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MUNICIPAL TORT LIABILITY: PURCHASE OF LIABILITY INSURANCE AS A WAIVER OF IMMUNITY

The maxim, "The King can do no wrong," is commonly said to be the foundation upon which the immunity from suit of the state and of the city is based. The law that has resulted from this ancient maxim is presently in a state of chaos and confusion. The instability in this area is not surprising because in dealing with the problem of municipal liability, the courts have been attempting to find a middle ground between two conflicting policy considerations. On the one hand, there is the common law concept of immunity. On the other, there is the belief that the risk of wrongful injury should not be borne by the individual, but by society. By society, it is meant that particular group, whether it be the population of a city, county or state which is represented by a governmental unit, who receives the benefits, services and derives the good out of that unit's activities. The idea that risk of wrongful injury should be borne by that segment of the citizenry which enjoys the services and benefits is a result of the concept that he who enjoys the benefits should bear the cost. This second consideration, based on the unfairness to the innocent victim of a principle of nonliability, and the social desirability of distributing the loss, is merely a manifestation of a trend which is becoming more and more evident in other fields.¹ Some jurisdictions rigidly adhere to the immunity rule while others have made inroads upon it through piecemeal imposition of liability.² Still other courts have found legislatively imposed liability by a liberal construction of statutes empowering municipal corporations to "sue or be sued," abandoning the traditional interpretation of such statutes as waiving only the immunity of the government from suit and not from liability.³

Wyoming courts have strongly adhered to the doctrine of municipal immunity. In the latest reaffirmance of such adherence, *Maffei v. Incorporated Town of Kemmerer* (1959)⁴, the court was asked to renounce this generally recognized doctrine and to judicially declare that which is alleged to be the better rule. This the Wyoming Supreme Court refused to do. To the contrary, it reaffirmed the municipal immunity rule in the performance of governmental functions in Wyoming. The court felt that Wyoming was unquestionably committed to the acceptance of the doctrine of municipal immunity, absent a statutory provision to the contrary. The case precipitated immediate legislation in the 1961 session. By the Laws of 1961, Chapter 81, cities and towns were authorized to carry liability in-

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1. See Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437, (1941).
 2. Vacin, *Municipal Corporations—Liability in Tort*, 60 Mich. L. Rev. 379, 380, (1962). Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363, (1945), which briefly summarizes the highlights of each state.
 3. *St. Julian v. State*, _____ La. _____, 82 So. 2d 85 (La. 1955).
 4. *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808, (1959).
 5. Wyo. Stat. §§ 15-20.6 to 20.10 (Supp. 1963).

surance.⁵ The purpose of this article is to investigate how this new statute will effect the present law.

To put the new statute and the old rule into a proper perspective for purposes of analysis and predictability, one must first have a background of the rules and the forces which have acted upon it. Although commonly, the 1788 case of *Russell v. The Men of Devon*⁶ is considered the start of the rule of immunity, several authorities believe that the rule had its genesis much earlier. Nevertheless, with the sovereign concept as a foundation, *Russell v. The Men of Devon* became the principal case establishing municipal non-liability in torts. But many authorities have distinguished this case from the modern problem. "The *Russell* case involved an unincorporated county; the modern problems involve incorporated cities. When the courts of this country were confronted with a problem of similar circumstances but affecting towns which were incorporated and with funds, they applied the doctrine of non-liability to American towns which was applied to the unincorporated county without funds in the *Russell* case. This was clearly mis-application of the precedent established in the *Russell* decision. However, the doctrine with its many variations, inconsistencies, and exceptions in application has been widely accepted and has become the American doctrine of municipal tort immunity."⁷ A fundamental reason for the long continued interest and concern with the doctrine of sovereign immunity is perhaps dissatisfaction with the principle founded and built upon this decision which embodies feudal concepts and political theories of the Middle Ages, that is, non-applicability of the doctrine of *respondeat superior*. It was not until *stare decisis* had done its work and the doctrine had been accepted in this country, that the doctrine of sovereign immunity was introduced as a rationalization of the result. In our early American history, municipal corporations were placed upon the same footing as private corporations in so far as tort liability was concerned, and sovereign immunity was not extended to them.⁸ This was changed in 1842 when the landmark *Bailey* case was decided⁹, and since then the fundamental legal principle underlying municipal tort liability has remained unchanged. Thus was evolved the municipal tort liability doctrine—that a city has both proprietary and governmental functions and that it may be liable for torts arising out of the former but not the latter.

Historically, the proponents of the immunity rule have failed to make a convincing case for its retention. Arguments for the rule must be based on social policy rather than legal maxims. These are, first, that public agencies engage in activities of a scope and variety far beyond that of any private business, which affect a much larger number of the public

6. *Russell v. Men of Devon*, 2 Term. Rep. 667, 100 Eng. Rep. 359 (KB 1788).

7. See Leflar and Kantrowitz, *Tort Liability of the State*, 29 N.Y.U. L. Rev. 1363, (1945); McAndrew v. Mularchuk, 38 N.J. 172, 162 A.2d 820, (1960); Prosser, *Torts* (2d Ed. 1955); See also *Torts—Municipal Corporation*, 27 Mo. L. Rev. 224, (1962).

8. *People v. Albany*, 11 Wend (NY) 539, 27 Am. Dec. 95, (1934); *Martin v. Brooklyn*, 1 Hill (NY) 545 (1841).

9. *Bailey v. New York*, 3 Hill (NY) 531, 38 Am. Dec. 669 (1842).

than do the activities of private enterprise. Many of the activities carried on by government are of a nature so inherently dangerous that no private entity would undertake the risk of performing them. It is argued that government is not free, as would be private industry, to discontinue these functions because of high cost of operation or because liability for continuing them is too great. Police protection, fire protection and health services cannot be cut back. It is said that a rule imposing liability in these areas would result in the curtailment of socially desirable public activities, causing evil effects disproportionate to the benefits which would flow from a doctrine of liability.

As stated above, the development of the law has been in the nature of a series of inroads. An examination of the cases in which these inroads were made reveals a series of distinctions being made which, for historical reasons appear to represent valid differences. It has been clear for some time that there has been no absolute municipal immunity from liability. The problem has been in determining what are the requisites for liability. The first inroad or limitation to be made on the immunity doctrine was the governmental-proprietary dichotomy.¹⁰ Under this, the first relevant determination in the case of negligence by a municipal corporation was a characterization as to the nature of the functional exercise which gave rise to the tort. In effect, this determination resolved the question of whether immunity existed, or conversely, whether liability was possible. Under this basic test, immunity was accorded where the function was governmental and liability was imposed where it was proprietary. No tort liability attaches with respect to the exercise of governmental functions because the city performs such functions under powers delegated by the state and under the same immunity enjoyed by the state.¹¹ On the other hand, in the exercise of proprietary functions or the performance of acts for the benefit of the corporation, a city stands on the same footing as any private corporation as to its liability for torts.¹²

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10. See, generally, Antieau, *The Tort Liability of American Municipalities*, 40 Ky. L.J. 131 (1952); aBrnett, *The Foundation of the Distinction Between Public and Private Functions*, 16 Ore. L. Rev. 250 (1937); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437, (1941); Smith, *Municipal Tort Liability*, 48 Mich. L. Rev. 41, (1949). "Apparently the purpose has been to confine the protection afforded to only those activities which have traditionally been considered 'necessary' to government, and to exclude from coverage those activities which are merely conveniently carried on by government instead of by private enterprise. This nineteenth century dichotomy was the judicial compromise struck between complete protection of public funds and complete protection of individuals tortiously injured by government agents. Both the basis of the distinction and its application, which has been difficult and artificial, have widely been regraded as less than satisfactory." Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 Law and Contemp. Prob. 214 (1942).
11. *Seaman v. Big Horn Canal Ass'n.*, 29 Wyo. 391, 213 Pac 938 (1923); *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925); *Villalpando v. City of Cheyenne*, 51 Wyo. 300, 65 P.2d 1109 (1937); *Densmore v. Birmingham*, 223 Ala. 210, 135 So. 320 (1931); *Lambert v. New Haven*, 129 Conn. 647, 30 A.2d 923, (1943); *Baltimore v. State*, 173 Md. 267, 195 Atl. 571 (1937).
12. *Ramirez v. City of Cheyenne*, 34 Wyo. 67, 241 Pac 710, 42 A.L.R. 245, (1925); *Maffei v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808, (1959); *Hooton v. Burley*, 70 Idaho 369, 219 P.2d 651, (1951); *Perry v. Wichita*, 174 Kan. 264, 255 P.2d 667, (1953); *Bishop v. Meridan*, 223 Miss. 703, 79 So. 2d 221, (1955); *Grimesland v. Washington*, 234 N.C. 117, 66 S.E. 2d 794, (1951).

The determination of the governmental-proprietary issue in any given case is a question of law for the court, not the jury,¹³ and doubt is to be resolved, in a few jurisdictions, in favor of holding the activity in question governmental in nature.¹⁴ Various tests were evolved for the purpose of determining into which category a particular tort fell. The "profit" test looked primarily at the nature of the function involved to determine whether or not the municipality engaged in the activity for profit thus making it a proprietary function. Under the "agent" test, an inquiry is made to determine whether the municipality was acting as the agent of the state in furthering the state policy, or whether it was acting primarily on behalf of the citizens of the community. In this attempt at distinguishing the functions, no satisfactory criteria could be devised. Most jurisdictions have set up some rather vague general guidelines. Usually, activities in the area of fire prevention, law enforcement, education, health, and general government, are governmental. But municipal railways, gas, streets, sidewalks, bridges and sewers are governmental in some jurisdictions and proprietary in others.¹⁵

The almost universal dissatisfaction with the rule of municipal immunity from tort liability has led to its being subjected to a number of other restrictions and qualifications designed to hold the municipality liable under some circumstances. A distinction has been made between contract and tort actions, on the theory that an award of contract damages indirectly benefits the government body by encouraging persons to contract with it, while a tort recovery yields no such advantage.¹⁶ The "nuisance theory" has generally held a municipality liable for injuries resulting from the creation or maintenance of a nuisance.¹⁷ The so-called "active wrongdoing" test, that is, drawing a distinction between municipal misfeasance and nonfeasance, is sometimes used to determine tort liability. Thus, it has been held that a city is liable for positive misfeasance or active wrongdoing but is immune for nonfeasance.¹⁸

13. *Hanson v. Los Angeles*, 63 Cal. App. 2d 426, 147 P.2d 109, 110, (1944).

14. "Activity of a municipality is presumed to be governmental rather than proprietary." *Savage v. Town of Lander*, 77 Wyo. 157, 309 P.2d 152, (1957); *Hayes v. Cedar Grove*, 126 W. Va. 828, 30 S.E. 2d 726, (1944).

15. 63 C.J.S., *Mun. Corp.* §§ 873 to 877. 28 *Am. Jur.*, *Mun. Corp.*, §§ 571 to 667. "A municipality is liable for damages arising out of its negligence in the maintenance of a sewer system; sewer maintenance is a proprietary function for which there is liability." *Lore v. Town of Douglas*, 355 P.2d 367 (1960).

16. See *Florey v. Burlington*, 247 Iowa 316, 73 N.W. 2d 770, (1955).

17. "A municipal corporation is not liable for injuries to children on theory of attractive nuisance, where its servants' negligence occurred or attractive condition was created in exercise of governmental function." *Wilson v. City of Laramie*, 65 Wyo. 234, 199 P.2d 119, (1948); See also, *Annotation*, "Role of municipal immunity from liability for acts in performance of governmental functions as applicable in case of personal injury or death as a result of nuisance," 75 *A.L.R.* 1196.

18. *Van Zandt v. Bergen County*, 79 F.2d 506 (3rd Cir. 1935); *Pennsylvania R. R. v. United States*, 124 F. Supp. 52 (N.J. 1954); *Milstrey v. Hackensack*, 6 N.J. 400, 79 A.2d 37, (1951); *Casey v. Bridgewater Tp.*, 107 N.J. L. 163, 151 *Atl.* 603, (1930); *McKeown v. Chicago*, 319 Ill. App. 563, 49 N.E. 2d 729, (1943); *Hartman v. Brigantine*, 23 N.J. 530, 129 A.2d 876, (1957); See also, *Repka, American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 *Law and Contemp. Prob.* 214, (1942).

These illustrations should demonstrate that many courts do not like the doctrine of governmental immunity and will go to great lengths to get around it any time it is squarely put to them. In the past three or four years, the high courts of eight states have laid aside these multifarious distinctions in favor of a judicial abrogation of the ancient common law immunity rule in spite of the fact that these same courts had prior thereto said that this matter should be left up to the state legislature.¹⁹ A court which is ready to abandon the doctrine of governmental immunity has an almost inexhaustible source from which it may draw as the basis for a denunciation of the theory of immunity.²⁰

The whole doctrine of governmental immunity from liability for torts rests on a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, the medieval absolutism supposed to be implicit in the maxim, "The King can do no wrong," should exempt the various branches of government from their wrongful acts and should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual and where it justly belongs.²¹

. . . If the doctrine of state immunity in tort survives by virtue of antiquity alone, this is an historical anachronism, which manifests an inefficient public policy and works injustice to everyone concerned.²²

Probably the most forceful rationale against the doctrine comes from the Michigan decision which abrogates the doctrine, *William v. City of Detroit*.

Little time need be spent in determining whether the strict doctrine of municipal immunity from tort liability should be repudiated. All this is old straw. The question is not "should we"—it is "how may the body be interred judicially with non-discriminatory last rites?" No longer does any eminent scholar or jurist attempt justification thereof . . . from this date forward, the judicial doctrine of government immunity from ordinary torts no longer exists in Michigan. In this case, we overrule preceding court made law to the contrary. We eliminate from the case law of Michigan an ancient rule inherited from the days of absolute

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19. Florida in *Hardgrove v. Town of Cocoa Beach*, 90 So. 2d 130 (Fla. 1957); Arizona in *Stone v. State Highway Commission*, 93 Ariz. 384, 381 P.2d 107 (1963); California in *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rep. 89, 359 P.2d 457, (1961); Hawaii in *Kamar and Cushnie v. Hawaii County*, 41 Hawaii 527, (1957); Illinois, *Moletor v. Kaneland Community Unit District*, 18 Ill. 2d 18, 163 N.E. 2d 89, (1959); Michigan in *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1, (1961); Minnesota in *Spanel v. Moundsview School District*, 118 N.W. 2d 795 (Minn. 1962); Wisconsin in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618, (1962).
 20. The classic reference is Professor Borchard. *Governmental Liability in Tort*, an eight part article, 34 Yale L.J. 1, 129, 229; 36 Yale L.J. 759, 1039; 28 Col. L. Rev. 577, 594, 734.
 21. *Thomas v. Broadlands Community Consolidated School District*, 348 Ill. App. 567, 109 N.E. 2d 636, 640. *Annotation*, 75 A.L.R. 1196.
 22. *Tooke, The Extension of Municipal Liability in Tort*, 19 Va. L. Rev. 97, 108.

monarchy which has been productive of great injustice to our courts. By so doing, we join a major trend in this country toward the righting of an age-old wrong.²³

The *Williams* case and like decisions in the seven other states show one side of a historic tug of war. This tug of war is represented by the pulling for the legislative prerogative of abrogation of public policy on one hand and the urging for the judicial prerogative on the other. Other cases indicative of the disdainful attitude adopted by the judiciary at the inactivity of the legislature are *Purce v. Yakima* and *Muskoff v. Corning Hospital District*²⁴ which agreed that the doctrine was judicially created and that its rejection was not the exclusive province of the legislature. *Holytz v. City of Milwaukee*²⁵, the case which abrogated the doctrine for the State of Wisconsin, states, "so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." *McAndrew v. Mularchuk*²⁶ held that there was no municipal immunity in case of negligent acts committed by a municipal corporation saying, "surely it cannot be successfully argued that an outmoded, inequitable and artificial curtailment of a general rule of action created by the judicial branch of the government cannot or should not be removed by its creator."

Perhaps the strongest argument for the abandonment of the sovereign immunity doctrine is its inconsistency with the modern socio-ethical notion that the risk of wrongful injury should not be borne by the individual upon whom the misadventure fortuitously falls, but by the segment of society that benefits from the activity that produces the injury. Another argument is the more extensive activity of government which results in a greater likelihood of injuries to individuals. Thus, it has been urged that compensation of government tort victims should be viewed as a justifiable and expected cost of modern government.²⁷

When there is an abrogation of the doctrine, even its worst enemies conclude that experience indicates that some restraint is necessary for the protection of public funds. In almost every case, there has been a reaction from the legislature or the judiciary itself, which either implements the rule and supplies the necessary safeguards or restores the rule of immunity.²⁸

23. *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1, (1961). The *Williams*' case explained itself by saying, "it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision."

24. *Purce v. Yakima*, 43 Wash. 2d 162, 260 P.2d 765, 774 (1953); *Muskoff v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rep. 89, 359 P.2d 457 (1961).

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

26. *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820, 832, (1960).

27. See Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L.J. 583, 720, (1929); Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. Rev. 805, (1930).

28. *Moreno v. Aldrick*, 113 So. 2d 406 (Fla. 1959); *Williams v. City of Detroit*, 369 Mich. 231, 111 N.W. 2d 1; *McDowell v. Markie*, 265 Mich. 268, 112 N.W. 2d 491 (1961).

By contrast, the Supreme Court of Wyoming in the *Maffei* case²⁹ disagreed that the basis of immunity was judicial. The court felt that the doctrine of municipal immunity became the rule in our state by statute and it is only by statute that the doctrine can be abrogated. The statute is Wyo. Stat. § 8-17 (1957) which provides that the common law of England (as of 1607) shall be the rule of decision in Wyoming. The Wyoming court understood that the *Devon* case clearly indicates that antecedent to *Russell v. The Men of Devon*, a judicial pronouncement had recognized the doctrine of municipal immunity. This antecedent pronouncement was found in a 1586 edition of *Brook's, La Graunde Abridgement*, therefore the doctrine of municipal immunity was part of the English common law as of 1607. Thus, by statute, the doctrine of municipal immunity became the rule of decision in our state, and it is only by statute that the doctrine can be abrogated. Our Supreme Court feels it cannot abolish the doctrine by judicial decree. Neither would our court adopt the idea that the 1788 judicial recognition of the common law of English amounted to a court originated doctrine. Rather they believed that the doctrine was already a part of the common law, through long use and custom. In commenting on the harsh language hurled at the doctrine by various indignant courts, Justice Harnsberger adds:

The harsh language thus used adds nothing to persuasiveness. It rather serves to emphasize the impropriety of courts of law assuming to base their decision on their own concept of sociological enlightenment rather than avail legislative reaction to such claimed modern advancements.

More support for the hypothesis that the abrogation of the doctrine is properly legislative can be found in *Ramirez v. Cheyenne*.³⁰ Missouri courts have also indicated that government immunity is to be retained until the legislature decides otherwise.³¹ "While most courts may admit the glaring defects in the present law, they feel that any changes that should be made must be left to the wisdom of the legislature."³² In many jurisdictions of secure consistency, the rule of thumb formula, government function—no liability, proprietary function—liability, is still producing rather normal legal results.³³

29. *Supra*, Footnote 4.

30. *Ramirez v. Cheyenne*, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925). See also, 38 Am. Jur. sec. 573. Recent Texas' cases have recognized the restriction on the power of the courts to legislate. *Hill v. Palms*, 237 S.W. 2d 455 (Tex. Civ. App. 1951); *Milner v. Red River Valley Publishing Company*, 249 S.W. 2d 227 (Tex. Civ. App. 1952); *Harned v. E-Z Finance Company*, 151 641, 254 S.W. 2d 81, (1953).

31. *Schweskert v. Kansas City*, decided by Kansas City Court of Appeals on June 4, 1962, (unreported), 26 MINLO Municipal Law Rev. 454, 455; *Fette v. St. Louis (Mo.)*, 366 S.W. 2d 446, (1964) (Missouri Supreme Court).

32. *McGraw v. Rural High School District No. 1, Linn County*, 120 Kan. 413, 414; 243 Pac. 1038, 1039.

33. See *Burke v. City of St. Louis*, 349 S.W. 2d 930 (Mo. 1961); *Taylor v. Kansas City*, 353 S.W. 2d 814 (Mo. 1961); *Myers v. Palmyra*, 355 S.W. 2d 17 (Mo. 1962); *Dugan v. City of Portland*, 157 Me. 521, 174 A.2d 660 (1961); *Cook v. City of Shreveport*, 134 So. 2d 582 (La. 1962); *Locigno v. City of Chicago*, 32 Ill. App. 2d 412, 178 N.E. 2d 124 (1961); *Cobin v. Roy City*, 12 Utah 2d 375, 366 P.2d 986 (1961).

Whatever side of the tug of war wins, there is clearly a present tendency against the doctrine of governmental immunity. However, the doctrine is still a well-settled rule in this country. The doctrine is generally considered to rest upon, or to have its source in three grounds: (A) the supposed immunity of the sovereign from suit, which is extended to the municipality as a representative or agency of the sovereign, (B) the idea that it is more expedient that scattered individuals suffer than that the public in general be inconvenienced and (C) the considerations of public policy involved in the theory that government agents will perform their duties more effectively if not hampered by fear of tort liability.³⁴ The rule continues to be applied by the overwhelming majority of courts in this country, and although judicial criticism of the rule is not infrequent,³⁵ it has been said that the tendency is to restrict rather than to extend the principle of immunity.³⁶ The courts have usually concluded that the doctrine is so well entrenched that relief against it must come, if at all, from the legislature.³⁷

Even while Professor Borchard's writing dwells at length upon the desirability of abrogating the doctrine of municipal immunity, he feels that in the United States only statutes can abolish the outmoded, unjust maxims that "The King can do no wrong" and "states are above the law and cannot even be sued." But nowhere does Professor Borchard claim that it is the modern tendency of courts to abolish the rule of nonliability of municipal corporations.

It is obvious that a comprehensive solution cannot be worked out by the judiciary. The court lacks the facilities for an examination of the social, economic and political considerations which must delineate the limits of liability. This problem can only be worked out by the legislature, where all public agencies and other in-

34. See *An Inquiry into the Principles of Municipal Responsibility in General Assumpsit and Tort*, 8 Vanderbilt L. Rev. 753, 765.

35. *Arkansas, Kirksey v. Ft. Smith*, S.W. 2d 257 (Ark. 1957); *Kansas, Wendler v. Great Bend* 181 Kan. 753, 316 P.2d 265 (1957); *Utah, Niblock v. Salt Lake City* 100 Utah 573, 111 P.2d 800 (1941), *Bingham v. Board of Education* 118 Utah 582, 223 P.2d 423 (1950); *Wisconsin, Britten v. Eau Claire* 260 Wis. 382, 51 N.W. 2d 30 (1952). Also, *Supra* footnote 19.

36. *California, Madison v. San Francisco* 106 Cal. App. 2d 232, 234 P.2d 995, 236 P.2d 141 (1951); *Illinois, Both v. Collins* 339 Ill. App. 437, 90 N.E. 2d 285 (1950); *Iowa, Brown v. Sioux City* 242 Iowa 1196, 49 N.W. 2d 853 (1951); *Kansas, Krantz v. Hutchinson*, 165 Kan. 449, 196 P.2d 227, 5 A.L.R. 2d 47 (1948); *Wendler v. Great Bend* 181 Kan. 753, 316 P.2d 265 (1957); *Minnesota, Hahn v. Ortonville*, 238 Minn. 428, 57 N.W. 2d 254 (1953); *New Jersey, Housing Authority v. Trust Company of New Jersey*, 136 A.2d 401 (1957); *Oklahoma, Tulsa v. Washington* 206 Okla. 61, 241 P.2d 194 (1952); *Texas, Parson v. Texas City* 259 S.W. 2d 333 (1953); *Wisconsin, Britten v. Eau Claire* 260 Wis. 382, 51 N.W. 2d 30 (1953). Also see, 38 *Am. Jur. sec. 573*, p. 266.

37. *Maffie v. Incorporated Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959); *Kirksey v. Ft. Smith*, 300 S.W. 2d 257 (Ark. 1957); *Flory v. Burlington*, 247 Iowa 316, 73 N.W. 2d 770 (1955); *Nissen v. Redelack*, 246 Minn. 83, 74 N.W. 2d 300, 55 A.L.R. 2d 1428 (1955); *Wickmen v. Housing Authority*, 196 Or. 100, 247 P.2d 630 (1953); *Parson v. Texas City* 259 S.W. 2d 333 (Tex. 1953); *Scates v. Board of Comrs.*, 196 Tenn. 274, 265 S.W. 2d 563 (1954); *Kilbourn v. Seattle*, 43 Wash. 2d 373, 261 P.2d 407 (1953); *Hayes v. Cedar Grove*, 126 W. Va. 828, 30 S.E. 2d 726, 156 A.L.R. 602 (1944); *Britten v. Eau Claire*, 260 Wis. 51 N.W. 2d 30 (1952).

terested parties will have opportunity to appear before the appropriate committee to explain their problems and proposed solutions. The special capacity to define and condition the terms of liability is to be found in the legislature and not in the judiciary.³⁸

As stated above, immediately after the *Maffei* case, the legislature of Wyoming enacted a statute allowing cities and towns to carry liability insurance.³⁹ This appears to be a step in the right direction and one which was needed to off-set the harsh results of the common law doctrine. The statute provides that cities and towns are authorized to carry liability insurance in any amount deemed necessary by such town or city, and that any person suffering damages from negligent acts of such cities or towns so insured may maintain action for damages against the city or town in an amount not exceeding the limits of the policy. An insured city or town may not plead governmental immunity as a defense in any action for the negligent acts of cities and towns, their officers, or employees in the performance of governmental functions.

Many problems can be visualized which makes one wonder whether the act is sufficient. First of all, the act is clearly permissive and the cities and towns are free to decide for themselves whether or not they want to spend city funds on insurance. Hence, if a city does not carry such insurance, the innocent victim is still in the same position of not being compensated for his losses suffered as a result of some city's wrongful acts. Next, the act applies only to cities and towns of Wyoming. It does not apply to the State, the counties, the many State agencies, irrigation districts, school districts, or any one of the many other political subdivisions exercising duties for the public good or benefit. As a result, if one happens to be the victim of a misadventure caused by one of these entities, the doctrine of sovereign immunity would be a bar to any type of just compensation. Another obvious inadequacy of the act is that it allows recovery in damages in an amount not to exceed the limit or limits of the insurance policy or policies carried by the municipality. All an innocent victim can do is hope that the policy limit adequate. As of this date, no litigation involving this municipal liability insurance has occurred in Wyoming, but upon its instigation, many other defects and inadequacies will undoubtedly arise.

This Wyoming act exemplifies a recent trend on the part of state and local government to purchase insurance to cover activities in which they engage, and in which they enjoy a sovereign immunity from tort liability. This trend is probably prompted either by a public awareness of the situation caused by a "Maffei" case or a benevolent legislature which feels that some sort of risk-distribution plan is needed. The existence of insurance as a feasible risk-distribution device is the most persuasive reason for modifying the sovereign immunity doctrine, and the insurance in-

38. *Annotation*, 68 A.L.R. 2d 1437, quoting Professor Borchard.

39. *Supra*, Footnote 5.

dustry is the most likely spur to future legislation. There appear to be four reasons why municipalities have procured insurance to cover immune activities: (A) the purpose may be to obtain the insurer's services in defending suits against it; (B) where the law relating to a particular activity is unclear, the purpose may be to place the risk of an adverse judicial determination on the insurer, and even where immunity at the present time clearly attaches, the insurer would bear the risk that the law might be modified during the term of the contract; (C) the purpose may be to protect members of the public injured by government employees; (D) finally, the purpose may be to protect government agents who remain personally liable for their torts. Most states now authorize the purchase of liability insurance covering immune governmental activities.⁴⁰ The statutes authorizing the purchase of liability insurance for immune governmental functions⁴¹ have generally been directed at specific problem areas, *i.e.* the much litigated school bus accident situation,⁴² or municipal vehicles involved in fire or police protection. Several states have gone further and authorized the insurance of all state-owned motor vehicles.⁴³ Although most of these statutes are permissive only, like Wyoming's, a growing number of states have enacted mandatory liability insurance for their municipalities.⁴⁴

This statute authorizing the purchase of liability insurance by cities and towns in Wyoming, as mentioned before, is certainly a step in the right direction. The only criticism is that the statute failed to go far enough. In Wyoming a governmental unit lacks the power to waive immunity and

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40. There appears to be no question that a municipal government entity can insure against liability for "proprietary" functions. The leading case is *Travelers Ins. Co. v. Village of Wadsworth*, 109 Ohio St. 440, 142 N.E. 900 (1924). The reason upholding such a purchase is that the functions might be endangered by tort suits without the insurance.
41. The following is a listing of the statutes enacted: Ark. Stats., § 66-517 (1947); Cal. Vehicle Code Ann., § 400 (1956); Gen. Stat. Conn. Rev., § 52-536 (1958); Del. Code Ann. title 14, § 2904 (1953); Idaho Code Ann. § 41-3304-06 (Supp. 1957); Fla. Stat. Ann., § 240.28 (1957); Ga. Code Ann., §§ 32-429, 32-431 (1952); Ind. Stat. Ann. § 38-1819 (1952); Iowa Code § 368A (12, 517A (1) (1958); Kan. Ben. Stat. Ann. § 72-615 (Supp. 1957); Minn. Stat. Ann., § 471-42-43 (Supp. 1958); Mont. Rev. Codes Ann., § 40-1204 (Supp. 1959); N.J. Stat. Ann., § 18:5-50.4 (Supp. 1959); N.M. Rev. Code, § 64-23-8.9 (1953); N.C. Gen. Stat., § 160-191.1 (1952); N.D. Rev. Code, §§ 15-4731, 39-0108 (Supp. 1953); Ohio Rev. Code Ann., §§ 307.44; 3327.09 (Baldwin 1953); Okla. Stat. title 69, § 30.16-18, title 70, § 9.7 (Supp. 1957); Ore. Rev. Stat., §§ 278.090, 332.180 (1953); Pa. Stat. Ann. title 24, § 7-774 (1950), title 71, § 634 (b) (Supp. 1958); S.D. Laws, C. 199 (1955); Vt. Laws No. 243, § 5 (1949); Va. Code Ann., § 22.284-294 (1950); Wash. Rev. Code, § 28.58.100(11) (1950); W. Va. Code Ann., § 1774 (7) (Michie 1949); Wis. Stat., § 40.57 (1957); Wyo. Stat., § 15-20.6 (Supp. 1963).
42. Every statute listed in note 41 *supra*, covers the school bus problem with the exception of that of South Dakota and Wyoming. The following are states whose statutes authorize only school bus insurance: Delaware, Florida, Georgia, Idaho, Kansas, Minnesota, New Jersey, Pennsylvania, Vermont, Virginia, Washington and Wisconsin. See Wyo. Stat. § 21-154 (1957) which covers the school but problem separately.
43. The following states authorize insurance for all state-owned motor vehicles: California, Connecticut, Indiana, Iowa, Montana, New Mexico, North Dakota, Oregon, Pennsylvania, Washington, and West Virginia.
44. Statutes in the following states require that insurance be purchased: Delaware, Florida, Idaho, Oregon, Pennsylvania, Vermont, Virginia and Wisconsin.

therefore, procurement of liability insurance, notwithstanding its statutory authorization, cannot be such a waiver. In essence the statute only authorizes persons who are suffering damages from the claimed negligent acts of said cities and towns so insured, to maintain an action in the amount of the insurance policy's coverage. Fortunately, a trend toward increasing municipal liability is discernible. But what effect the sanctioning of liability insurance covering immune governmental activities will have in retarding or accelerating the progress of governmental liability in Wyoming is yet unanswered.

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