retain its immunity from suit which can be altered only by the legislature. Whereas the state's immunity from tort liability is based on the common law,<sup>26</sup> the state's immunity from suit has a constitutional basis in Article I, Section 8 of the Wyoming Constitution which provides that, "Suits may be brought against the state in such manner and in such courts as the legislature may by law direct".<sup>27</sup>

The first case to construe Article I, Section 8<sup>28</sup> was *Hjorth Royalty Co. v. Trustees of the University of Wyoming*.<sup>29</sup> After citing Article I, Section 8<sup>30</sup> the court stated that such provisions are not self-executing.<sup>31</sup> The court held that no suit can be maintained against the state until consent is given by the state;<sup>32</sup> and furthermore, it is up to the legislature to decide whether or not the state should consent to suits against it.<sup>33</sup> A long line of cases have upheld this interpretation so that the rule in Wyoming today is that no suit can be maintained against the state unless the legislature has consented to and made provision for such suit.<sup>34</sup>

23. *Id.* at 757.

24. *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975).

25. *Minge, Governmental Immunity From Damage Actions in Wyoming*, 7 Land & Water L. Rev. (Part I - 229, Part II - 617), 657 (1972). (Hereinafter cited as *Minge*).

26. *Hicks v. State*, *supra* note 16, at 1154.

27. Wyo. CONST. art. I, § 8.

28. Wyo. CONST. art. I, § 8.

29. 30 Wyo. 309, 222 P. 9 (1924).

30. Wyo. CONST. art. I, § 8.

31. *Hjorth Royalty Co. v. Trustees of the University of Wyoming*, *supra* note 29, at 9.

32. *Id.* at 9.

33. *Id.* at 11.

34. *See, Retail Clerks Local 187 v. University of Wyoming*, 531 P.2d 884 (1975).

Several other jurisdictions have a similar constitutional provision.<sup>35</sup> The courts have taken two approaches in considering sovereign immunity in light of a constitutional mandate that the legislature should provide the manner and courts in which suits may be brought against the state. One approach is that taken in Wisconsin and Ohio.

Wisconsin abolished state immunity from tort liability in *Holytz v. City of Milwaukee*.<sup>36</sup> The court made a distinction between governmental immunity from tort liability and the sovereign immunity of the state from suit.<sup>37</sup> The court held<sup>38</sup> that there would be substantive liability on the part of the state, since the court nullified the defense of nonliability for torts, but that the right of a private party to sue the state was conditioned upon the state's consent.<sup>39</sup>

Ohio also has a constitutional provision<sup>40</sup> almost identical to Article I, Section 8 of the Wyoming Constitution.<sup>41</sup> In interpreting the Ohio Constitution the court held that the purpose of the provision is to abolish the defense of governmental immunity, but that it is not self-executing.<sup>42</sup> The court reasoned that the defense of immunity from liability was no longer available to the state because of the constitutional provision, but the defense of lack of consent to suit was still available.<sup>43</sup> Thus a tort action could not be brought against the state without its consent.<sup>44</sup> The court concluded by acknowledging that the judiciary could not constitutionally grant the consent to sue the state.<sup>45</sup>

Missouri has taken another approach. In *Jones v. State Highway Commission*,<sup>46</sup> the court recognized the distinction between immunity from liability and immunity from suit,

35. See, *Thacker v. Board of Trustees of Ohio State University*, 35 Ohio St. 2d 79, 298 N.E.2d 542, 544 (1973) for a list of jurisdictions which have an immunity theory pursuant to a constitutional provision.

36. 17 Wis.2d 26, 115 N.W.2d 618 (1962).

37. *Id.* at 625.

38. *Id.* at 625.

39. Wis. Const. art. IV, § 27 provides that the legislature shall direct by law in what manner and in what courts suit may be brought against the state.

40. Ohio Const. art. I, § 16 provides that suit may be brought against the state, in such courts, and in such manner as may be provided by law.

41. Wyo. Const. art. I, § 8.

42. *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736, 743 (1972).

43. *Id.* at 744.

44. *Id.* at 744.

45. *Id.* at 744.

46. 557 S.W.2d 225 (Mo. 1977).

but still allowed recovery on a tort claim against the state.<sup>47</sup> The court found sufficient legislative consent to suit in a statute which allowed the state agency involved to sue and be sued in its official name.<sup>48</sup>

The approach employed by the Missouri court is available to Wyoming litigants. The contention is that Article I, Section 8 of the Wyoming Constitution<sup>49</sup> should be restrictively construed as merely authorizing the legislature to regulate the procedure for and venue in actions against the state.<sup>50</sup> In *Jivelekas*, Justice Rose expressed his belief that Article I, Section 8<sup>51</sup> furnishes recognition that suit may be brought against the state so long as the legislature establishes the procedure in which such litigation shall be undertaken.<sup>52</sup> In this regard the legislature has passed Section 1-35-101 of the Wyoming Statutes.<sup>53</sup> This statute provides that any action permitted by law that is brought against enumerated state agencies is an action against the State of Wyoming, and that any such action must be brought in the courts of the State of Wyoming.<sup>54</sup> An argument can be made that Section 1-35-101 of the Wyoming Statutes<sup>55</sup> is a legislative consent to suits against the state, and can be said to have given legislative recognition to the restrictive construction<sup>56</sup> of Article I, Section 8 of the Wyoming Constitution.<sup>57</sup>

The Wyoming court has had an opportunity to interpret Section 1-35-101 of the Wyoming Statutes.<sup>58</sup> In *Harrison v. Wyoming Liquor Commission*,<sup>59</sup> the plaintiff's action for damages had been dismissed by the trial court because the Liquor Commission was held to be exempt from suit.<sup>60</sup> On appeal the plaintiff contended that Chapter 35 of the Special

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47. *Id.* at 230.

48. *Id.* at 230.

49. WYO. CONST. art. I, § 8.

50. Minge at 236.

51. WYO. CONST. art. I, § 8.

52. *Jivelekas v. City of Worland*, *supra* note 18, at 429.

53. WYO. STAT. § 1-35-101 (1977).

54. The state agencies listed in Wyo. Stat. § 1-35-101 (1977) are: The Wyoming farm loan board, board of land commissioners, state board of charities and reform, public service commission of Wyoming, state board of equalization of Wyoming, and the trustees of the University of Wyoming.

55. WYO. STAT. § 1-35-101 (1977).

56. Minge at 236.

57. WYO. CONST. art. I, § 8.

58. WYO. STAT. § 1-35-101 (1977).

59. 63 Wyo. 13, 177 P.2d 397 (1947).

60. *Id.* at 398.

Session Laws of 1933<sup>61</sup> was an implied consent to make the state subject to suit.<sup>62</sup> In writing for the Court Justice Blume stated, "It is not necessary to determine the meaning of the statute and we do not do so".<sup>63</sup> He went on to state the general rule that statutes authorizing suit against the state are to be strictly construed.<sup>64</sup> In applying this rule<sup>65</sup> Justice Blume refused to interpret the statute as authorizing suit against an agency, the Liquor Commission, which was not one of the state agencies specifically enumerated in Section 1-35-101 of the Wyoming Statutes.<sup>66</sup> By holding as it did the court left open the question of whether or not Section 1-35-101 of the Wyoming Statutes<sup>67</sup> is a legislative consent to suit against the state agencies which are specifically enumerated in the act.

The Wyoming court in several other cases has held that the legislature has not consented to suit against the state,<sup>68</sup> but in none of these cases did the court consider the effect of Section 1-35-101 of the Wyoming Statutes.<sup>69</sup>

The Court of Appeals for the 10th Circuit has recognized the validity of the argument that Section 1-35-101<sup>70</sup> is a legislative consent to suit against the state. In *Williams v. Eaton*,<sup>71</sup> a civil rights action against the Trustees of the University of Wyoming and the State of Wyoming; the court considered the effect of Section 1-35-101 of the Wyoming Statutes<sup>72</sup> on the state's immunity from suit provided by article I, section 8 of the Wyoming Constitution.<sup>73</sup> The court stated, "by law immunity of the Trustees from suit is waived only as to such actions in the courts of the State of Wyoming".<sup>74</sup> The court held that immunity was not waived as to

61. *Now*, WYO. STAT. § 1-35-101 (1977).

62. *Harrison v. Wyoming Liquor Commission*, *supra* note 59, at 399.

63. *Id.* at 399.

64. *Id.* at 399.

65. *Id.* at 399.

66. WYO. STAT. § 1-35-101 (1977).

67. WYO. STAT. § 1-35-101 (1977).

68. *See*, *Retail Clerks Local 187 v. University of Wyoming*, *supra* note 34; *Hamblin v. Arzy*, 472 P.2d 933 (Wyo. 1970); *Ellis v. Wyoming Game & Fish Commission*, 74 Wyo. 226, 286 P.2d 597 (1955); *Price v. State Highway Commission*, 62 Wyo. 385, 167 P.2d 309 (1946).

69. WYO. STAT. § 1-35-101 (1977).

70. WYO. STAT. § 1-35-101 (1977).

71. 443 F.2d 422 (10th Cir. 1971).

72. WYO. STAT. § 1-35-101 (1977).

73. WYO. CONST. art. I, § 8.

74. *Williams v. Eaton*, *supra* note 71, at 428.

suits against the state in the federal courts.<sup>75</sup> Although *Williams* is not mandatory authority for Wyoming courts, it is important because it exemplifies a reasonable interpretation of Section 1-35-101.<sup>76</sup> The federal court did interpret the statute as a waiver of the state's immunity from suit in actions in the state courts of Wyoming. Furthermore, since the Trustees of the University of Wyoming are listed in the statute, *Williams* lends credibility to the argument that Section 1-35-101 of the Wyoming Statutes<sup>77</sup> is a legislative consent to suit against the state agencies listed in the act.<sup>78</sup>

A final argument for the proposition that suit can be maintained against the state is implicit in the distinction between proprietary and governmental functions. In some jurisdictions the state is held to be liable in actions based upon tortious acts committed in the course of a proprietary as distinguished from a governmental capacity.<sup>79</sup> One commentator<sup>80</sup> believes that several cases allow that the State of Wyoming could be liable without legislative consent to suit if the wrongful act occurs in the course of a proprietary activity.<sup>81</sup> For example, in *Chavez v. City of Laramie*<sup>82</sup> the court cited with approval the rule that "a state exercising governmental functions cannot be made to respond in damages for tort . . . unless it has voluntarily assumed such liability and consented to be liable".<sup>83</sup> Whether a statement such as this, which is dicta, would allow recovery against the state if proprietary activities were involved is questionable.<sup>84</sup>

If the state can in fact be held liable for proprietary activities it creates an anomaly in the law. It is inconsistent to determine that the state can be liable for torts committed in

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75. *Id.* at 428.

76. WYO. STAT. § 1-35-101 (1977).

77. WYO. STAT. § 1-35-101 (1977).

78. On the other hand, *Awe v. University of Wyoming*, *supra* note 8, was a suit against the Trustees of the University of Wyoming in state court, and it was dismissed. But, the court did not decide any questions of sovereign immunity. The suit was dismissed because the plaintiff had failed to file a claim with the state before filing suit as required by statute.

79. *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970).

80. *Minge* at 236.

81. *See, Chavez v. City of Laramie*, 389 P.2d 23 (Wyo. 1964); *Osborn v. Lawson*, 374 P.2d 201 (Wyo. 1962); *Ellis v. Wyoming Game & Fish Commission*, *supra* note 68; *Harrison v. Wyoming Liquor Commission*, *supra* note 59.

82. 389 P.2d 23 (Wyo. 1964).

83. *Id.* at 25.

84. Justice Rose in *Jivelekas v. City of Worland*, *supra* note 18, at 429, and one commentator, *Minge* at 254, believes that the cases cited *supra* note 81, would allow recovery against the state for proprietary activities even in the absence of legislative consent.

connection with proprietary functions, and at the same time conclude that Article I, Section 8 of the Wyoming Constitution<sup>85</sup> prohibits all suits against the state without legislative consent.<sup>86</sup> As interesting as this argument may be it is tenuous at best in light of the fact that the state has never been held liable for torts committed in the course of proprietary functions when sovereign immunity has been pleaded as a defense.<sup>87</sup>

### CONCLUSION

It has been said that the governmental immunity of the State of Wyoming has a foundation in both the common law and the Wyoming Constitution.<sup>88</sup>

As a result of *Oroz* the common law should no longer be a barrier to abrogation of state immunity. The same reasons that called for the abrogation of the tort immunity of counties and municipalities apply with equal force to the state's immunity from tort liability. The state's immunity from liability is court created and can be taken away by the court.<sup>89</sup> The court can reasonably be expected to abolish the state's immunity from tort liability at the first opportunity.<sup>90</sup>

The constitutional foundation, contained in Article I, Section 8 of the Wyoming Constitution,<sup>91</sup> is that the state is immune from suit in the absence of legislative consent.<sup>92</sup> Thus, even if the state is substantively liable for its torts the Wyoming Constitution still presents a formidable barrier to recovery from the state. The legislature may have consented to suit against the state in Section 1-35-101 of the Wyoming Statutes.<sup>93</sup> The question of whether or not the statute is a legislative consent to suit against at least the state agencies specified in the act is still open as a result of *Harrison*.

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85. WYO. CONST. art. I, § 8.

86. Minge at 236.

87. Minge at 655.

88. Minge at 657.

89. *Jones v. State Highway Commission*, *supra* note 14, at 228; *Hicks v. State*, *supra* note 16, at 1155.

90. It is important to note that two of the five justices, Mr. Raper and Mr. Rose, have already expressed their willingness to abolish the state's sovereign immunity.

91. WYO. CONST. art. I, § 8.

92. *Hjorth Royalty Co. v. Trustees of the University of Wyoming*, *supra* note 29, at 11.

93. WYO. STAT. § 1-35-101 (1977).

Hopefully, if the court takes the initiative by abolishing the state's immunity from liability the legislature will follow by providing the means for an injured claimant to maintain an action against and recover from the state.<sup>94</sup>

The court need not be worried by the illusory threat of unlimited liability if it abolishes state immunity. The removal of immunity does not impose strict liability upon the state.<sup>95</sup> Nor would the state be liable for acts or omissions committed in the exercise of a legislative or judicial function.<sup>96</sup> Furthermore, the state can protect itself through liability insurance or by maintaining some sort of central trust for the satisfaction of valid tort claims.<sup>97</sup>

As a commentator has said, "It is suggested that the court does have the power to abrogate the immunity doctrine and that is perhaps the most effective method of attracting legislative attention to the problem and of facilitating a comprehensive solution."<sup>98</sup>

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94. Minge at 657.

95. Jones v. State Highway Commission, *supra* note 14, at 230.

96. *Id.* at 230.

97. Oroz v. Board of County Commissioners of Carbon County, *supra* note 2, at 1160 (Raper, Justice, specially concurring).

98. Minge at 662.