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Hjort: The Passing Of Sovereign Immunity In Montana: The King Is Dead!  
**THE PASSING OF SOVEREIGN IMMUNITY IN MONTANA:  
THE KING IS DEAD!**

Barry L. Hjort

*INTRODUCTION*

The 1972 Montana Constitutional Convention adopted a provision which abrogates the doctrine of sovereign immunity in Montana. It provides, "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973."<sup>1</sup> This bold constitutional step places Montana in a situation which is unique among the fifty states. Only this jurisdiction has moved to abolish the doctrine of sovereign immunity, *without limitation*, by constitutional fiat. It is the purpose of this comment to trace the history of the doctrine, to examine its application in Montana, to consider the Constitutional Convention's treatment of the subject, to evaluate the potential impact of the new constitutional provision and to offer recommendations for change of this provision to render the law of sovereign immunity more certain and predictable.

*THE HISTORICAL BACKGROUND*

The doctrine of sovereign immunity, which is a synonym of the phrase "governmental tort immunity," simply proclaims that a unit of government is not liable for the torts of its officers and employees which are committed within the scope of their employment.<sup>2</sup> With a long and litigious history, the doctrine has been invoked in many times and many countries to protect the sovereign from suits by its citizenry. In recent times, the doctrine has drawn scathing criticism from the commentators,<sup>3</sup> the courts,<sup>4</sup> and more particularly, the Bill of Rights Committee of the Montana Constitutional Convention.

[T]he doctrine of sovereign immunity bars tort suits against the state for negligent acts by its officials and employees. The committee finds this reasoning repugnant to the fundamental premise

<sup>1</sup>MONT. CONST. art II, § 2 (1972).

<sup>2</sup>Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L. F. 795.

<sup>3</sup>The literature is voluminous. The classic treatment of the doctrine is found in Borehard, *Governmental Liability in Tort* (pts 1-3), 34 YALE L. J. 1, 129, 229 (1924-25), *Governmental Responsibility in Tort* (pts 4-6), 36 YALE L. J. 1, 757, 1039 (1926-27), *Governmental Responsibility in Tort* (pt 7), 28 COLUM. L. REV. 577 (1928), and *Theories of Governmental Responsibility in Tort* (pt 8), 28 COLUM. L. REV. 734 (1928). For more recent symposia examinations of the doctrine, see the following: 9 LAW & CONTEMP. PROB. 179 (1942); 29 N.Y.U. L. REV. 1321 (1954); 1966 U. ILL. L.F. 795. For a state by state analysis in those jurisdictions recently abolishing the doctrine of sovereign immunity by judicial decision see the case listing, *infra* note 43. Many of these cases are treated in a contemporary note or comment found in the respective Law Review or Bar Journal of the appropriate jurisdiction.

<sup>4</sup>*E.g.*, *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971); *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 11 Cal. Rptr 89, 359 P.2d 457, (1961).

of the [sic] American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency. The committee believes that just as the government administers a system of justice between private parties it should administer the system when the government itself is alleged to have committed an injustice. The committee notes that private firms are liable for the negligence of their employees and points out this fact to indicate the inconsistency of the state's position in the system of tort law.<sup>5</sup>

The origin of the doctrine of sovereign immunity is somewhat obscure. That it is not indigenous to the Anglo-American common law is shown by its existence in Roman jurisprudence.<sup>6</sup> Whatever its genesis, the doctrine appeared in the English common law in the form of the maxim, "The King can do no wrong."<sup>7</sup> The philosophical underpinnings apparently derived from the divine right of kings, and "Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state."<sup>8</sup> Even this simplistic foundation has been challenged in view of the fact that the English monarch could not refuse to redress wrongs if properly petitioned by his subjects.<sup>9</sup> It seems clear that the regency justifications advanced for the doctrine certainly should have lost currency with the advent in England of parliamentary democracy. But this was not the case. The doctrine persisted in England until the Twentieth Century and was accepted in the United States as a concomitant of the received common law, despite the fact that this nation fought a war of revolution partially to rid itself of the strictures of monarchical prerogatives.

Early on, the United States Supreme Court perceived the basic incongruity of transplanting a doctrine of kingly right into the jurisprudence of a democracy. In *Chisholm v. Georgia*<sup>10</sup> the Court held that a state was not immune from citizen suit. However, the apparent demise of the doctrine was shortlived. In 1798 the eleventh amendment to the Constitution was adopted and it has since been construed as an absolute bar to private suit against the state by the citizens of another state.<sup>11</sup>

It is noteworthy that the initial adoption of the doctrine by an American state was improper not only in a philosophical sense, but also in the strictly legal application of the principle. *Russell v. The Men of*

<sup>5</sup>BILL OF RIGHTS COMMITTEE PROPOSAL, REPORTS OF THE SUBSTANTIVE COMMITTEES—MONTANA CONSTITUTIONAL CONVENTION 1971-72, 30 (Convention Print, 1972).

<sup>6</sup>Borchard, *supra* note 3, 28 COLUM. L. REV. at 580-81.

<sup>7</sup>See, 1 BLACKSTONE, COMMENTARIES \*246.

<sup>8</sup>In *Muskopf v. Corning Hosp. Dist.*, *supra* note 4 at 458-9 the history of the doctrine is traced extensively in footnote 1.

<sup>9</sup>See generally, Comment, *State Immunity From Tort Liability*, 8 MONT. L. REV. 45-46 (1947); Borchard, *supra* note 3, 36 YALE L.J. 1; 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 8 (3d ed. 1966); and *Id.* for extended analysis on this point.

<sup>10</sup>*Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419 (1793).

<sup>11</sup>*Smith v. Reeves*, 178 U.S. 436 (1900).

*Devon*<sup>12</sup> is widely cited for the proposition that the common law recognized the doctrine of governmental immunity,<sup>13</sup> and that local governmental units were not liable for the torts of their agents.<sup>14</sup> Yet King's Bench there denied recovery in a suit against an unincorporated town on the ground that "[I]t is better that an individual should sustain an injury than that the public should suffer an inconvenience."<sup>15</sup> This rationale was adopted by the Supreme Judicial Court of Massachusetts in *Mower v. Inhabitants of Leicester*<sup>16</sup> even though the town was incorporated under Massachusetts law and could have satisfied a judgment.<sup>17</sup> In this illogical manner, sovereign immunity was first accepted into the jurisprudence of an American state. The climate was hospitable because it eventually flourished in every jurisdiction.<sup>18</sup>

The rule's entrenchment was reinforced by the august Chief Justice John Marshall in *Cohens v. Virginia*.<sup>19</sup> Although cognizant of the *Chisholm* decision and the subsequent enactment of the eleventh amendment, Marshall said: "[T]he general proposition, that a sovereign independent state is not suable, except by its own consent . . . will not be controverted."<sup>20</sup> Once stamped with the Marshall *imprimatur*, growth of the doctrine was inevitable. In spite of its tenuous justification and its chimerical philosophical foundations, discussions of the doctrine permeate decisions where the state's reliance on the immunity defense constitute a travesty on the law. As Professor Davis has well said: "Decisions based on sovereign immunity customarily rest on authority, the authority rests on history, and the history rests on medievalisms about monarchs."<sup>21</sup>

### THE JUSTIFICATION

"But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten."<sup>22</sup> Justice Holmes' observation fairly states the reason for the continued existence of sovereign immunity in the majority of American jurisdictions. It is a fitting irony that his judicial justification of the doctrine has stood as one of the most frequently cited reasons for its continuation. "A sovereign is exempt from

<sup>12</sup>Russell v. The Men or Devon, 100 Eng. Rep. 359 (K.B. 1788).

<sup>13</sup>Evans v. Board of County Comm'ns, *supra* note 4 at 969.

<sup>14</sup>Muskopf v. Corning Hosp. Dist., *supra* note 4 at 459.

<sup>15</sup>Russell v. The Men or Devon, *supra* note 12 at 362.

<sup>16</sup>Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812).

<sup>17</sup>*Id.* at 249.

<sup>18</sup>Kramer, *supra* note 2 at 801-805.

<sup>19</sup>Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821).

<sup>20</sup>*Id.* at 380.

<sup>21</sup>K. DAVIS, ADMINISTRATIVE LAW TEXT 497 (3d ed. 1972).

suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."<sup>23</sup> In criticism of this rationale it has been suggested that the assertion of Justice Holmes begs the question, is outmoded and conceptually dogmatic.<sup>24</sup>

A second justification is that allowing suit against the government might constitute a serious interference with the proper performance of governmental functions, and the control of state and federal governments over their respective funds and property.<sup>25</sup> This reasoning would appear specious as applied to the federal government, with its vast financial resources and legal talent.<sup>26</sup> However, the argument may well be persuasive when applied to an individual state, and particularly so when the governmental unit involved is a remote political subdivision.

Other reasons commonly advanced for the retention of sovereign immunity include: the public policy basis for immunity, that a sovereign not be subject to citizen suit; the absurdity inherent in the concept that a wrong may be committed by an entire people; the replacement of "king" by "state" in the "king can do no wrong"; the theory that an agent of a state is always outside the scope of his authority and employment when he commits any wrongful act; the reluctance to divert public monies to pay for private injuries; and the embarrassment to a government attending a decision that it is subject to liability.<sup>27</sup> These justifications have been criticized as being merely conclusions without a sound basis in theory or fact and as being tenuous policy grounds upon which to rest a court decision.<sup>28</sup>

The somewhat ridiculous contention has also been advanced that in suing the government the individual citizen is actually suing himself.<sup>29</sup> This rationale is refuted on the ground that the people are not the government, rather they are simply represented by the government.<sup>30</sup>

Perhaps the strongest argument in support of the doctrine of sovereign immunity is financial. The early colonial acceptance of the doctrine was probably predicated upon the shaky financial posture of the new American states rather than any predilection for the old philosophical

<sup>23</sup>Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

<sup>24</sup>3A J. MOORE, FEDERAL PRACTICE 2864 (2d. ed. 1970). See also Comment, *supra* note 9 at 51-52.

<sup>25</sup>Sherry, *The Myth That The King Can Do No Wrong: A Comparative Study of The Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 AD. L. REV. 39, 43 (1969).

<sup>26</sup>3A J. MOORE, *supra* note 24 at 2734.

<sup>27</sup>W. PROSSER, LAW OF TORTS 975 (4th ed. 1971).

<sup>28</sup>Tanner, *Government Immunity in Kansas: Prospects for Enlightened Change*, 19 KANSAS L. REV. 211, 212 (1971).

<sup>29</sup>*Id.* at 212.

justifications.<sup>31</sup> In fact, the settlement of a large judgment, or even the premium payment on an adequate liability insurance policy may bulk large in the fiscal planning of state agencies and local governmental entities. Unfortunately, the commentators, in their zeal to refute the traditional justifications for sovereign immunity, have tended to view the state as a monolith, and have given little consideration to the circumstances of a governmental subdivision stripped of its immunity cloak. This aspect of immunity will be examined in detail in subsequent sections.

### THE TREND

As pointed out above<sup>32</sup> the continued existence of an unlimited form of sovereign immunity has elicited a torrent of criticism from the commentators. The notion is generally accepted that it is a great injustice to the private citizen to be left without a meaningful judicial remedy when he is wronged by the tortious conduct of the servant of a governmental entity.<sup>33</sup> It seems wholly incongruous that the private employer, whose resources are often quite limited, should be compelled to make recompense for the torts of his employees, while the state and federal governments, with their access to the public largesse, should be permitted to escape liability for the acts of their agents. Enlightened members of the state judiciaries and of state legislatures have taken steps to rectify this anomaly. The old view that the burden of loss should fall upon the person injured by the acts or omissions of a public servant has been supplanted by a more modern standard which opts for a distribution of the private losses caused by governmental enterprise over the public at large—the general beneficiary of that enterprise.<sup>34</sup>

The plaintive cries of the scholars, lawyers and remediless litigants have not gone unheeded. Chinks began to appear in the armor of the old anachronous medievalism.<sup>35</sup> In 1945, the New York Court of Appeals held that the state's Court of Claims Act constituted a legislative waiver

<sup>31</sup>Gellhorn & Schench, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 731 (1947).

<sup>32</sup>See generally, Borchard, *supra* note 4.

<sup>33</sup>Kramer, *supra* note 2 at 796.

<sup>34</sup>Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 921.

<sup>35</sup>Sovereign immunity is a doctrine of subtle gradations. It is not normally applied with mechanical rigidity in those jurisdictions where it prospers, nor has it entirely disappeared from those states where it has been abrogated. In each jurisdiction the doctrine has had a different history. It has frequently been subject to qualification depending upon whether the function being performed at the time of injury was governmental or proprietary, and whether the entity involved was a state agency or institution, county, municipal corporation, or local school district, irrigation district or the like. See discussion, *infra* notes 60-66 for Montana cases on this subject. Additionally, if the alleged harm was inflicted by a public officer or employee, courts have attempted to make distinctions based upon whether the action was discretionary or ministerial, whether the act constituted misfeasance or nonfeasance, and whether the act was intentionally harmful or malicious. Again, see discussion, *infra* notes 74-78 for Montana cases.

of governmental tort immunity for both the state and its subdivisions.<sup>36</sup> Then in 1946 Congress enacted the *Federal Tort Claims Act*,<sup>37</sup> waiving immunity for the torts of federal employees committed while they acted within the scope of their employment. Once breached, the gap in the sovereign immunity barrier was quickly widened.<sup>38</sup> But at this writing there is only one state, Montana, which has absolutely nullified the doctrine by constitutional mandate.<sup>39</sup> One other jurisdiction has taken a similar step, but left a provision in its constitution for legislative modification.<sup>40</sup> Twenty states<sup>41</sup> have constitutional provisions which, in varying language, declare essentially that the legislature shall provide by law in what manner and in what courts suit may be brought against the state. In twenty-three other jurisdictions<sup>42</sup> no constitutional mention is made of the subject. The most popular method of overturning the doctrine of governmental immunity has been by judicial decree. At this time, eighteen states<sup>43</sup> have abolished the doctrine in varying degrees by case law. Frequently after a judicial declaration terminating the doctrine, state legislatures have acted to impose some limitations upon private suits brought against governmental units. In at least five jurisdictions<sup>44</sup> state immunity has been ended by statute. Oftentimes the

<sup>36</sup>60 Stat. 842 (1946). 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2678, and 2680.

<sup>37</sup>See generally, Van Alstyne, *supra* note 34 at 924-968 for a state by state analysis of developments to 1965.

<sup>38</sup>See, *supra* note 1.

<sup>39</sup>ILL. CONST. art. 13, § 4. "Except as the General Assembly may provide by law, sovereign immunity in this state is abolished."

<sup>40</sup>ALAS. CONST. art. 2, sec. 21; ARIZ. CONST. art. 4, pt. 2, sec. 18; CAL. CONST. art. 20, sec. 6; CONN. CONST. art. 11, sec. 5; DEL. CONST. art. 1, sec. 9; FLA. CONST. art. 10, sec. 13; IND. CONST. art. 4, sec. 24; KY. CONST. sec. 231; MICH. CONST. art. 9, sec. 22; NEB. CONST. art. 5, sec. 22; NEV. CONST. art. 4, sec. 22; N.D. CONST. art. 1, sec. 22; OHIO CONST. art. 1, sec. 16; ORE. CONST. art. 4, sec. 24; PA. CONST. art. 1, sec. 11; S.C. CONST. art. 17, sec. 2; S.D. CONST. art. 3, sec. 27; WASH. CONST. art. 2, sec. 26; WIS. CONST. art. 4, sec. 27; WYO. CONST. art. 1, sec. 8.

<sup>41</sup>Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, Vermont, and Virginia.

<sup>42</sup>*Stone v. Arizona Hwy. Comm.*, 98 Ariz. 384, 381 P.2d 107 (1963); *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Muskopf v. Corning Hosp. Dist.*, *supra* note 4; *Evans v. Board of County Comm'rs*, *supra* note 4; *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957); *Smith v. Idaho*, 93 Idaho 795, 473 P.2d 937 (1970); *Molitor v. Kaneland Community Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Campbell v. State*, ..... Ind. ...., 284 N.E.2d 733 (1972); *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969); *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); *Myers v. Genesee County Auditor*, 375 Mich. 1, 133 N.W.2d 190 (1965) and *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Johnson v. Municipal U. of Omaha*, 184 Neb. 512, 169 N.W.2d 286 (1969), and *Brown v. Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968); *Walsh v. Clark County School Dist.*, 82 Nev. 414, 419 P.2d 774 (1966), and *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960), and *Willis v. Dept. of Conservation*, 55 N.J. 534, 264 A.2d 34 (1970); *Bernadine v. City of New York*, *supra* note 34; *Becker v. Beaudoin*, 261 A.2d 896 (R.I. 1970); and *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

remedial statutory provisions are modeled upon the *Federal Tort Claims Act*,<sup>45</sup> with modifications to accommodate peculiar state requirements.<sup>46</sup>

That there is a trend toward abolition of the doctrine is manifestly clear. Cogent arguments have been marshalled against the justifications proffered for continuation of governmental immunity.<sup>47</sup> However, the issue which remains for clarification is *to what extent* should abolition be carried? While it is the apparent consensus that sovereign immunity must go, agreement on what should replace it has not been reached.<sup>48</sup> This crucial concern will be examined below in the evaluation of the impact of Montana's new constitutional Article II, § 18.

### SOVEREIGN IMMUNITY IN MONTANA

#### THE PAST

The present Montana constitution neither authorizes nor prohibits sovereign immunity. It is therefore quite natural that development of the doctrine in Montana was left to the Montana supreme court on a case-by-case basis, and to the Montana legislature as that body perceived the need for change in the *status quo*.

Primarily because of an absence of constitutional direction, development and integration of the doctrine of governmental immunity into Montana's jurisprudence was undertaken on a piecemeal basis. The immunity rationale first appeared at a time when Montana enjoyed territorial status. The territorial court held, in an action seeking a writ of mandate to compel the treasurer of Lewis and Clark County to accept a territorial warrant in partial payment of taxes, that in the absence of territorial legislation or a controlling Congressional enactment, no territorial citizen would be permitted to sue the territorial government.<sup>49</sup>

After Montana achieved statehood, the supreme court was not called upon to consider the doctrine until 1926.<sup>50</sup> In that year a taxpayer brought suit to enjoin the board of examiners from holding a hearing to investigate circumstances surrounding the injuring of a Montana State University student on university property. The student, newly matriculated and unfamiliar with his assigned dormitory, opened a door in a darkened hallway, stepped through, and tumbled down an elevator shaft. The Montana legislature approved private legislation for the student's relief, authorized the claim against the state as valid, and

<sup>45</sup>W. PROSSER, *supra* note 25 at 986.

<sup>46</sup>*Cf.* Lansing, *The King Can Do Wrong! The Oregon Tort Claims Act*, 47 ORE. L. REV. 357 (1968).

<sup>47</sup>Van Alstyne, *supra* note 34 at 921.

<sup>48</sup>Tanner, *supra* note 28 at 213.

<sup>49</sup>Langford v. King, 1 Mont. 33, 38 (1968). *See also*, Fisk v. Cuthbert, 2 Mont. 593 (1877).



made an appropriation of \$7,500 pursuant to its enactment. In reversing the trial court grant of an injunction, the Montana supreme court said:

[T]he state is a public corporation and out of considerations of public policy the doctrine of respondeat superior does not apply to it unless assumed voluntarily. In other words the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability.<sup>51</sup>

The court concluded that in view of the legislative action, the state in this instance had intended to assume liability and that the action was in conformity with the state constitution.

The procedure followed in *Mills*—a legislative appropriation followed by a meeting of the board of examiners to investigate the claim—is the reverse of the method contemplated by existing statutes. Provision has been made in the law for a board of examiners<sup>52</sup> to meet<sup>53</sup> and consider unsettled claims<sup>54</sup> against the state, and to draft a report<sup>55</sup> to the legislature including the board's findings, recommendations, and claim rejections.<sup>56</sup> The statutes apparently envision the entertainment of tort claims.<sup>57</sup> This statutory machinery would appear to provide an alternative means of relief for the citizen suffering egregious damage at the hands of the state under circumstances where the immunity doctrine would normally bar a lawsuit. It is only reasonable to assume, however, that a legislative appropriation could be expected to be parsimonious when contrasted with a potential jury award on the same damage claim.

In *Coldwater v. State Highway Comm'n*,<sup>58</sup> the court was faced with a plaintiff's claim that the Commission, in improperly maintaining a public roadway, was acting in a proprietary rather than a governmental capacity,<sup>59</sup> and that consequently the governmental immunity doctrine

<sup>51</sup>*Id.* at 333.

<sup>52</sup>§ 82-1101, REVISED CODES OF MONTANA, (1947) [hereinafter cited as R.C.M. 1947].

<sup>53</sup>§ 82-1102, R.C.M. 1947.

<sup>54</sup>§§ 82-1113, 82-1114, R.C.M. 1947.

<sup>55</sup>§ 82-1116, R.C.M. 1947.

<sup>56</sup>§ 82-1115, R.C.M. 1947.

<sup>57</sup>Lefflar & Kantowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1387 (1954).

<sup>58</sup>*Coldwater v. State Highway Comm'n* 118 Mont. 65, 162 P.2d 772 (1945).

<sup>59</sup>The law of sovereign immunity has been complicated by the addition of the governmental-proprietary distinction, and, with regard to public officers, the discretionary-ministerial distinction. As a general proposition, *immunity* attaches to governmental and discretionary functions and *liability* attaches to proprietary and ministerial functions. Traditionally, the governmental-proprietary distinction has been applied to questions of municipal liability and the discretionary-ministerial distinction to questions of officer or employee liability. Because of difficulty of application, the governmental-proprietary distinction has been criticized by the commentators and has been abandoned in several jurisdictions. However, it is generally agreed that the discretionary-ministerial distinction is useful and necessary when properly applied. See, generally, Minge, *Governmental Immunity From Damage Actions in Wyoming*, 7 LAND & WATER L. REV. 229, 246 (1972); and Comment, *supra* note 9 at 49. For a short analysis of the various interpretive distinctions bearing on immunity, see STATE LEGISLATIVE RESEARCH COUNCIL, THE FEASIBILITY OF ABOLISHING OR MODIFYING SOVEREIGN IMMUNITY IN SOUTH DAKOTA, 2-3 (Pierre, S.D. 1967).

could not be raised as a defense. Without reticence, the court held that the maintenance of public highways by a state agency was a governmental function. The governmental-proprietary distinction has not always seemed so clear. The Montana court has variously held that: a city operates its fire department in a proprietary capacity, except when the department is actually engaged in extinguishing fires at which time department operations become a governmental function;<sup>60</sup> a city and county working jointly to repair a highway act in a proprietary capacity<sup>61</sup> (in contradistinction to *Coldwater*); a county operating a ferry service does so in its proprietary capacity;<sup>62</sup> a school district operating a gymnasium<sup>63</sup> or swimming pool<sup>64</sup> does so in a governmental capacity; but a city operates a swimming pool in a proprietary capacity;<sup>65</sup> a school district operates busses in its governmental capacity;<sup>66</sup> but immunity from suit is waived by statute<sup>67</sup> to the extent of liability insurance coverage; a state agency acting to protect the resources and property of the state does so in a governmental capacity.<sup>68</sup>

In addition, the court has determined that when the state sues a county to enjoin the issuance of a tax deed to state property, the county does not partake of the state's sovereignty and does not come within the protection of the rule that actions may not be had against the sovereign without its consent.<sup>69</sup> And when the state is sued by a city for trespass because it did not go through proper condemnation proceedings to obtain the city's property for interstate highway construction, it may not plead sovereign immunity because Article III, § 14 of the old Montana constitution, providing for compensation for the taking of *private* property, constitutes a waiver of immunity.<sup>70</sup> Finally, a citizen subject to criminal prosecution for the killing of an elk out of season may not defend on the ground that he was protecting his property from the animal's depredations, for the state owns wild game in its sovereign capacity and a private citizen may not sue for damages caused his property by such *ferae naturae*.<sup>71</sup>

If this plethora of hair-splitting distinctions does not serve to confuse, consider the state of affairs where public officers are joined with

<sup>60</sup>Kern v. Arnold, 100 Mont. 346, 49 P.2d 976, 980 (1935).

<sup>61</sup>Johnson v. City of Billings, 101 Mont. 462, 54 P.2d 579, 583 (1936).

<sup>62</sup>Jacoby v. Chouteau County, 112 Mont. 70, 112 P.2d 1068, 1070 (1941).

<sup>63</sup>Rhoades v. School Dist. No. 9, 115 Mont. 353, 142 P.2d 890, 892 (1943).

<sup>64</sup>Perkins v. Trask, 95 Mont. 1, 23 P.2d 982, 983 (1933).

<sup>65</sup>Felton v. City of Great Falls, 118 Mont. 586, 169 P.2d 229, 233 (1946).

<sup>66</sup>Longpre v. Joint School Dist. No. 2, 151 Mont. 345, 443 P.2d 1, 2 (1968).

<sup>67</sup>§ 75-3406, R.C.M. 1947.

<sup>68</sup>Kish v. Montana State Prison, ..... Mont. ...., ..... P.2d ..... (1973).

<sup>69</sup>Freebourn v. Yellowstone County, 108 Mont. 21, 88 P.2d 6, 9 (1939).

<sup>70</sup>City of Three Forks v. State Highway Comm'n, 156 Mont. 392, 480 P.2d 826, 830 (1971.)

<sup>71</sup>State v. Balthow, 110 Mont. 225, 100 P.2d 86, 91 (1940).

the state or its subdivision as party defendants. The issue of when a suit against a public officer is in fact a suit against the state is bogged in the same quagmire of petty distinctions that has beset the other sovereign immunity classifications. Generally, in the past American courts tended to compensate for the lack of sovereign responsibility by permitting suit against the public officer in his individual capacity.<sup>72</sup> This judicial shortcut is obviously unsatisfactory if for no other reason than the fact that it discourages public spirited citizens from engaging in governmental work because they fear for their personal financial security. The broad trend of the law in recent decades has fortunately been toward increased liability of governmental units and decreased liability of public officers and employees.<sup>73</sup> This is a desirable movement.

Much to the credit of the Montana supreme court is the fact that it has generally avoided the imposition of liability upon public officers in their individual capacities. It has, however, like its judicial contemporaries, struggled with the discretionary-ministerial distinction. In the context of suits against public officers and employees, the court has held: that a claim and delivery action to recover a shotgun from a deputy game warden—a suit involving state officers in an effort to recover property in the possession of the state—must be regarded as a suit against the state and subject to the immunity bar;<sup>74</sup> that an action for a writ of mandamus to compel the state furnishing board to sign a formal contract for the purchase by the state of certain supplies, where the law requires certain action as a duty resulting from an office, must be regarded as ministerial and may be compelled by a writ of mandamus without running afoul of the immunity rule;<sup>75</sup> that only when official acts are purely ministerial is the public officer liable for injuries<sup>76</sup> to private citizens; that an action to recover for personal injuries suffered in a car accident caused by an alleged defect in a county roadway was permissible, since the Yellowstone County Commissioners were liable individually for a failure to comply with their statutory duties;<sup>77</sup> that an action against a state fish and game warden for damages for an alleged wrongful refusal to issue plaintiff certain game licenses could not be maintained, since the warden's duty in regard to license issuance was not purely ministerial, and absent some statutory obligation on the part of the officer no recovery could be had, for "[p]rotection [against suit] is not extended to the officer for his own sake, but because the public interest requires full independence of action and decision on his

<sup>72</sup>Comment, *supra* note 9 at 52.

<sup>73</sup>K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25.17 (1970 Supp.).

<sup>74</sup>Heiser v. Severy, 117 Mont. 105, 158 P.2d 501, 503 (1945).

<sup>75</sup>Robert Mitchell Furniture Co. v. Toole, 26 Mont. 22, 66 P. 496, 498-499 (1901).

<sup>76</sup>Smith v. Zimmer, 45 Mont. 282, 125 P. 420, 423 (1912).

<sup>77</sup>Becker v. Chapple, 72 Mont. 199, 232 P. 538 (1925).

<sup>78</sup>Meinske v. McFarland, 122 Mont. 515, 206 P.2d 1012, 1014 (1949).

part, uninfluenced by any fear or apprehension of consequences personal to himself.<sup>78</sup>

The foregoing sampling of cases is not intended either to criticize or discredit the decisions of the Supreme Court of Montana. It is offered only for the purpose of illustrating the artificial distinctions and arbitrary classifications that pervade the law of sovereign immunity.

Any analysis of existing Montana law on the subject of governmental immunity would be incomplete without an examination of the changes wrought by statute. It has previously been pointed out that a school district has been held liable under § 75-3406, R.C.M. 1947 for the damages suffered by a bus passenger to the extent of the district's liability insurance coverage.<sup>79</sup> Similiar enactments have waived governmental tort immunity for cities, towns, counties, and school districts to the extent that the respective governmental units were covered by liability insurance.<sup>80</sup> Statutes provide: that any casualty insurer contracting liability insurance for state owned property must include in its agreement a clause waiving the insurer's right to raise the defense of sovereign immunity,<sup>81</sup> that no mention may be made of insurance coverage at the trial of any damage action against a governmental unit; and that if the jury award exceeds the policy limits, and the defendant could have successfully raised the immunity defense, the trial court may reduce the award to the maximum policy limit.<sup>82</sup> The import of this statute has not been litigated. It would appear, however, that the effect of the enactment is to waive completely the sovereign immunity defense once liability insurance has been purchased. Only if immunity *could have been raised* (and it may not be where insurance is purchased), will a judgment be subject to the limitation of maximum dollar policy coverage. Had this enactment been followed with legislation requiring every state agency and governmental subdivision to purchase liability insurance, Montana would seemingly have achieved a very workable statutory solution to the knotty problem of the immunity defense.

If it can be said that the legislature has failed to act decisively, so too did the supreme court pass up its several opportunities to overturn a doctrine of judicial origin. The court recognized as early as 1936<sup>83</sup> that sovereign immunity owed its survival only to its ancient lineage, and in 1945<sup>84</sup> it declined to act on the ground that reform was a matter for

<sup>78</sup>Longpre v. Joint School Dist. No. 2, *supra* note 66 at 2.

<sup>79</sup>*See*, §§ 83-701 *et. seq.*, R.C.M. 1947, §§ 75-5939, 75-5940, 75-5941, R.C.M. 1947. *See* also, comments of the court in *Kaldahl v. State Highway Comm'n*, 158 Mont. 219, 490 P.2d 220, 221 (1971).

<sup>80</sup>§ 40-4401, R.C.M. 1947.

<sup>81</sup>§ 40-4402, R.C.M. 1947.

<sup>82</sup>*Johnson v. City of Billings*, *supra* note 61 at 583.

the legislature. By 1971<sup>85</sup> the court could point to the enactment of §§ 83-701 *et. seq.*, R.C.M. 1947 as a legislative recognition of the problem, and paint its refusal to overturn the doctrine as deference to legislative wisdom. It is noteworthy that the California court was not so easily deterred by legislative enactments when it chose to end sovereign immunity's reign in that state.<sup>86</sup> Nevertheless, as late as January of 1973<sup>87</sup> the Montana court had no difficulty in upholding the existing law. Its justification defies explanation. "The legislature adopted Chapter 7, Title 83 for a purpose and *that purpose was to establish the doctrine of sovereign immunity* [emphasis supplied] and to provide certain waivers of that immunity."<sup>88</sup> Contrary to the court's statement, sovereign immunity was an established fixture in Montana's jurisprudence prior to any legislative action on the matter. The court's misstatement is perhaps best explained by the fact that the opinion was drafted with full knowledge that the law of sovereign immunity would undergo a radical alteration when the new constitution takes effect July 1, 1973.

#### THE CONSTITUTIONAL CONVENTION

Delegates to the 1972 Montana Constitutional Convention were inundated with a deluge of background material to aid their preparation for deliberations. In an effort to forestall costly extension of the session, and to ensure that each delegate was properly informed on the crucial issues, the Montana Constitutional Convention Commission prepared in advance a background report<sup>89</sup> covering each area of anticipated convention concern. This report was intended as a primer for the delegates, and as a focus point for consideration of the issues.

The Bill of Rights Committee accepted the basic premise of the Commission Report on sovereign immunity and voted unanimously to adopt section 18. The Committee Report takes note of the history of governmental immunity, decries the injustice of its effect, observes that sufficient latitude must be given agencies to upgrade their insurance coverage, but makes no mention of the consequences which reasonably might be expected to flow from a constitutional abrogation of the doctrine.<sup>90</sup> Like the study report, the committee proposal does not allude to any existing constitutional provision in another jurisdiction which abolishes governmental immunity without limitation.

<sup>85</sup>Kaldahl v. State Highway Comm'n, *supra* note 80 at 221.

<sup>86</sup>Muskopf v. Corning Hosp. Dist., *supra* note 4 at 461.

<sup>87</sup>Kish v. Montana State Prison, *supra* note 68 at .....

<sup>88</sup>*Id.* at .....

<sup>89</sup>R. APPLEGATE, THE BILL OF RIGHTS, MONTANA CONSTITUTIONAL CONVENTION STUDY, No. 10, 289 (1971-72). This study purports to be objective, but in its presentation of alternatives for delegate consideration it tends to aggrandize the alternative of constitutional action to rectify the immunity problem. No mention is made, for example, of the fact that twenty-three states currently have no constitutional provision dealing with sovereign immunity. See, *supra* note 42.

<sup>90</sup>BILL OF RIGHTS COMMITTEE PROPOSAL, *supra* note 5 at 31-32.

Committee of the whole deliberations on § 18 cast little light on whether the delegates were aware that they were breaking new constitutional ground. Although there was an amendment adopted which changed the Bill of Rights Committee's recommended language,<sup>91</sup> debate on the section was somewhat perfunctory. The intent of the delegates as to the interpretation to be given to the provision is extraordinarily clear, however.

The provision was aimed at ridding the state of Montana of sovereign immunity in any form.<sup>92</sup> Language in the provision deleting immunity for "injury to a person" was not intended to affect survivorship actions.<sup>93</sup> Increased cost to governmental units for liability insurance was considered of negligible importance.<sup>94</sup> Abolition of immunity was intended to extend to the lowliest of governmental units, including not only those subdivisions enumerated but also fire departments, law enforcement agencies, and irrigation districts.<sup>95</sup> It was suggested that additional language should be included in the section providing for the imposition of "reasonable limitations" by the legislature.<sup>96</sup> The suggestion was never formalized by motion and the absolute language of the section was left intact.

The 1972 Montana Constitutional Convention left, in Article 2, section 18, an exceedingly uncertain legacy. The potential effect of that legacy will now be examined.

### AN EVALUATION

In a Legislative Research Council Report prepared by South Dakota in 1967 on the feasibility of abolishing sovereign immunity in that jurisdiction, the Council concluded that there were only two possible methods of achieving the objective: judicial decision or legislative action.<sup>97</sup> Although the researchers wrote without the prospect of a Constitutional Convention, they did not reckon with the inventiveness of Montana's

<sup>91</sup>Article II, § 18 underwent two changes during convention deliberations. The original language proposed by the Bill of Rights Committee read: "The state and its subdivisions shall have no special immunity from suit. This provision shall apply only to causes of action arising after June 1, 1973." See, BILL OF RIGHTS COMMITTEE PROPOSAL, *supra* note 5 at 31. During Committee of the Whole debate the section was amended to read: "The state and its subdivisions shall have no special immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after June 1, 1973." See, MONTANA CONSTITUTIONAL CONVENTION 1971-72, VII TRANSCRIPT OF PROCEEDINGS, 5429 (March 7 to March 10, 1972). In its final form, Article II, § 18 reads: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973." MONT. CONST. art. II, § 18 (1972).

<sup>92</sup>MONTANA CONSTITUTIONAL CONVENTION, *supra* note 91 at 5436, 5438.

<sup>93</sup>*Id.* at 5431-32.

<sup>94</sup>*Id.* at 5433, 36.

<sup>95</sup>*Id.* at 5435-36.

<sup>96</sup>*Id.* at 5437.

convention delegates. Indeed, one is tempted to speculate, after a perusal of the Montana Convention materials, that the delegates, like Christ's tormentors, should be forgiven because they did not know what they did. All levity aside, there is no doubt that § 18 came into being as the consequence of a laudable purpose. Nevertheless, the delegates may have unknowingly created a legal monster of gargantuan dimension.

It is clear that sovereign immunity in its unlimited sense is an excrescence on the law and should be abolished. However, there is no apparent consensus on what should take its place. It is generally agreed, however, that an *absolute abolition of sovereign immunity is not a rational alternative*.<sup>98</sup> Such a solution is entirely too simplistic for a problem of such great complexity.

Because it is a desirous end that governmental units should respond in tort for the injuries they inflict, it does not necessarily follow that governmental entities should be treated in all respects like private persons or corporate enterprises. Governmental undertakings have, in many instances, no counterpart in the private sector.

Many of the activities carried on by government are of a nature so inherently dangerous that no private industry would wish to undertake the risk of administering them. Such activities, in addition to the street and highway system, include such services as law enforcement, fire fighting, care of mental patients, the keeping of jails and juvenile detention facilities and the control and treatment of communicable diseases. These activities are so important to the health, safety and welfare of the public that they could not possibly be abandoned, although the imposition of broad tort liability upon the agencies carrying on these activities might become extremely burdensome to the taxpayers.<sup>99</sup>

The function of government is, after all, to govern. Yet in simply carrying out this purpose, damage is unavoidably inflicted upon private persons. In making laws, conducting courts, revoking licenses or permits, and regulating zoning, the state inevitably causes a private party some measurable harm.<sup>100</sup> Yet it would be the sheerest folly in many such instances to hold the government liable for its "wrongdoing."<sup>101</sup>

Turning then to the primary concern of this comment, what does the absolute constitutional abrogation of sovereign immunity mean in practical terms? It means first that every governmental entity must obtain adequate liability insurance, no matter what the expense, by July 1, 1973. It means that existing Montana statutes<sup>102</sup> on the subject of

<sup>98</sup>There is extensive literature on the subject. See generally 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25.17 (1958); DAVIS, *supra* note 73 at 860-868; PROSSER, *supra* note 27 at 986; Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 So. CAL. L. REV. 161, 176-178 (1963); CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY, No. 1, 810-819 (1963); and authorities cited in Van Alstyne, *supra* note 34 at 922, footnote 22.

<sup>99</sup>Kennedy & Lynch, *supra* note 98 at 177.

<sup>100</sup>*Id.* at 177.

<sup>101</sup>*Id.* at 180.

governmental tort immunity are of no further effect. It means that the extant Montana case law with its governmental-proprietary distinctions<sup>103</sup> has no further value as precedent. It means that every governmental unit, no matter how insignificant, is now subject to suit in the same manner as a private person would be. It means that every governmental unit is going to act with extreme caution in performing any function where liability might result.<sup>104</sup> And, it means that the Montana supreme court, if faced with a suit raising the issue of immunity, will have great difficulty in construing the new constitutional provision so as to find any remote vestige of immunity protection in view of the explicit language of the provision and the stated intent of the framers.<sup>105</sup>

What effect will the absence of governmental immunity have? The answer is, of course, unfathomable at this time. One may only speculate. The effect could be cataclysmic: the state a target defendant; a marked increase in cases docketed for trial; large judgments against governmental entities forcing the curtailment of services; increased tax levies to meet legal defense costs and insurance premiums; and, most dramatically, the paralysis of governmental functions while judges and juries deliberate the rightness or wrongness of governmental undertakings. On the other hand, it is possible that sovereign immunity may depart without noticeable effect. Such a possibility is unlikely in view of the far-flung activities of governmental bodies and the litigious nature of the public at large.

If left unchanged, Article II, § 18 portends, at best, an uncomfortable uncertainty. At worst, the spectre of disaster. The uncertainty generated by the provision may be rectified only by legislative action. Several alternative solutions aimed at clarifying and rendering more predictable the law of sovereign immunity are now offered for consideration.

### RECOMMENDATIONS

The most obvious solution to the difficulty posed by Article II, § 18 is to take legislative action to nullify it. Such a step would be not only procedurally inexpedient but also destructive of the well intentioned purpose of the framers. Nullification is, nevertheless, a potential solution. Without the constitutional provision Montana could have an adequate statutory framework for governmental tort responsibility simply by

<sup>103</sup>See discussion, *supra* notes 58-64.

<sup>104</sup>Not only will governmental entities act with caution, they may refuse to perform any function unless absolutely commanded by statute. For example, it was customary in the past for the Missoula County Clerk of Court to furnish information from its judgment rolls as a courtesy to interested parties. That practice has been discontinued on the ground that the furnishings of erroneous information could lead, after July 1, 1973, to liability. Conversation of the author with Missoula Clerk of Court, March 29, 1973.

<sup>105</sup>See discussion, *supra* notes 62-66.



supplementing existing statutes<sup>106</sup> with legislation requiring that each governmental subdivision carry adequate liability insurance commensurate with the risk of harm its operation poses to the public. Such remedial legislation necessarily would have to stipulate a minimum dollar amount of coverage and would have to require that each governmental entity purchase the minimum coverage to ensure the efficient operation of § 40-4402, R.C.M. 1947.<sup>107</sup> Furthermore, in spite of the feeling of the convention delegates to the contrary, a statutory solution to the immunity problem has been considered satisfactory in other jurisdictions.<sup>108</sup>

If § 18 is deleted from the constitution and no further legislative action taken, Montana would be left with its manifestly inadequate existing scheme for sometime waiver of the state's immunity. It should be evident at this juncture that a statutory framework<sup>109</sup> permitting tort suit by an injured citizen only where the governmental unit has chosen to purchase liability insurance admits of a large potential for abuse. To permit or deny private recovery only upon the basis of whether a given governmental subdivision opts to purchase insurance is to give sanction to caprice and inequity.

A second possibility for reform would be amendment of § 18 by the addition of language indicating that the legislature could provide for reasonable limitations. Such a provision would permit legislative modification if unforeseen contingencies should arise, and hopefully would not be seized upon as an invitation to reinvigorate the doctrine by legislative enactment. Perhaps even more desirable than such a modification would be an amendment based on the language of the Illinois constitution.<sup>110</sup> This language is construed as an open-ended abolition of the doctrine. That is, the government may not resort to the immunity defense except where specifically authorized to do so by statute. Again, this provision has the virtue of being flexible inasmuch as the legislature

<sup>106</sup>See discussion, *supra* note 81-82.

<sup>107</sup>§ 40-4402, R.C.M. 1947. "Whenever an insurer accepts any premium, money or other consideration from a political subdivision of the state, municipality, or any public body, corporation, commission, board, agency, organization, or other public entity for casualty or liability insurance, neither such insured nor insurer shall raise the defense of sovereign or governmental immunity in any damage action brought against such insured or insurer, and any agreement in the insurance contract permitting the defense of sovereign or governmental immunity is hereby declared void. No attempt shall be made in the trial of an action brought against such political subdivision of the state, municipality, or any public body, corporation, commission, board, agency, organization, or other public entity, to suggest the existence of any insurance which covers in whole or in part any judgment or award which may be rendered in favor of plaintiff. If the court shall determine that the defendant could have successfully raised the defense of sovereign or governmental immunity, and if the verdict exceeds the limits of the applicable insurance, the court shall reduce the amount of such judgment or award to a sum equal to the applicable limit stated in the policy."

<sup>108</sup>Van Alstyne, *supra* note 34 at 969-974; and CALIFORNIA LAW REVISION COMMISSION, *supra* note 98 at 811-813.

<sup>109</sup>See discussion, *supra* notes 80-82.

is free to reimpose immunity's protective cloak should necessity so dictate.

Various combinations of constitutional provision and statutory enactment, or statutory framework and case law have been utilized in other jurisdictions to meet the difficulties posed by the immunity defense.<sup>111</sup> Apparently no single method has been devised which is completely satisfactory. As a final recommendation, attention is directed to the suggestion of Professor Davis that the ultimate solution to the immunity dilemma may lie in development of a test for tort liability modeled on governmental liability in eminent domain cases.<sup>112</sup> Unfortunately, this possibility suffers from the same vice as § 18: a lack of prior application and interpretation injecting extreme uncertainty into the law.

### CONCLUSION

Montana has absolutely abolished sovereign immunity by constitutional provision, the only state in the Union to take this step. The commentators universally recognize that an unlimited access by the state and its subdivisions to the sovereign immunity defense works great injustice on the private citizen injured by agency action. They also recognize that a wholesale abolition of the doctrine is not a feasible alternative because a government performs different functions than private enterprise, and often times must continue to perform high risk services even though injury to the public is an inevitable concomitant. Article II, § 18 admits of no interpretation which would allow the legislature to re-impose some limited form of immunity should the need arise. This is both unrealistic and unwise. Several recommendations are herein offered for possible alteration of § 18 to bring it within the ambit of a reasonable solution to the difficulty posed by the doctrine. It is submitted that change of the provision is necessary not only so that the legislature may act to prevent a multiplicity of unwarranted tort suits, causing a disruption of the operations of state government, but also to render the law more flexible and certain.

<sup>111</sup>Professor Van Alstyne indicates that there have been five fundamental approaches taken in an effort to create public entity tort liability. He does not include a single instance of a constitutional attempt to abolish governmental immunity. Van Alstyne, *supra* note 34 at 969-974.

<sup>112</sup>K. Davis, *supra* note 98 at 594.