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Wyoming's Government Claims Act: Sovereign Immunity with Exceptions - A Statutory Analysis

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COMMENTS

WYOMING'S GOVERNMENTAL CLAIMS ACT: SOVEREIGN IMMUNITY WITH EXCEPTIONS— A STATUTORY ANALYSIS

On July 1, 1979 the shackles of absolute governmental immunity were cracked from the wrists of tort litigants who had been injured by governmental action. On that date the Wyoming Governmental Claims Act (GCA)[1] inaugurated a new era of limited governmental liability. In direct response to the Wyoming Supreme Court's decision in *Oroz v. Board of County Commissioners*[2] the 45th Wyoming Legislature enacted the GCA in order to "balance the respective equities between persons injured by governmental action and the taxpayers of the state of Wyoming whose revenues are utilized by governmental entities on behalf of those taxpayers."[3]

As Chief Justice Guthrie noted in *Oroz*,[4] the area of governmental and sovereign immunity has been exhaustively discussed. This article will not attempt to add, except briefly, to the voluminous literature which dissects the intricacies of governmental immunity.[5] Rather, the comment will focus upon the GCA, analyze its significant provisions, recommend several necessary changes, and come to conclusions as to the extent to which the legislature succeeded in "balancing the respective equities."[6]

1. WYO. STAT. § 1-39-101 through § 1-39-119 and § 26-3-128.1 (Supp. 1979).
2. 575 P.2d 1155 (Wyo. 1978). Oroz abrogated the governmental immunity of local governments.
3. WYO. STAT. § 1-39-102(a) (Supp. 1979).
4. *Supra* note 2, at 1157.
5. The best starting point is the excellent discussion by Prof. Minge. Minge, *Government Immunity From Damage Actions in Wyoming*, 7 LAND & WATER L. REV. (Part I-229, Part II-617) (1972). *See also* Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1 (1972); Note, 14 LAND & WATER L. REV. 271 (1979); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976) (Justice Rose opinion).
6. The vocabulary in this area of the law is confusing. In Worthinton v. State, 598 P.2d 796 (Wyo. 1979), retired Chief Justice Guthrie distinguished between sovereign immunity, which applies to the state, and governmental immunity which applies to all local governments. Other courts have defined governmental immunity as applying to the general immunity from torts enjoyed by both the state and local governments, and sovereign immunity as limited to the states immunity from suit without its consent. Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618, 625 (1962); *see* Note, supra note 5, at 271-272. The different labels are not helpful and obviously the legislature did not adopt Justice Guthrie's distinctions since the GCA applies to all governments. In this comment the generic term governmental immunity will be used except where differentiation is essential.

BACKGROUND—THE ROAD TO OROZ AND THE GCA

In the early 1970's the doctrine of governmental immunity came under increasingly hostile attack by the courts and the commentators.[7] The initial salvos in Wyoming were fired by Professor Minge in his two penetrating articles.[8] Minge noted that Wyoming governments have historically enjoyed a broad grant of immunity from tort actions.[9] However, beginning in 1974 the Wyoming Supreme Court turned an increasingly unfriendly eye upon this immunity.[10] Although the court continued, until *Oroz*,[11] to uphold immunity, it was faced with strong and scholarly opposition by Mr. Justice Rose.[12] In addition, three years prior to *Oroz*,[13] Mr. Chief Justice Raper in *Awe v. The University of Wyoming*[14] indicated his belief that the legislature should act to set up some "uniform system of handling state tort liability."[15]

The 44th Wyoming Legislature, aware of the imminent demise of governmental immunity, passed in 1977 a Wyoming Tort Claims Act.[16] However, the act was vetoed by the Governor. In 1978 *Oroz* held that "immunity from tort liability, heretofore judicially conferred upon counties (municipal corporations, school districts, and other subdivisions of government) is abrogated."[17] *Oroz* did not reach the issue of the state's immunity,[18] although the concurring opinions by Justices Raper and Rose cast doubt upon the continuing viability of the doctrine.[19] The *Oroz* decision made the abolition of immunity prospective and

7. DAVIS, ADMINISTRATIVE LAW IN THE SEVENTIES supplementing ADMINISTRATIVE LAW TREATISE, § 25.00 *et. seq.* (1976 and 1980).
8. Minge, *supra* note 5.
9. *Id.* at 235.
10. Collins v. Memorial Hospital of Sheridan County, 521 P.2d 1339, 1344 (Wyo. 1974).
11. *Supra* note 2.
12. Jivelekas v. City of Worland, *supra* note 5.
13. *Supra* note 2.
14. 534 P.2d 97, 106-107 (Wyo. 1975).
15. *Id.*
16. House Bill No. 186, Wyoming State Legislature, 1977 Session. See reference to the act in Oroz, *supra* note 2, at 1160 (Justice Raper, concurring).
17. *Supra* note 2, at 1158.
18. *Id.* at 1158 n. 6.
19. *Id.* at 1159-1161.

except for the claim of Mr. Oroz,[20] local government liability became the rule as to all claims arising on or after July 1, 1979. The Governmental Claims Act was passed on March 6, 1979 and made effective on July 1, 1979.[21]

Before analyzing the GCA, note must be made of the Wyoming Supreme Court's position as to recovery for injuries caused by the state that arose prior to July 1, 1979. In *Worthington v. State*[22] the court was faced with claims against the state for injuries that had occurred in separate automobile accidents in 1976 and 1977.[23] The court addressed squarely the plaintiffs' argument that the court should abrogate immunity as it applies to the State of Wyoming. The court rejected the plaintiffs' position and held that "the defense of sovereign immunity was available to protect defendants (State of Wyoming, State Highway Commission, and Department of Revenue and Taxation) from suit. . . ."[24] The court's decision was based upon the long established interpretation of article 1, section 8 of the Wyoming Constitution, that provides that the State of Wyoming is not subject to suit without it's consent.[25] Since there was no consent in this case the state's immunity from suit was a complete shield.

It is clear from the *Worthington*[26] opinion that the court will defer to the legislature's actions in establishing a uniform system for handling tort claims. As retired Chief Justice Guthrie stated,

20. The final chapter in Mr. Oroz's landmark suit is recorded in Oroz v. Hayes, 598 P.2d 432 (Wyo. 1979).
21. 1979 WYO. SESS. LAWS. Ch. 157, § 8.
22. 598 P.2d 796 (Wyo. 1979).
23. Worthington is a complex case. The court held that the injuries suffered by the plaintiffs were not within the risks contemplated by the insurance contract between the defendant insurer (State Farm) and the State of Wyoming. *Id.* at 809. Because the risks were not covered by the insurance contract the plaintiffs could not avail themselves of the protection of WYO. STAT. § 1-35-102 (1977) which waives governmental immunity to the extent of liability coverage. Since the immunity was not waived the plaintiffs had to attack the doctrine directly and without success.
24. Worthington v. State, *supra* note 22, at 805.
25. WYO. CONST. art. 1 § 8 states:
> All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. *Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.* (Emphasis added.)
26. *Supra* note 22.

> [T]his matter can be far better handled by a legislature to carve out and classify those areas in which the doctrine of immunity shall be abolished and those areas in which it should be retained. If this is not left in the hand of the legislature, this court would be forced to settle the possible areas in which the doctrine should not apply on a case-by-case basis with unnecessary confusion and expense to litigants and the State.[27]

Although the constitutional argument in *Worthington* is not above criticism,[28] the holding in the case is certain. The court will let the legislature, through the GCA, establish a system for handling injuries caused by governmental action. The court will uphold the July 1, 1979 beginning date and all causes of action resulting from injuries occurring prior to that date should be barred by the continued validity of governmental immunity.

THE GOVERNMENTAL CLAIMS ACT—AN OVERVIEW

In attempting to devise a uniform system for handling tort claims the legislature was assisted in its decision-making by a wealth of information from other states and an able Legislative Service Office.[29] By 1978, at least 36 states had adopted or were considering some form of governmental tort law.[30]

The legislature's first decision was whether to enact a "close-ended" or "open-ended" statutory scheme. A "close-ended" approach reasserts governmental immunity but

27. *Id.* at 805.
28. *Id.* at 809 (J. Rose, dissenting opinion). *See* Note, supra note 5.
29. The author is grateful for the assistance of Mr. Joseph B. Meyer and Mr. T. Thomas Singer of the Legislative Service Office who kindly made the legislative committee materials available.
30. NATIONAL LEAGUE OF CITIES 6, *The New World of Municipal Liability*, (April, 1978). A copy of this comprehensive document, which contains a state-by-state survey of the status of governmental immunity was distributed to the members of the Subcommittee to Study Sovereign Immunity of the Joint Judiciary Interim Committee. Letter of August 7, 1978 from Joseph B. Meyer to subcommittee members. For a more recent state survey *see* NATIONAL ASSOCIATION OF ATTORNEY GENERALS. Sovereign Immunity: The Tort Liability of Government and Its Officials (September 1979). For a slightly dated state-by-state survey *see* Harely and Wasinger, *Governmental Immunity: Despotic Mantle of Creature of Necessity*, 16 WASHBURN L.J. 12 (1976). *Note*, their analysis of the status of governmental immunity in Wyoming is incorrect.

waives the immunity for certain enumerated exceptions. Such an approach has been taken by Colorado,[31] New Mexico[32] and Maine[33] among others. In contrast, the majority of states have passed "open-ended" legislation[34] that makes liability the rule and retains immunity only for certain categories of activities.[35] The Federal Tort Claims Act is "open-ended."[36]

The Wyoming legislature chose a "close-ended" approach, based on the advice of the Attorney General,[37] and also probably in the belief that such a statute retains greater immunity for the government. The reassertion of immunity is set forth in Section 1-39-104(a): "A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112."[38] An important practical note is that the GCA is similar to the New Mexico Tort Claims Act,[39] and decisions from that state should be consulted to interpret like provisions of the GCA.

31. COLO. REV. STAT. § 24-10-101 *et. seq.* (1973).
32. N. M. STAT. ANN. § 41-4-1 *et. seq.* (1978).
33. ME. REV. STAT. ANN. tit. 14, § 8101 *et. seq.*
34. *The New World of Municipal Liability*, supra note 30, at 7. In 1978, 24 of 36 states had open-ended statutes.
35. *See*, Oregon, ORE. REV. STAT. ch. 30.260 to 30.300 (1977); California, CAL. GOV'T CODE § 810 et. seq. (West 1966); Nevada, NEV. REV. STAT. ANN. § 41.031 to 41.039 (1973).
36. 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671 *et. seq.* (1970).
37. OP. WYO. ATT'Y GEN. No. 79-003, Jan. 30, 1979, p.9. "In the event the legislature shall desire to authorize suits for specific causes of action or to limit the amount of recovery, the quoted provisions of the Constitution (ART. 10, § 4, ART. 1, § 8) compel the legislation to first establish the doctrine of sovereign immunity and thereafter to waive the doctrine to the extent legislatively determined."
38. WYO. STAT. § 1-39-104(a) (Supp. 1979).
39. *Compare* N.M. STAT. ANN. § 41-4-2, § 41-4-3 (1978) (definitions of "public employee and "scope of duties") and the exceptions in §§ 41-4-5 through 41-4-12 *with* WYO. STAT. §§ 1-39-102, 1-39-103 and exceptions §§ 1-39-105 through 1-39-112 (Supp. 1979). The exceptions to immunity in both statutes are practically identical. *Note, however*, changes in N.M. STAT. ANN. §§ 41-4-4, 41-4-10 (Supp. 1979). *See also* Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. REV. 249 (1976); see Trujillo v. City of Albuquerque, 603 P.2d 303 (N.M.App. 1979) (this case arose prior to the New Mexico Tort Claims Act); McClure v. Town of Mesilla, 601 P.2d 80 (N.M.App. 1979). Candelaria v. Robinson, 606 P.2d 196 (N.M.App. 1980); City of Albuquerque v. Redding, 605 P.2d 1156 (N.M. 1980). The Wyoming legislative subcommittee, *supra*, note 30, considered a bill patterned after the New Mexico Tort Claims Act. Letter from Joseph B. Meyer, Legislative Service Office to Rep. Ross Copenhaver, March 22, 1978.

From a procedural standpoint, jurisdiction for claims under the GCA is vested in the district courts of Wyoming.[40] Venue is expansive, as claims against the state can be brought in the county in which the public employee resides, the county in which the cause of action arose or in Laramie County.[41] The definition of "governmental entity"[42] and the corresponding definitions of "state"[43] and "local government"[44] appear to cover every conceivable governmental organization. The GCA also provides that it is the exclusive remedy against a governmental entity and that no other claims against the government arising out of the same transaction may be brought.[45]

The GCA does not directly address the article I section 8[46] constitutional requirement that the state give its consent to suit. Nowhere in the act does it say that the state thereby consents to suit. However, the language "the governmental entity is liable"[47] would certainly be interpreted by all laymen and most lawyers as constituting permission to sue the state.

Constitutionality of the GCA

The GCA should pass constitutional muster under both the state and United States Constitution. The act would survive a challenge based on the state constitution. Wyoming Constitution article 1, section 8[48] gives the legislature the power to determine the manner in which suits may be brought against the state. The Wyoming Court's interpretation of this constitutional provision in *Worthington*[49] strongly supports the power of the legislature to enact the GCA.[50] Additionally, the recent decisions by the court have

40. WYO. STAT. § 1-39-117(a) (Supp. 1979).
41. WYO. STAT. § 1-39-117(b) (Supp. 1979).
42. WYO. STAT. § 1-39-103(a)(i) (Supp. 1979).
43. WYO. STAT. § 1-39-103(a)(v) (Supp. 1979).
44. WYO. STAT. § 1-39-103(a)(ii) (Supp. 1979).
45. WYO. STAT. § 1-39-116 (Supp. 1979); *see* McClure v. Town of Mesilla, *supra* note 39, for a discussion of the meaning of the exclusive remedy provision.
46. *Supra* note 25.
47. WYO. STAT. § 1-39-105 through 1-39-112 (Supp. 1979).
48. *Supra* note 25.
49. *Supra* note 22.
50. Also, the Attorney General's opinion, *supra* note 37, concludes that the act would be constitutional.

demonstrated a desire of the Justices to place the burden of enacting a uniform system for handling tort claims upon the legislature.[51] Finally, constitutional challenges have been raised against tort claims acts in other states and the statutes have been uniformly upheld.[52]

State tort claims acts have also been challenged under the United States Constitution, primarily on fourteenth amendment due process and equal protection grounds. These challenges have been mostly unsuccessful. In a recent United States Supreme Court decision, *Martinez v. California*,[53] the court upheld a California statute that grants absolute immunity to state employees who make parole release decisions. The court rejected the plaintiff's due process claims and held that there was a rational relationship between the states purpose of protecting the exercise of the parole officer's discretion and the statutory immunity. The court stated that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest."[54]

Using similar reasoning, several state courts have upheld their tort claim statutes against equal protection challenges.[55] Also, the statutory limitation on the amount of recovery ($500,000 under the GCA) has survived constitutional attack,[56] and such limitations are now an accepted feature of governmental claims acts.[57] In summary, the GCA should survive a constitutional assault.

51. Worthington v. State, *supra* note 22; Oroz v. Bd. of County Comm'rs, *supra* note 2; Awe v. University of Wyoming, *supra* note 14.
52. Silva v. State, 86 Nev. 911, 478 P.2d 591 (1970); Fritz v. Regents of the University of Colorado, 586 P.2d 23 (Colo. 1978); White v. Detroit, 254 N.W.2d 572 (Mich. App. 1977); Datil v. City of California, 263 Cal. App.2d 665, 69 Cal. Rptr. 788 (1968).
53. ..... U.S. ....., 100 S.Ct. 553 (1980). Note that this is a rare unanimous decision.
54. *Id.* at 554.
55. Madsen v. State, 583 P.2d 92 (Utah 1978); Fritz v. Regents of University of Colorado, *supra* note 52; Datil v. City of Los Angeles, *supra* note 52; Silva v. State, *supra* note 52; Est. of Cargill v. City of Rochester, 406 A.2d 704 (N.H. 1979), app. dismissed.
56. Torres v. State, 372 N.E.2d 445, (Ill. App. 1978), *app. dismissed* 99 S.Ct. 270 (1978), upholding Illinois' $25,000 recovery limit. *See also* Silva v. State, *supra* note 52, at 594; 48 U.S. L.W. 3596 (1980).
57. *See* City of Colorado Springs v. Gladin, 599 P.2d 909 (Colo. 1979). Undoubtedly, a Wyoming plaintiff will attack the constitutionality of the limit on recovery. The argument will probably be based on article 10, § 1 of the Wyoming Constitution which provides: "No law shall be enacted limiting the amount of damages to be recovered for causing the

Liability—Making the Case Against the Government

In order to recover against the governmental entity the plaintiff will have to meet all of the statutory requirements and survive all defenses. As the California Supreme Court has stated in interpreting California's Tort Claims Act:

> "The intent of the act is not to expand the rights of plaintiff's in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances: immunity is waived only if the various requirements of the act are satisfied."[58]

To be successful, the plaintiff must show: (1) that the suit is a tort action; (2) that the claim falls within one of the enumerated exceptions; (3) that the negligence (4) of a public employee (5) while acting within the scope of his duties (6) caused bodily injury, wrongful death, or property damage. These requirements will be discussed in order.

Tort Action

In interpreting the GCA it is important to remember the general rule that statutes in derogation of state sovereignty are to be strictly construed.[59] Therefore, it can be expected that Wyoming courts will require that actions brought under the GCA fit comfortably within its intended scope. The threshold requirement in these suits is that they

injury or death of any person. . . ." This argument should not succeed. The Attorney General concludes in Opinion No. 79-003, *supra* note 37, that such a limitation is constitutionally permissible. In summary, the Attorney General's conclusion is based on two propositions: 1. "If the power exists to perform an act the power exists to perform part of an act." The legislature has the power to grant partial immunity. 2. The provision in WYO. CONST. art. 10, § 4, was not intended to be applied to the state or its political subdivisions.

58. Williams v. Horvath, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976). Note in contrast the statement of the Nevada Supreme Court in Hagblom v. State Div. of Motor Vehicles, 571 P.2d 1172, 1174-1175 (Nev. 1977). Nevada has an open-ended statute that waives immunity, *supra* note 35. The court stated, "We are mindful that '[i]n a close case we must favor a waiver of immunity and accommodate the legislative scheme.'" citing Silva v. State, *supra* note 52, at 593.

59. Harrison v. Wyoming Liquor Commission, 63 Wyo. 13, 177 P.2d 397 (1947); Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971).

must be "tort" actions.[60] Section 1-39-104(q) grants immunity for "any tort".[61] Unfortunately, tort is not defined by the statute. This lack of definition is characteristic of many state tort claims acts.[62] The legislature must have intended that common-law notions of "tort" prevail. In Wyoming, "tort" has a very broad meaning,[63] so suits that make a colorable claim of being "tort" actions should be brought under the umbrella of the GCA. As is discussed in greater detail below, a determination that a suit is a tort action and therefore proper under the GCA can have a significant impact upon such rights as indemnification, the notice of claim period and the statute of limitations.[64] Undoubtedly, some of the initial battles involving the GCA will turn on the interpretation of the word "tort".

The Exceptions to Immunity

The enumerated exceptions to immunity in sections 1-39-105 through 1-39-111 of the Wyoming Statutes make the governmental entity liable for damages resulting from bodily injury, wrongful death, and property damage caused by the negligence of public employees while acting within the scope of their duties. Section 1-39-112[66] provides for more expansive liability resulting from a law enforcement

60. The GCA does not address immunity from contract actions. The state has historically been immune from contract actions based on the WYO. CONST. art. 1 § 8 argument that the state may not be sued without its consent. Hjroth Royalty Comp. v. Trustees of University, 30 Wyo. 309, 222 P. 9 (1924). The Wyoming Court recently reaffirmed the state's immunity from contract actions when the state is engaging in a governmental function. Biscar v. University of Wyoming Board of Trustees, 605 P.2d 374 (Wyo. 1980). However, the issue is now moot. The 1980 Wyoming Legislature amended WYO. STAT. § 1-39-104(a) (Supp. 1979) to waive the immunity of a governmental entity to actions based on a contract. 1980 WYO. SESS. LAWS. Ch. 46.
61. WYO. STAT. § 1-39-104(a) (Supp. 1979).
62. *See*, N.M. STAT. ANN. § 41-4-1 *et. seq.* (1978); MONT. STAT. ANN. § 2-9-101 *et. seq.* (1979).
63. "Generally tort has a meaning somewhat similar to "wrong" and is an unlawful act injurious to another independent of contract and the injury may be either by non-feasance, malfeasance, or misfeasance. Price v. State Highway Com'n 62 Wyo. 385, 167 P.2d 309, 312 (1946). The definition of tort will also be a central point of conflict in suits brought under the civil rights acts, especially 42 U.S.C. § 1983 (1970). Suits under § 1983 may not be couched in terms of traditional torts and because the GCA requires the government to indemnify employees only for "tort claims", the definition of tort becomes crucial. *See* the discussion accompanying notes 117-129.
64. *See* the discussion accompanying notes 117-139 *infra*.
65. WYO. STAT. §§ 1-39-105 through 111 (Supp. 1979).
66. WYO. STAT. § 1-39-112(Supp. 1979).

officer's acts and this section will be addressed later in this comment.

The enumerated exceptions cover the following activities:

Sec. 105 — Operation of motor vehicles, aircraft and water craft.
Sec. 106 — Operation and maintenance of buildings, recreation areas and public parks.
Sec. 107 — Operation of airports.
Sec. 108 — Operation of public utilities and services (but no liability for failure to provide services).
Sec. 109 — Operation of any public hospital or in providing public outpatient health care.
Sec. 110 — Health care providers
Sec. 111 — Operation or maintenance of public facilities.
Sec. 112 — Law enforcement officers.

The exceptions are not very specific, which is probably intentional since the act is designed to cover the great majority of circumstances in which the activities of public employees can create a risk of physical harm to the public. Note that the exceptions make the governmental entity liable in those situations where the government is acting most like a private individual. These exceptions are analogous to the activities that court's have labeled as proprietary and governments have historically been liable for such actions.[67] The strength of the GCA and the close-ended approach to liability is that it avoids the uncertain and result-oriented justice that prevails when courts must grapple with the imprecision of the governmental/proprietary distinction.[68] The enumerated exceptions set forth the areas of liability clearly and the government should be immune from actions that fall outside the exceptions.

An interesting question is raised by section 1-39-111,[69] liability for public facilities. This section probably covers

67. Savage v. Town of Lander, 77 Wyo. 157, 309 P.2d 152 (1957).
68. One commentator calls the distinction "probably one of the most unsatisfactory known to the law." DAVIS, *supra* note 7, § 25.07 (Supp. 1976).
69. WYO. STAT. § 1-39-111 (Supp. 1979).

highways, bridges, parking lots, and the like but what else should be included in the term "public facilities" is uncertain. The comparable New Mexico statute deals with highways and streets, and also makes the state immune from liability for defects in design or plan or from the failure to construct or reconstruct.[70] The Wyoming section's limitation to "operation and maintenance" would seem to preclude an action for defective design but the issue will certainly be litigated.

Section 1-39-112, the law enforcement exception provides: "A governmental entity is liable for damages resulting from tortious conduct of law enforcement officers while acting within the scope of their duties".[71] This section exposes the governmental entity to broader liability than the other exceptions. The section permits the government to be liable for assault, battery, false arrest, malicious prosecution, abuse of process, libel, slander, defamation and perhaps deprivation of civil rights, to name a few. While such broad liability is probably desirable in order to adequately protect the public against police tyranny, the statute has some troubling aspects. Note the term "law enforcement officer" is undefined. The legislature could have borrowed the definition of "peace officer" from section 9-14-101[72] of the Wyoming Statutes. That section limits the term to full-time, fully compensated officers.

By not using the term "peace officer" the legislature may have intended to subject other public employees, who are not traditionally identified as peace officers but who have law enforcement duties, to the statute's broad liability. But where the definitional lines should be drawn is unclear. For example, parole officers, parking meter attendants, dog

70. N.M. STAT. ANN. § 41-4-11(B) (1978). *See* City of Albuquerque v. Redding, *supra* note 39.
71. WYO. STAT. § 1-39-112 (Supp. 1979).
72. WYO. STAT. § 9-14-110 (1977). Note the definition in the New Mexico statutes. N.M. STAT. ANN. § 41-4-3(D) (1978), "law enforcement officer" means "any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor." *See* Candelaria v. Robinson, *supra* note 39.

catchers, national guardsmen, the attorney general, and OSHA compliance officers have law enforcement duties and therefore may fall within the definition. Because the potential liability for the actions of law enforcement officers is enormous, the legislature should draw some clear lines at its earliest opportunity to deliniate the kinds of employees who are to be included within the term.[73]

Negligence

The GCA establishes a negligence standard.[74] The legislature specifically provided that the act does not allow the imposition of strict liability.[75] The legislature could have used language such as that found in the New Mexico statute that states: "liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty."[76] However, such language is arguably superfluous and its absence from the GCA is probably without significance. The enumerated exceptions are based upon the negligence of the public employee and therefore, plaintiff's suing under the GCA will be required to make the traditional showing of duty, breach, proximate cause and damage.[77]

Public Employee

Section 1-39-103(a)(iii) defines public employee as:

> any officer, employee or servant of a governmental entity, including elected or appointed officials, law enforcement officers and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, but the term does not include an independent con-

73. Until the legislature acts, courts may get some small assistance from State v. McClain, 224 Kan. 464, 580 P.2d 1334 (1978) and State v. Padilla, 91 N.M. 451, 575 P.2d 960 (1978). *See also* 24A WORDS AND PHRASES "Law Enforcement Officer" (1966 and Supp.).
74. WYO. STAT. § 1-39-105 through 111 (Supp. 1979) are all phrased to make the governmental entity liable for damages . . . "caused by the negligence of public employees."
75. WYO. STAT. § 1-39-102(b) (Supp. 1979).
76. N.M. STAT. ANN. § 41-4-2(B) (1978).
77. PROSSER, TORTS § 28 *et. seq.* (4th ed. 1971).

> tractor or a judicial officer exercising the authority vested in him.[78]

The definition is very broad and would appear to cover almost any person acting in the service of the government. The issue should be very infrequently litigated with the possible exception of the independent contractor status.

Because the GCA is phrased in terms of the "negligence of the public employee", it is essential that the plaintiff name the responsible public official as a defendant. It may often be difficult to identify the proper public employee. For example, in *Oroz*,[79] the plaintiff sued the Board of County Commissioners. While the Board is the appropriate governmental entity, the commissioners are not the public employees whose negligence caused the injury. In such a case, the plaintiff should name the county road and bridge supervisor as a defendant. The plaintiff will then have to prove that it was within the defendant supervisor's scope of duties to maintain the roadway.[80]

Scope of Duties

Under the definitions in the GCA, "scope of duties" means: "performing any duties which a governmental entity requests, requires or authorizes a public employee to perform regardless of the time and place of performance."[81]

As with "public employee," this definition is very broad. The key factors are whether the governmental entity "requests, requires or authorizes" the performance of the duties. For example, the individual defendants in *Price v. State Highway Commission* were held to be immune because their acts were within their "official authority and in line

78. WYO. STAT. § 1-39-103(a) (iii) (Supp. 1979).

79. *Supra* note 2.

80. *See*, Annot., *Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Procure Liability Insurance Covering Public Officers or Employees for Liability Arising Out of Performance of Public Duties*, 71 A.L.R.3d 6 (1976). In § 2(b) the annotation advises the plaintiff to join as a defendant anyone possibly connected with the injury-causing event.

81. WYO. STAT. § 1-39-103(a) (iv) (Supp. 1979).

with their official duty."[82] The New Mexico Court of Appeals has stated in a case in which it was determined that a city manager's fraud was not within the scope of his employment that:

> "Course of employment" like "scope of authority" is not capable of precise definition. It is largely a question of fact. However, one is not in the course of employment unless the conduct in controversy is of the same general nature as that authorized or incidental to the conduct authorized.[83]

It can be expected that the Wyoming courts will examine closely the relationship between the employees' actions and the governmental duties that motivate that action.

The GCA appears to require that the plaintiff plead and prove that the defendant employee was acting within the scope of his duties. In many cases, where the scope of the duties is clear, the proof should not be difficult and may even be conceded by the governmental entity. However, if the governmental entity determines that the employee was acting outside the scope of his duties, the government will seek to have itself dismissed from the law suit. In such a case, the employee may cross-claim against the governmental entity and the issue will be litigated. In a suit involving a law enforcement officer under section 1-39-112,[84] because of the expansive liability, the government will be strongly pressured to seek to prove that the officer's actions were outside the scope of his duties. Such suits will be difficult because they will pit the government against the employee. This tension between the employee and the governmental entity seems to destroy one of the purposes of

82. *Supra* note 63, at 313. *See also* Osborn v. Lawson, 374 P.2d 201, 203 (Wyo. 1962).

83. Stull v. City of Tucumcari, 88 N.M. 320, 540 P.2d 250, 252 (1975). For an extensive discussion of this requirement *see* Lang v. Cruz, 74 N.M. 473, 394 P.2d 988 (1964). *See also* 2 MECHEM, OUTLINES AGENCY, § 365 et. seq. (4th Ed. 1952); RESTATEMENT (SECOND) OF AGENCY, § 229 (1958). An excellent discussion is found in Annot., *Validity and Construction of Statute Authorizing or Requiring Governmental Unit to Indemnify Public Officer or Employee for Liability Arising Out of Performance of Public Duties*, 71 A.L.R.3d 90, § 23 (1976). *See* Candelaria v. Robinson, *supra* note 39, (discussion of scope of duties of a district attorney).

84. WYO. STAT. § 1-39-112 (Supp. 1979).

the GCA, which is to place the burden of liability upon the government rather than the employee. However, these circumstances are perhaps unavoidable given the structure of the statute, which vests in the determination of the scope of duties the government's obligation to defend and indemnify the employee.

Bodily Injury, Wrongful Death and Property Damage

The enumerated exceptions require that the negligence of the public employee cause bodily injury, wrongful death or property damage. This limitation to physical injury would seem to preclude recovery for personal injury such as defamation, libel, slander, embarrassment or humiliation. As is discussed below this limitation cannot be applied to restrict the rights of plaintiff's suing under Section 1983 of the federal civil rights act.[85]

Defenses

The GCA preserves to the governmental entity all common law defenses.[86] It can be expected that the governmental entity will assert any tort defenses that may be available.

In addition to common law defenses, plaintiffs suing local governments may have to hurdle the familiar, yet troublesome defenses embodied in the governmental/proprietary and discretionary/ministerial distinctions. The pertinent language is:

> *In the case of the state*, this act abolishes all judicially created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used by the courts to determine immunity or liability. [Emphasis added.][87]

Oroz[88] abolished any defenses based on these distinctions when it held local governments to the "same rules as

85. *See* text accompanying notes 107-130.
86. WYO. STAT. § 1-39-102(a) (Supp. 1979).
87. WYO. STAT. § 1-39-102(b) (Supp. 1979).
88. *Supra* note 2.

private persons or corporations if a duty has been violated and a tort has been committed."[89] This section is subject to two contrary interpretations. First, section 1-39-102(b)[90] could be interpreted to be recognition of the *Oroz* result and an extension of *Oroz* to the state. Such an interpretation is consistent with the overall scheme of the GCA which is to create a uniform system for handling tort claims and to make liability dependent upon traditional negligence concepts.

Alternatively, the section could be interpreted to be an attempt by the legislature to reverse *Oroz* and reestablish the validity of defenses based on these categories. The critical words are "in the case of the state".[91] The difficulty is that in construing statutes effect must be given to every word, clause and sentence.[92] If the legislature had intended to abolish the categories as applied to all governmental entities the offending phrase could have been deleted, as New Mexico did in its statute.

From a practical standpoint if the legislature has resurrected these categories from the graveyard of legal anachronisms the impact upon plaintiffs suing local governments is tremendous. Under the law as it stood prior to *Oroz*, plaintiffs were required to plead and prove whether the negligence of the local government was committed in the performance of governmental or proprietary functions.[93] If the legislature has reinstated these requirements, then plaintiffs may be faced with the anomalous result of being able to prove liability under the GCA, but being denied recovery because the government was acting in a discretionary or governmental function.

Hopefully, the statute will be interpreted by the courts as merely extending the *Oroz* result to the state. Because

89. *Id.* at 1158.
90. WYO. STAT. § 1-39 102(b) (Supp. 1979).
91. "State" is defined by WYO. STAT. § 1-39-103(a)(v) (Supp. 1979) to mean the "state of Wyoming or any of its branches, agencies, departments, boards, instrumentalities or institutions."
92. Basin Electric Power Co-operative v. State Board of Control, 578 P.2d 557, 566 (Wyo. 1978).
93. Savage v. Town of Lander, *supra* note 67.

local government immunity is a court-made rule, the courts could decide that the categories are no longer meaningful.[94] Such an action by the Wyoming courts would be in keeping with the whole intent of the GCA. It is incongruous that a comprehensive act such as the GCA, which seeks to create a uniform system for managing tort claims, should retain such anachronistic, uncertain, and unfair defenses. The legislature should rectify this statutory problem, but until the legislature acts, Wyoming courts would better effectuate the purpose of the GCA by declining to uphold the validity of these categories.

Public Employee Liability

From the public employee's standpoint, the most important section of the GCA is section 1-39-104.[95] That section provides:

> (a) A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112.
>
> (b) When liability is alleged against any public employee, if the governmental entity determines he was acting within the scope of his duty, whether or not alleged to have been committed maliciously or fraudulently, the governmental entity shall provide a defense at its expense. A governmental entity shall save harmless, and indemnify its public employees against any tort claim or judgment arising out of an act or omission occurring within the scope of their duties.

The law governing the liability of public employees is complex and confused and recent United States Supreme Court decisions on civil rights and constitutional torts have only contributed to the uncertainty.[96] Although the GCA

94. However, the Wyoming Supreme Court's opinion in Biscar, *supra* note 60, indicates that the governmental/proprietary distinction is still valid, at least as applied to the states' contractual immunity.
95. WYO. STAT. § 1-39-104 (Supp. 1979).
96. *See* the excellent critique in DAVIS, *supra* note 7, § 26.00 *et. seq.* (Supp. 1976 and 1980). *See also* Freed, *Executive Official Immunity for Constitutional Violations: an Analysis and a Critique*, 72 NW. U. L. REV. 526 (1977);

appears on its face to establish clear rules for determining liability, that is, absolute immunity unless the action is within one of the exceptions, this clarity is illusory. In order to analyze the public employees' liability it is instructive to break down public employee *immunity* into three categories: (1) No immunity-negligence, (2) absolute immunity, and (3) qualified immunity.

(1) No immunity-negligence

If the suit is brought under one of the enumerated exceptions in section 1-39-105 through 112,[97] the employee has no immunity and any defenses are grounded in the law of negligence. This lack of immunity should not be surprizing, since most public employees would probably agree that they should not be treated differently from other individuals for injuries caused by such activities as driving a car, piloting an airplane, or maintaining a building or street.

Although the employee has no immunity he is not personally liable as long as the activity was within the scope of his duties. Section 1-39-104(b)[98] obligates the governmental entity, to provide a defense and indemnify the employee for any tort claim or judgment.

(2) Absolute immunity

If the claim is not within the enumerated exceptions of the GCA and does not claim a civil rights or constitutional violation the employee and therefore the government should be absolutely immune from liability. This immunity is designed to cover the day-to-day administrative and policy making functions of the government. Note how the GCA's approach differs from the open-ended statutory scheme enacted by Oregon.[99] In Oregon liability is the rule, but public employees and governments are protected by a discretionary functions exception that creates immunity for

Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COL. L. REV. 1175 (1977).

97. WYO. STAT. § 1-39-105 through 112 (Supp. 1979).

98. WYO. STAT. § 1-39-104(b) (Supp. 1979).

99. *Supra* note 35.

all discretionary acts.[100] The vice of this approach is the use of the imprecise term "discretionary", which leads to uncertainty and promotes result-oriented justice. If the court wants to find the employee immune, all it must do is label the employee's acts discretionary.[101]

The GCA avoids this problem by reasserting governmental immunity. Some states,[102] which have close-ended statutes, still enacted long descriptions of activities for which the employee retained immunity. Such lists are superfluous in a statutory scheme like the GCA. A public employee in Wyoming whose scope of duties are legislative or quasi-legislative (e.g. adopting or failing to adopt charters, ordinances, rules, regulations) or judicial or quasi-judicial (e.g. granting, refusing to grant, or revoking, a permit, order, license or any other administrative action) has immunity for these acts as long as there has been no civil rights or constitutional violation. For example, assume an inspector for the State Department of Environmental Quality (DEQ) detects a pollution source, investigates and as a result, the DEQ Administrator issues a cease and desist order.[103] Both public employees should be absolutely immune from a claim of abuse of process, malicious prosecution, or even trespass. This immunity is based on the fact that such claims do not fit within the enumerated exceptions, and that the violator's remedies are administrative.[104] This immunity effectuates the policies that the public interest is served by the fearless administration of the laws and that a public employee should not be subject to liability for action taken on behalf of the government. As the United States Supreme Court has stated:

100. ORE. REV. STAT. § 30.265(3)(c) (1977).
101. *See* Brennen v. City of Eugene, 591 P.2d 719 (Ore. 1979). Dickens v. DeBolt, 602 P.2d 246 (Ore. 1979). For a recent case interpreting the "discretionary function" exemption under the Federal Tort Claims Act, *see* Bernitsey v. U.S., 48 U.S.L.W. 2643 (3rd Cir. 1980).
102. *Supra*, note 33, § 8103(2).
103. The statutory authority for this action is found in WYO. STAT. § 35-11-109 (a)(vi) & (vii) and § 35-11-701(a) and (b) (1977). A question that could be asked on the facts of this hypothetical is whether the employees are law enforcement officers. *See* text accompanying note 72 *supra*.
104. *See* discussion at notes 71-73 *supra*. *See also* the Wyoming Administrative Procedure Act, WYO. STAT. § 9-4-104 *et. seq.* (1977). Note the recent New Mexico case of Candelaria v. Robinson, *supra* note 39, where a county prosecutor was held to have immunity from a defamation suit under New Mexico's Tort Claims Act.

> Implicit in the idea that officials have some immunity . . . absolute or qualified . . . for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[105]

Although the immunity should protect the public employee from liability, section 1-39-104(b)[106] obligates the government to provide a defense and indemnify the employee from any tort claim or judgment.

(3) Qualified immunity — Section 1983 and Constitutional Torts.

The GCA provides significant protection to public employees who are sued in traditional tort actions. However, in the last decade perhaps the most common actions against public employees have been suits brought under 42 U.S.C. section 1983.[107] It is beyond the scope of this comment to consider in detail the liability of public employees under section 1983.[108] However, the GCA, either by design or over-sight, provides no protection to public employees, other than law enforcement officers, from section 1983 actions. The potential exposure of public officials to liability under section 1983 is substantial and a brief discussion of this issue with suggestions for legislative action is essential.

105. Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).
106. WYO. STAT. § 1-39-104(b) (Supp. 1979).
107. 42 U.S.C. § 1983 provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See in Wyoming, Bertot v. School District No. 1, Albany County, Wyoming, 613 F.2d 245 (10th Cir. 1979), *reversing* 522 F.2d 1171 (10th Cir. 1975); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978) *reh. den.* 587 P.2d 203 (Wyo. 1978). Williams v. Eaton, *supa* note 59.

108. *See* Antieu, *Federal Civil Rights Acts* § 29 *et. seq.* (1971 & Supp.); DAVIS *supra* note 7, § 25.00 & 26.00 *et. seq.* (Supp. 1976 & 1980); Note, 14 LAND & WATER L. REV. 281 (1979); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L. REV. 65 (1978). *See also*, Butz v. Economou, 438 U.S. 478 (1978). *See* Johnson v.

Unlike the traditional tort immunity afforded public employees when their government is immune,[109] under section 1983 the immunity of the government and the employee are not co-extensive. The state is absolutely immune from section 1983 actions. This immunity is based upon the eleventh amendment.[110] and it has been upheld by the United States Supreme Court in the recent case of *Quern v. Jordan.*[111] Although the state is immune, local governments are not. The United States Supreme Court's holding in *Monell v. New York City Department of Social Services*[112] established that municipalities are persons who can be held liable under section 1983.

The GCA makes no mention of section 1983 actions. This omission could be interpreted to mean that the legislature intends public employees to be immune from such suits. The argument would be made that section 1983 actions do not fit within the enumerated exceptions, that they are not tort actions that result in bodily injury, wrongful death and property damage, and that therefore the government and its employees are immune. Such an argument, however, ignores established law. Section 1983 was created to protect rights guaranteed by the United States Constitution, and even though state courts have concurrent juris-

Herschler, No. C78-217k (U.S.D.C. Wyo.), summary judgment entered March 6, 1980 sustaining Governor Herschler's absolute immunity under § 1983 for acts of a judicial nature, based on Butz v. Economou, *supra.* It is also beyond the scope of this comment to discuss the development of constitutional torts. The seminal case is Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The most recent development is Davis v. Passmam, ____ U.S. ____, 99 S. Ct. 2264 (1979). *See also* Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978), *cert. den.* 439 U.S. 1048 (1979) (refusing to extend the Biven's doctrine to make municipalities liable for police actions). *See* the extensive discussion in DAVIS, *supra* note 7, § 26.00-0 *et. seq.* (Supp. 1980).

109. See Osborn v. Lawson, *supra* note 82.

110. The eleventh Amendment to the United States Constitution provides:
> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

111. ____ U.S. ____; 99 S. Ct. 1139 (1979). *See also* Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979) *cert. den.* 100 S.Ct. 1026 (1980); Korgich v. Regents of New Mexico School of Mines 582 F.2d 549 (10th Cir. 1978).

112. 436 U.S. 658 (1978). The U.S. Supreme Court recently held that a municipality does not have a qualified immunity from liability under 42 U.S.C. 1983 and may not assert the good faith of its officers as a defense to such liability. Owen v. City of Independence, Mo., ____ U.S. ____, 48 U.S.L.W. 4389 (Decided April 16, 1980). *See* Note, *supra* note 108.

diction over section 1983[113] actions, "states cannot create defenses to the Federal Civil Rights Acts."[114]

Although not entitled to absolute immunity, public employees are granted a qualified good-faith immunity. This qualified immunity is based upon the United States Supreme Court's holding in *Wood v. Strickland.*[115] As set forth by the Wyoming Supreme Court, this immunity is available to the public employee if he can demonstrate by a preponderance of the evidence:

> (1) That he acted without malicious intention to deprive the plaintiff of his constitutional rights or cause him to suffer other injury, and
> (2) That he did not know and reasonably need not have known that his conduct violated the constitutional rights of the party affected.[116]

To understand the predicament of a public employee sued in a section 1983 action, assume the following facts. A social worker employed by the state Department of Public Assistance and Social Services takes a child suspected of being abused into protective custody under circumstances that give rise to a colorable section 1983 claim.[117] Assume that the state, the agency head and the social worker are named as defendants in a section 1983 suit by the parents. Once the complaint is filed the state will have to choose how to defend the action. The state could rest its defense solely on the eleventh amendment and seek to have itself

113. Board of Trustees v. Holso, *supra* note 107.
114. Antieu, *supra* note 108, at 111. *See* McLaughlin v. Tilendis, 398 F.2d 287, 290 (7th Cir. 1968); Hampton v. City of Chicago, Cook County, Ill. 484 F.2d 602, 607 (7th Cir. 1973), *cert. den.* 415 U.S. 917 (1979); Martinez, *supra* note 53, at 553-554.
115. 420 U.S. 308 (1975).
116. Board of Trustees v. Holso, *supra,* note 107 at 1019. The Holso test is slightly different from the standard in Wood v. Strickland, *supra* note 115. The *Wood* test is stated to make the school board member "not immune . . . if he knew or reasonably should have known." 420 U.S. at 320. The *Wood* test is also stated in terms of a "disregard of settled, undisputable law." *Id.*
117. For example, a law enforcement officer (note that this term is undefined) could take a neglected child into protective custody under the provisions of WYO. STAT. § 14-6-205 (1977), and deposit the child with the Department of Public Assistance and Social Services (DPASS). DPASS could then fail to hold the shelter care hearing within 72 hours, as required by WYO. STAT. § 14-6-209 (1977).

dismissed from the suit.[118] The defense is based on the argument that the GCA does not apply to section 1983 actions because they are not "tort" actions and therefore the state has no obligation to defend or indemnify its employees. This argument places the burden of liability directly and solely upon the public employees.

A second option for the state is to again defend on the eleventh amendment, but the Attorney General could decide as a matter of policy that the state should defend state employees no matter what kind of suit is brought. This policy would not involve a consideration of the GCA but would be merely an executive decision to provide a defense to state employees. This approach would not place any obligation upon the state to indemnify.

A third approach that the state could take to defending the action is based on an interpretation of section 1-39-104 (b) of the Wyoming Statutes.[119] Note that this section obligates the government to provide a defense when "liability" is alleged. The section can be read in two ways. The state

118. The eleventh amendment immunity only applies to the state and cannot shield the public employee. *See* Edgar v. State, *supra* note 111.

The 1980 Legislature clarified one aspect of the state's responsibility to provide a defense. The legislature enacted WYO. STAT. § 9-2-518, 1980 WYO. SESS. LAWS. Ch. 7, which obligates the attorney general to provide a defense to any state official (agency head or elected state executive officer) who is sued in a civil suit not involving a tort action governed by WYO. STAT. § 1-39-104 (Supp. 1979). In the hypothetical, the state would defend the agency head, but the social worker would be left to hire private counsel.

WYO. STAT. § 9-2-518 (1980) is directed at § 1983 suits and is a clear indication that the legislature does not believe that the GCA covers civil rights actions. Section 9-2-518 is a very curious statute. When it was originally proposed the act was limited to providing a defense to state officials who were sued by state employees. 1980 LEG. H.B. 12. This was presumably intended to cover § 1983 actions brought by disgruntled state employees against their superiors. *See* Atchison v. Nelson, No. C79-205B (U.S.D.C. Wyo.). However, as finally enacted the limitation to suits by state employees was removed.

Section 9-2-518(b) (1980) requires the state official to reimburse the state if it is determined that the official acted outside the "scope of his employment." The legislature could have used the term "scope of duties" from the GCA but did not. Presumably the two phrases are synonymous. The GCA says nothing about reimbursement of the governmental entity in a tort action. A public employee sued under one of the exceptions in the GCA could be found to have acted maliciously and fraudulently, but if the employee was acting within the scope of his duties there is no reimbursement requirement. The legislature could have followed, but did not, New Mexico's statute which requires any public employee to reimburse the government if it is determined that the employee acted maliciously or fraudulently. N.M. STAT. ANN. § 41-4-4(D) (Supp. 1979).

119. WYO. STAT. § 1-39-104(b) (Supp. 1979).

could argue that the term "liability" should be limited to allegations of "tort liability" and interpreted in conjunction with section 1-39-104(a)[120] which limits immunity to torts. Because section 1983 actions are not traditional tort suits, the GCA does not, under this argument, require the state to defend. The public employee will counter by arguing that if the legislature had wanted to limit the obligation to defend to torts it could have said "tort liability".[121] The absence of the modifier indicates an intention to obligate the government to provide a defense no matter what kind of action is brought, be it tort, contract or civil rights.

If, as is probable, the employees succeed in requiring the state to provide a defense, they will try to assert that the GCA requires indemnification. This is a much more difficult argument because the indemnification obligation is limited to "tort claim or judgment".[122] Again, because section 1983 suits are not tort actions, the state has no indemnification obligation. The state's argument against indemnification is buttressed by the Wyoming Legislature's enactment in 1980 of section 9-2-518 which requires the attorney general to provide defense for state officers but does not mention indemnification.[123] The indemnification issue will be difficult for a court because of the compelling equities on the side of the employees, but the legislative intent to preclude indemnification is fairly clear.[124]

A law enforcement officer may be in a more fortunate position than other public employees in that a section 1983 suit may fall within the exception under section 1-39-112 of the Wyoming Statutes.[125] All that is required is proof of damages resulting from tortious conduct. If the officer was acting within the scope of his duties (probably a hotly

120. WYO. STAT. § 1-39-104(a) (Supp. 1979).
121. The public employee will certainly also argue that the definition of tort in Wyoming, *supra* note 62 is broad enough to include a § 1983 action.
122. WYO. STAT. § 1-39-104(b) (Supp. 1979).
123. 1980 WYO. SESS. LAWS Ch. 7, *supra* note 118.
124. Note the California Supreme Court's Decision in Williams v. Howath, *supra* note 57, where the court made California's indemnification provision applicable to § 1983 actions. Although the California Tort Claims Act required imdemnification for "any" claims, the court's reasoning for applying the provision to § 1983 actions is compelling. *Id.* at 1131-1134.
125. WYO. STAT. § 1-39-112 (Supp. 1979).

contested issue) and the action is one sounding in tort, he should be indemnified.

It is a question of policy whether the government should indemnify its employees. As the GCA is now written, a public employee who is not a law enforcement officer is personally liable for section 1983 actions unless shielded by the qualified good-faith immunity. Given the central thrust of the GCA, which is to make the governmental entity bear the burden of government-caused injuries, it seems inequitable to place the potentially extensive liability of section 1983 actions on the employees' shoulders. Indeed, because of the nature of the section 1983 action, those officials with the greatest potential exposure are the top administrative and elective officials in the government.

However, the most persuasive criticism of the GCA's failure to indemnify its employees for section 1983 actions is that it will result in very arbitrary court judgments. The GCA's denial of indemnity turns on the meaning of "tort". Tort has never been amenable to very precise definitions and the development of constitutional torts has further complicated definitional efforts. While it is true that some section 1983 actions are not related to common law notions of tort,[126] many section 1983 suits could be brought as tort actions. For example, suits that could state claims against the police for wrongful death, false imprisonment, or assault and battery[127] have been successfully prosecuted as section 1983 actions. What the GCA does is to vest in the plaintiff the power to determine, by the kind of action that he brings, whether the employee will be indemnified by the government. It is unfortunate that the legislature has conferred such power upon plaintiffs to affect the personal fortunes of public employees.[128]

It would be very simple for the legislature to extend indemnification to public employees for section 1983 actions.

126. *See* Williams v. Horvath, *supra* note 57, at 1129 n. 2.
127. Landrum v. Moats, 576 F.2d 1320 (5th Cir. 1978) *cert. den.* 439 U.S. 912 (1978) (wrongful death); Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) (false imprisonment); Williams v. Horvath, *supra* note 57 (assault and battery).
128. *See* DAVIS, *supra* note 7, § 26.07 (Supp. 1980).

For example, Oregon accomplishes this by defining the word "tort" to include "any violation of 42 U.S.C. Section 1983."[129] Such a change is desirable and the legislature would promote fairness and ease the minds of a great number of public employees if this amendment were made.

One other issue that affects public employee liability and that requires legislative change should be noted. It is not clear whether the GCA would protect a person who had left government service from a suit brought for actions taken while he was a public employee. Such a circumstance may not be uncommon. Again, the legislature should consult the New Mexico statute[130] for language that extends the government's obligation to pay a settlement or claim to a former employee when liability is imposed for actions taken within the scope of his duties while employed.

Claims Procedure

The GCA requires that claims brought under the act be presented to the governmental entity within two years of the date of occurrence.[131] This is an exceedingly generous time period, the limit in other states being as short as 90[132] or 180[133] days. The notice of claims statutes have been upheld by the Wyoming courts and this claims requirement is certainly constitutional.[134]

Statute of Limitations

The general statute of limitations in the GCA provides that actions must be commenced within one year after the

129. ORE. REV. STAT. § 30.265(1) (1977). *See also* the language in the New Mexico statute. N. M. STAT. ANN. § 41-4-4(B)(2) (Supp. 1979).
130. N. M. STAT. ANN. § 41-4-4(G) (Supp. 1979).
131. WYO. STAT. § 1-39-113 (Supp. 1979).
132. N. M. STAT. ANN. § 41-4-16 (1978).
133. ME. REV. STAT. ANN. tit. 14 § 8107 (1964).
134. Awe v. University of Wyoming, *supra* note 14. See Note, 14 LAND & WATER L. REV. 259 (1979); *see also* Comment, *Idaho Tort Claims Act: Nature of Claims*, 12 IDAHO L. REV. 190 (1975). Note that for actions not falling within the GCA the claims period is one (1) year. WYO. STAT. § 9-2-332 (Supp. 1979). It can be expected that a plaintiff who is barred by an untimely filing under § 9-2-332 will try to make his action sound in tort in order to take advantage of the longer claim period under the GCA. The plaintiff may also challenge the shorter statute on equal protection grounds. *See* note 140, *infra* and Comment, *Idaho Tort Claims Act: Notice of Claims*, *supra*.

date the notice of claim is filed under section 1-39-113.[135] Counting the two year notice period, litigants have a total of three years in which to file suit under the GCA. By contrast, the limitation on actions not under the GCA are four (4) years for injury to the rights of the plaintiff, not arising under contract,[136] and one (1) year in an action for libel, slander, assault, battery, malicious prosecution or false imprisonment.[137]

The GCA, then, makes a significant change in the limitations period for suits against governments. For actions for bodily injury, wrongful death or property damage under the GCA, the limitation period is one year shorter than corresponding suits against private parties. However, for suits against law enforcement officers under section 1-39-112,[138] the GCA provides an additional two years for claims based on libel, slander, etc.

It is a general rule that the enactment of statutes of limitation is within the sound discretion of the legislature and courts are generally reluctant to interfere unless there is manifest injustice. The legislature is free to shorten or lengthen statutes of limitation and it can single out select classes of action for special treatment.[139] Given the power of the legislature to determine statutes of limitation, a constitutional challenge, probably based on equal protection grounds, should be unsuccessful.[140]

Other Provisions

Section 1-39-115[141] provides for the settlement of claims by the state. Presumably, the legislature intended that local

135. WYO. STAT. § 1-39-114 (Supp. 1979).
136. WYO. STAT. § 1-3-105(a)(iv)(C) (1977).
137. WYO. STAT. § 1-3-105(a)(v) (A-C) (1977).
138. WYO. STAT. § 1-39-112 (Supp. 1979).
139. 51 AM. JUR. 2d *Limitations of Actions* § 37-40 (1972). Note the special two year limitation given to suits against physicians in WYO. STAT. § 1-3-107 (1977).
140. The challenge would be similar to one made against a notice of claim statute, that the act establishes classes of litigants without their being a rational relationship between the classification (State v. Private) and the statutory purpose. See Comment, *Idaho Tort Claims Act; Notice of Claims, supra* note 133. Note that the statute of limitations on § 1983 actions is two years, under Wyoming law. Spiegel v. School Dist. No. 1, Laramie County, 600 F.2d 264 (10th Cir. 1979).
141. WYO. STAT. § 1-39-115 (Supp. 1979).

governments be free to set up their own claims settlement procedures. The section gives the Attorney General 120 days in which to settle the claim. That may be too short a period in which to adequately investigate the claim and determine if the claimant might be entitled to judgment.

Section 1-39-118[142] limits the liability of the governmental entity to $500,000 for all claims arising out of a single transaction or occurrence. Compared with other states, this is a generous limitation. Subsection (b) authorizes the purchase of insurance by the governmental entity to cover all or any portion of the risk. Additionally, the insurance can exceed the risk limits and cover areas outside the scope of the GCA. However, given the likely constitutionality of the GCA and its limits of recovery, a governmental entity has little reason to acquire more extensive coverage, and premiums paid for such coverage might constitute waste of governmental resources.[143]

A troublesome problem on the limitation of liability has been raised recently by the United States Supreme Court decision in *Nevada v. Hall*.[144] In that case, the court approved a California decision that permitted a California plaintiff to obtain judgment against the State of Nevada for injuries resulting from an accident occurring in California with a University of Nevada vehicle. Nevada argued unsuccessfully that recovery should be limited to the amount specified in the Nevada Tort Claims Statute. The court held, *inter alia*, that the full faith and credit clause[145] does not require a state to apply another state's law in violation of its own legitimate public policy. As a result of this decision, the $500,000 limitation in the GCA may not protect the government for injuries caused by a public employee while traveling in another state on public business. The legislature will have to weigh the need for additional coverage to address this problem.

142. WYO. STAT. § 1-39-118 (Supp. 1979). See also Annot., 71 A.L.R.3d 90 (1976).
143. The plaintiff should check any insurance policy carefully because the coverage may in fact be broader than the GCA requires. For example, some personal liability policies expressly cover § 1983 actions.
144. 440 U.S. 410 (1979).
145. UNITED STATES CONST. art. IV, § 1.

Finally, section 1-39-118[146] provides that no judgment shall include an award for exemplary or punitive damages,[147] for interest prior to judgment, or for attorney fees. The statute may not, however, prevent an award of attorney fees in civil rights cases. The Civil Rights Attorney's Fee Act[148] permits the judge in his discretion to award attorney fees for a successful civil rights claim. The same policy reasons that do not permit states to create defenses to civil rights actions are invoked to avoid the limitation on the award of attorney fees.[149]

CONCLUSION

The GCA is a complex act and it will take many years and several court cases before the intricacies are fully illuminated. However, this much can be said now. The GCA is a landmark piece of legislation in Wyoming and it goes far to "balance the respective equities" between governments and the individual. Wyoming governments are now liable for a wide variety of activities and plaintiffs no longer have to struggle against the inequities of the doctrine that the "King can do no wrong".

As with any statute, the need for legislative amendment will become apparent with time. However, there are changes that the legislature should consider at its earliest opportunity. The state should indemnify public employees who are sued under the civil right acts. Such indemnity is well justified, has been adopted by the majority of neighboring states, and involves a very simple amendment. The legislature should also clarify its intent as to the retention of the governmental/proprietary and discretionary/ministerial categories as defenses for local governments. Hopefully, the legislature will bury these relics once and for all.

Lawrence J. Wolfe

146. WYO. STAT. § 1-39-118 (Supp. 1979).
147. *See* Frick v. Abel, 602 P.2d 852 (Colo. 1979) for a case under the Colorado Tort Claims Act where the individual police officer was required to pay the exemplary damages.
148. 42 U.S.C. § 1988 (1976).
149. Hutto v. Finney, 437 U.S. 678 (1978), holding that a fee award under 42 U.S.C. § 1988 is not barred by the eleventh amendment; *see also* Ferdinand v. City of Fairbanks, 599 P.2d 122 (Alaska 1979); Board of Trustees v. Holso, *supra*, note 107.