Montana Law Review

Volume 45
Issue 1 *Winter 1984*

Article 7

January 1984

White v. State: Raising the Stakes of State Tort Claims

Michael P. Heringer
University of Montana School of Law

NOTES

WHITE V. STATE: RAISING THE STAKES OF STATE TORT CLAIMS

Michael P. Heringer

I. INTRODUCTION

Article II, section 18 of the 1972 Montana Constitution abolished governmental immunity in Montana.[1] Prior to its adoption, the Montana Supreme Court had qualified the extent of governmental immunity when it stated: "It is beyond question in this jurisdiction that the state cannot be sued without its consent."[2] Effective in 1975, article II, section 18 was amended to permit governmental immunity to be granted by a two-thirds vote of the Montana Legislature.[3] This amendment essentially provided the legislature with the means to limit government liability in tort.

In 1977, the legislature used this power to adopt a statute barring recovery of noneconomic damages and limiting recovery of economic damages.[4] The legislature also enacted a statute that bars recovery of punitive damages against any governmental entity.[5]

In *White v. State*,[6] a 1983 case, the Montana Supreme Court declared unconstitutional the statute barring recovery of noneconomic damages and limiting recovery of economic damages. As a result, governmental entities were once again confronted with the reality of unlimited liability. The legislature responded immediately by passing an act[7] that includes a new damage limitation statute that does not distinguish between economic and

---

1. In its original form, MONT. CONST. art. II, § 18 provided: "The state, counties, cities, towns and all other governmental entities shall have no immunity from suit for injury to person or property. This provision shall only apply to causes of action arising after July 1, 1973."
2. Coldwater v. State Highway Comm'n, 118 Mont. 65, 74, 162 P.2d 772, 776 (1945).
3. MONT. CONST. art. II, § 18 currently 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, *except as may be specifically provided by a ⅔ vote of each house of the legislature.* (emphasis added).
4. MONT. CODE ANN. § 2-9-104 (1981) (repealed 1983).
5. MONT. CODE ANN. § 2-9-105 (1983).
6. ___ Mont. ___, 661 P.2d 1272 (1983).
7. Act of Apr. 29, 1983, ch. 675, 1983 Mont. Laws 1615.

noneconomic damages.[8] The statute does, however, continue to limit the amount of liability to each claimant and for each occurrence.[9]

This note will examine pre-*White* legislation and judicial decisions that have affected the doctrine of sovereign immunity in Montana. This note will also analyze the *White* decision and the legislative response, and explore the practical implications of sovereign immunity in Montana.

II. LEGISLATIVE AND JUDICIAL BACKGROUND

A. *Legislative Enactments*

In 1973, after the Montana Constitution had abolished governmental immunity, the legislature enacted the Montana Comprehensive State Insurance Plan and Tort Claims Act (Tort Claims Act).[10] This Act designates which governmental entities are responsible for procuring insurance, sets out the procedure a claimant must follow to bring an action, and provides limitations on venue and the time for filing claims. Only one provision of the original Tort Claims Act restricted the government's unlimited liability exposure. That statute barred recovery of attorney's fees, interest, or punitive damages from any governmental entity.[11]

In 1977, changes in the Tort Claims Act created significant limitations on governmental liability. Specific government officers, agents, and employees—including members of the state legislature,[12] members of the judiciary,[13] the governor,[14] and local elected executives[15]—were granted immunity "from suit for damages arising from the lawful discharge of an official duty."[16] Other changes provided that a court could regulate attorney's fees,[17] and permit-

8. MONT. CODE ANN. § 2-9-107 (1983).

9. For text of statute, *see infra* note 76.

10. Montana Comprehensive State Insurance Plan and Tort Claims Act, ch. 380, 1973 Mont. Laws 753 (codified as amended at MONT. REV. CODES ANN. §§ 82-4301 to -4335 (1947)). The Act, as amended, is currently codified at MONT. CODE ANN. §§ 2-9-101 to -318 (1983). The official title of the original Act, given in MONT. REV. CODES ANN. § 82-4301 (1947), is no longer used in the current statutes, but courts and attorneys continue to refer to Montana's "Tort Claims Act." This note will do the same.

11. MONT. REV. CODES ANN. § 82-4324 (1947).

12. MONT. CODE ANN. § 2-9-111(3) (1983).

13. MONT. CODE ANN. § 2-9-112(2) (1983).

14. MONT. CODE ANN. § 2-9-113 (1983).

15. MONT. CODE ANN. § 2-9-114 (1983).

16. This language is quoted from and common to §§ 2-9-111 to -114.

17. MONT. CODE ANN. § 2-9-314 (1983) requires any attorney seeking compensation from the state to file a contract of employment showing the fee arrangement between attor-

ted interest to accrue on a judgment not satisfied within a two-year period.[18]

The legislature also adopted two provisions limiting liability for damages. The first keeps intact the bar on punitive damages.[19] The second—the statute found unconstitutional in *White*—barred recovery of noneconomic damages and limited recovery of economic damages to "$300,000 for each claimant and $1 million for each occurrence."[20] For the purposes of the latter statute, the Tort Claims Act defined economic damages as "tangible pecuniary losses."[21] Noneconomic damages were defined as "those damages not included in economic, punitive, or exemplary damages including, without limitation, damages for pain and suffering, loss of consortium, mental distress, and loss of reputation."[22]

B. *Case Law*

1. *Prosecutorial Immunity*

In the absence of statutory provision, the Montana Supreme Court has granted immunity to public officials when the public need weighs heavily in favor of such a policy.[23] In *State ex rel. Department of Justice v. District Court*,[24] the court recognized prosecutorial immunity as an issue distinct from sovereign immunity. The case involved two separate malicious prosecution claims against the Attorney General, Department of Justice, and State of Montana. The supreme court reversed the district court denials of motions to dismiss, and held that the prosecution was immune from suit. After distinguishing prosecutorial immunity from sovereign immunity, the court held that article II, section 18 did not

---

ney and client; this contract becomes part of the court record. The district court has the power to regulate the attorney's fee. If the attorney violates the stated conditions, "he forfeits the right to any fee which he may have collected or been entitled to collect." *Id.*

18. MONT. CODE ANN. § 2-9-317 (1983).

19. MONT. CODE ANN. § 2-9-105 (1983) provides: "The state and other governmental entities are immune from exemplary and punitive damages."

20. MONT. CODE ANN. § 2-9-104 (1981) (repealed 1983). The statute provided in part:

(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable for:

(a) noneconomic damages; or

(b) economic damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

21. MONT. CODE ANN. § 2-9-101(2)(a) (1981) (repealed 1983).

22. MONT. CODE ANN. § 2-9-101(2)(b) (1981) (repealed 1983).

23. Orser v. State, 178 Mont. 126, 131, 582 P.2d 1227, 1230 (1978).

24. 172 Mont. 88, 560 P.2d 1328 (1976).

abolish prosecutorial immunity, and that the Tort Claims Act does not affect it. The court based its decision on the public need for free and independent judicial and quasi-judicial officers.[25] The supreme court has not specifically ruled whether county or city attorneys have similar immunity, but it is likely that the same policy reasons would apply and that prosecutorial immunity would be extended to them as well.

2. *Limitations on Prosecutorial Immunity*

There are limits to the doctrine of prosecutorial immunity. In *Orser v. State*,[26] the plaintiff brought an action against the state and two game wardens for malicious prosecution. In its defense, the state argued that game wardens should be included among those who enjoy prosecutorial immunity, citing a California decision[27] as precedent. The court rejected the California rationale as nonrepresentative of prior rulings on immunity for law enforcement personnel, and held that the state must accept responsibility for the tortious acts of its game wardens that fall within the course and scope of their employment. In *Orser*, the game wardens acted within their authority and had probable cause to arrest the plaintiff; thus the state was not held liable. The court, however, made it clear that absolute immunity does not necessarily apply to all state employees whose function is to aid in the enforcement of criminal law.

In *State v. District Court*[28] plaintiff alleged that he suffered permanent brain damage because city policemen had failed to take him to a hospital for medical care after he had been beaten in a barroom fight. The supreme court reversed the district court's finding that the state was liable for the officers' actions. In reaching its decision, the court overruled two pre-1972 cases that held the state responsible for city policemen.[29] The court noted that the

25. The court based its position on the reasoning of the Washington Supreme Court: "If the prosecutor must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in any criminal case, his freedom and independence in proceeding with criminal prosecutions will be at an end." *Id.* at 92, 560 P.2d at 1330 (quoting Creelman v. Svenning, 67 Wash. 2d 882, 885, 410 P.2d 606, 608 (1966)).

26. 178 Mont. 126, 582 P.2d 1227 (1978).

27. In White v. Towers, 37 Cal. 2d 727, 235 P.2d 209 (1951), the California Supreme Court ruled that a game warden as a law enforcement officer "is entitled to immunity from civil liability [for malicious prosecution] with which the law surrounds officials directly connected with the judicial process." *Id.* at 730, 235 P.2d at 211.

28. 170 Mont. 15, 550 P.2d 382 (1976).

29. The first decision, Kingfisher v. City of Forsythe, 132 Mont. 39, 314 P.2d 876 (1957), held that a city policeman was an agent for the state. A later decision, Boettger v. Empire Liab. Assurance Corp., 158 Mont. 258, 490 P.2d 717 (1971), noted that there was not

intent of the Tort Claims Act was to make cities and other political subdivisions, rather than the state, responsible for the tortious acts of their employees. In this case the state exercised no direct, detailed, or daily supervision over city policemen and was powerless to prevent their negligent acts. The court cited the power to hire and fire an employee as the most significant factor in determining which governmental entity would be held responsible.[30]

3. *Indemnification*

A governmental entity is obligated to indemnify its employees in the event one of them is sued in tort.[31] Thus an individual employee enjoys personal immunity for tortious acts or omissions committed within the course and scope of his employment, and the plaintiff has no recourse against the party who actually caused the injury. Such personal immunity may be contrary to the principles of agency law that typically apply to employer-employee relationships. In agency law, although the principal is liable under the doctrine of respondeat superior, "the agent is personally liable for his own tortious act."[32]

A government employee, however, is personally liable for certain types of malicious or fraudulent conduct, even if committed within the course and scope of employment.[33] In *Orser*, the court ruled that game wardens were not personally immune from suit for malicious prosecution, because such conduct fell within the statutory exception for intentional torts.[34]

In *Dvorak v. Huntley Project Irrigation District*,[35] two employees of an irrigation district (a governmental entity) failed to provide water to the plaintiff in violation of state law. The court held that the statutes that barred recovery of noneconomic damages and limited economic damages did not apply to the individual defendants. The statutes only apply to the state and other governmental entities. Individual government employees can also be held responsible for punitive damages.[36]

---

a principal-agent relationship between a city and its policemen.

30. State v. District Court, 170 Mont. at 20, 550 P.2d at 384.

31. MONT. CODE ANN. § 2-9-305 (1983).

32. Wyse, *A Framework of Analysis for the Law of Agency*, 40 MONT. L. REV. 31, 38 (1979).

33. *See* MONT. CODE ANN. § 2-9-305(6) (1983).

34. *Orser*, 178 Mont. at 135, 582 P.2d at 1232.

35. ___ Mont. ___, 639 P.2d 62 (1981).

36. *Id.* at ___, 639 P.2d at 66.

4. *Duty of Care*

In *B.M. v. State*[37] a minor, through her foster mother, brought a claim for damages arising from her placement in a special education program when she was six years old. Although the child had an IQ of seventy-six, with the approval of the state superintendent she was placed in a program for children with IQ's from fifty to seventy-five.

The supreme court reversed the trial court's decision that the superintendent's actions were not subject to judicial review because they were discretionary in nature.[38] The court based its holding on the fact that the Constitution had abolished governmental immunity except in situations where the legislature had by a two-thirds vote enacted contrary legislation. According to statute, "[e]very governmental entity is subject to liability for its torts and those of its employees . . . whether arising out of a governmental or proprietary function except as specifically provided by the legislature . . . ."[39] Since the legislature had not enacted specific legislation to limit the liability of school boards in the administration of special education programs, educators and the entities that employ them can be held liable for negligence.

The court further held that the state owes a "duty of care to special education students."[40] This duty of care is founded on principles of public policy,[41] the Montana Constitution,[42] and statutory law.[43]

---

37. ___ Mont. ___, 649 P.2d 425 (1982).

38. The distinction between discretionary and ministerial functions was important in Montana until the adoption of the 1972 Constitution. *See, e.g.*, Comment, *The Passing of Sovereign Immunity in Montana: The King is Dead!*, 34 MONT. L. REV. 283, 290 n.59 (1973): "As a general proposition, *immunity* attaches to governmental and discretionary functions and *liability* attaches to proprietary and ministerial functions."

39. MONT. CODE ANN. § 2-9-102 (1983).

40. B.M. v. State, ___ Mont. at ___, 649 P.2d at 427.

41. The court concluded: "[I]n the absence of a clear statutory declaration granting immunity, it is our duty to permit rather than deny an action for negligence." *Id.*

42. MONT. CONST. art. X, § 1 provides in part: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."

43. MONT. CODE ANN. § 20-5-102 (1983) makes attendance at a state-approved school mandatory. MONT. CODE ANN. § 20-7-402 (1983) provides that school districts shall comply with policies recommended by the State Superintendent of Public Instruction in administering special education programs.

Justice Sheehy did not agree that the state owes a duty of care to special education students. B.M. v. State, ___ Mont. at ___, 649 P.2d at 429 (Sheehy, J., dissenting). He noted that other courts in similar situations have held that educators and school districts do not owe a duty of care to participants in special education programs. *See* D.S.W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554 (Alaska 1981); Smith v. Alameda County Social Services Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979); Hoffman v.

5. *Interest on a Judgment*

The Tort Claims Act states that "[i]f a governmental entity pays a judgment within 2 years after the day on which the judgment is entered, no penalty or interest may be assessed against the governmental entity."[44] In *Jacques v. State*,[45] where the state was held liable for injuries to plaintiff when a Montana National Guard artillery shell exploded, the court held that the interest statute is constitutional. Interest, not being a detriment arising from the wrongful act, could be suspended by statute.[46] The statute allows governmental entities sufficient time to appropriate the funds necessary to satisfy a judgment.

6. *Failure to Pay a Claim*

Although the Tort Claims Act limits the amount of damages a claimant can recover from a governmental entity, there is a possibility that a governmental entity will be unable to satisfy a judgment against it. Thus the issue arises: What are the plaintiff's alternatives in the event a governmental entity fails to satisfy a judgment? That question has never been entertained by the Montana Supreme Court in a tort action.

In *First National Bank v. Sourdough Land & Cattle Co.*,[47] plaintiff bank brought an action against defendant because defendant sought to satisfy a judgment against the state for breach of contract by garnishing state funds in the bank's possession. The court held that, in a contract dispute, state funds are not subject to execution. The court concluded that a judgment should be paid from funds appropriated by the legislative session next succeeding the date of the judgment, not including special sessions.[48]

While *First National Bank* was a contract case, the Tort Claims Act indicates the same solution for tort claims. The Act states that "[n]o levy of attachment or writ of execution shall issue against any property of a governmental entity for the security or collection of any claim or judgment against any governmental entity . . . ."[49]

Bd. of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

44. MONT. CODE ANN. § 2-9-317 (1983).

45. ___ Mont. ___, 649 P.2d 1319 (1982).

46. *Id.* at ___, 649 P.2d at 1327.

47. 171 Mont. 390, 558 P.2d 654 (1976).

48. *Id.* at 398, 558 P.2d at 658.

49. MONT. CODE ANN. § 2-9-318 (1983).

III. WHITE v. STATE

A. *The Facts*

Karla White, the plaintiff, alleged that on Sept. 1, 1977, she was attacked and injured by an escapee from Warm Springs State Hospital. She contended that the state negligently permitted the inmate to escape from a state institution and remain free for five years, until the date of the attack. Because most of her damages were noneconomic in nature, White argued that the statutes that barred recovery of noneconomic and punitive damages, and limited economic damages, were unconstitutional.[50] The district court found these statutes unconstitutional and granted summary judgment in favor of plaintiff. From that decision the State of Montana appealed.

B. *The Decision*

The Montana Supreme Court affirmed in part the lower court decision, holding that the statute that barred recovery of noneconomic damages violated plaintiff's constitutional right of equal protection. The court also held that the statute barring recovery of punitive damages did not violate plaintiff's constitutional rights.

C. *Analysis*

1. *Recovery of Noneconomic Damages*

Without expressly adopting plaintiff's equal protection argument,[51] the court noted that provisions in the United States and

---

50. *See supra* notes 19 & 20.

51. Plaintiff argued that MONT. CODE ANN. § 2-6-104 (1981) (repealed 1983) denied her right to equal protection because:

> 1. It classifies victims of negligence who have sustained noneconomic damages by whether they have been injured by a nongovernment tort-feasor or a government tort-feasor. It totally denies any recovery to the latter class.
> 2. It classifies victims of government tort-feasors by whether they have suffered economic damages or noneconomic damages. It allows recovery to the former group up to $300,000 while it totally denies recovery to the latter group.
> 3. It classifies victims of government tort-feasors by the severity of the victims' injuries. It grants recovery to those victims who have not sustained significant injury by allowing them to recover up to $300,000 in economic damages. It discriminates against the seriously injured victims by denying recovery for any injuries over $300,000.

White, ___ Mont. at ___, 661 P.2d at 1274.

Montana Constitutions guarantee that "all persons . . . be treated alike under like circumstances."[52] The court concluded that section 2-9-104 of the 1981 Montana Code Annotated violated plaintiff's right of equal protection, because a statute "cannot discriminate between those who suffer pain and loss of life quality and those who primarily suffer economically."[53]

In reaching this conclusion, the court held that the right to a speedy remedy for every injury is a fundamental right guaranteed by the Montana Constitution.[54] Since the statute at issue affected a fundamental right, a "strict scrutiny" test had to be applied. When this test is applied, the statute will "be found unconstitutional unless the State can demonstrate that such law is necessary 'to promote a compelling government interest.' "[55]

The state argued that the privilege to bring a suit for injuries does not involve a fundamental right and therefore the statute had to be judged by the "rational basis" test.[56] In rejecting this argument, the court cited *Corrigan v. Janney*,[57] in which it held that "it is 'patently unconstitutional' for the legislature to pass a statute which denies a certain class of Montana citizens their causes of action for personal injury and wrongful death."[58]

The state further contended that the preservation of its treasury and the fact that government must engage in various potentially dangerous activities constitute a compelling state interest justifying immunity for noneconomic damages. The court noted that the state has a valid interest in protecting its treasury, but reasoned that "payment of tort judgments is simply a cost of doing business."[59] The court concluded that the state had not satisfied the strict scrutiny test; therefore immunity from liability for noneconomic damages was unconstitutional.

The court went on to determine that the entire statute was unconstitutional. Former section 2-9-104 both barred recovery of noneconomic damages and restricted recovery of economic damages to "$300,000 for each claimant and $1 million for each occurrence." If only the part barring noneconomic damages were eliminated, the remainder of the statute would discriminate against those who suffer economic losses, since only damages for the latter

52. *Id. See* U.S. CONST. amend. XIV, § 1; MONT. CONST. art. II, § 4.
53. *White*, ___ Mont. at ___, 661 P.2d at 1275.
54. *Id. See* MONT. CONST. art. II, § 16.
55. *White*, ___ Mont. at ___, 661 P.2d at 1274.
56. *Id.*
57. ___ Mont. ___, 626 P.2d 838 (1981).
58. *White*, ___ Mont. at ___, 661 P.2d at 1275.
59. *Id.*

would be limited.

2. *Punitive Damages*

The court held that the right to recover punitive damages is not a fundamental right guaranteed by the Constitution. Thus it applied a rational basis test to plaintiff's claim that section 2-9-105, which provides governmental immunity from punitive damages, violated her right to equal protection. Plaintiff unsuccessfully argued that "without the threat of punitive damages, the government will be free to flagrantly violate constitutional or important rights without fear of punishment."[60] The court found that a rational basis existed for granting governmental immunity from punitive damages, noting that smaller political subdivisions would be more vulnerable to financial catastrophe if an injured party were permitted to recover punitive damages. The court also stated:

> The primary purpose of assessing punitives is to punish the wrongdoer and through that punishment, deter future conduct of the tort-feasor and others who might be inclined to engage in like conduct. The problem with assessing punitive damages against the government is that the deterrent effect is extremely remote and innocent taxpayers are, in fact, the ones punished.[61]

D. *The Dissents*

Three justices concurred in the majority opinion. Justice Gulbrandson, concurring in part, agreed that governmental entities are immune from punitive damages and that noneconomic damages should be recoverable.[62] He dissented, however, from that part of the opinion eliminating the economic damage limitation, because in his view that issue was not before the court. He proposed that the court should find the stated dollar limitations of former section 2-9-104 applicable to both economic and noneconomic losses.[63]

Justice Weber, joined by Chief Justice Haswell, had more serious reservations about the majority's resolution of the equal protection argument.[64] In a strong dissent, Justice Weber stated that the right to a speedy remedy, guaranteed by the Montana Consti-

---

60. Brief for Respondent at 62.
61. *Id.* at ____, 661 P.2d at 1276.
62. *Id.* (Gulbrandson, J., concurring in part and dissenting in part).
63. *Id.* at ____, 661 P.2d at 1277 (Gulbrandson, J., concurring in part and dissenting in part).
64. *Id.* (Weber, J., concurring in part and dissenting in part).

tution,[65] "does not contain a grant of a fundamental right. As a result the plaintiff has the burden of proving that the classification is arbitrary. Plaintiff has not met that burden."[66] He also contended that the legislature is not constitutionally prohibited from eliminating a common law right, as it did when it enacted a law barring recovery of noneconomic damages and limiting recovery of economic damages. Finally, Justice Weber pointed out that the legislature is constitutionally empowered to grant governmental immunity by a two-thirds vote of each house.[67]

In support of his position, Justice Weber cited several cases holding that the legislature may restrict an individual's access to the courts. In *Shea v. North-Butte Mining Co.*[68] plaintiff, an injured miner, argued that his constitutional right of access to the courts was denied because of the limited right of recovery established by the Industrial Accident Board. The court held that the legislature may abolish common law remedies—e.g. an action for injuries arising from negligence—"so long as there is no impairment of rights already accrued."[69]

A more recent case, *Reeves v. Ille Electric Co.*,[70] reiterated the *Shea* holding. Plaintiff argued that a statute[71] requiring an action for damages resulting from improvements to real property to be brought within ten years after completion of the improvements was unconstitutional, because it denied him access to the courts and a speedy remedy for injuries. The court concluded that "the legislature is not constitutionally prohibited from eliminating a common law right as it did in *Shea* . . . ."[72]

In *Linder v. Smith*[73] plaintiff attacked the constitutionality of the Montana Medical Malpractice Panel Act[74] on the ground that it denied him the right of access to the courts in violation of his constitutional rights. The court noted that "access to the courts is

---

65. MONT. CONST. art. II, § 16 provides in part: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."

66. *White*, ___ Mont. at ___, 661 P.2d at 1281 (Weber, J., concurring in part and dissenting in part).

67. *Id. See supra* note 3.

68. 55 Mont. 522, 179 P. 499 (1919).

69. *Id.* at 534, 179 P. at 503.

70. 170 Mont. 104, 551 P.2d 647 (1976).

71. MONT. CODE ANN. § 27-2-208 (1983).

72. *Reeves*, 170 Mont. at 110, 551 P.2d at 651.

73. ___ Mont. ___, 629 P.2d 1187 (1981).

74. MONT. CODE ANN. §§ 27-6-101 to -704 (1983). The name of this Act was changed to the "Montana Medical Legal Panel Act" in 1983. *See* MONT. CODE ANN. § 27-6-101 (1983).

not an independent fundamental right; access is only given such a status when another fundamental right . . . is at issue, and no alternative form exists in which to enforce that right."[75]

The *White* case can probably be construed to be consistent with the prior cases. Although earlier case law held that access to the courts is not an independent fundamental right by itself, the *White* majority held that plaintiff also had a constitutional right to a speedy remedy for all her injuries. Therefore two constitutional rights were at stake. Also, unlike in *Shea* and *Linder*, White did not have an alternative forum in which to enforce her claim for noneconomic damages.

IV. The Legislative Response to White

In response to *White*, the 1983 legislature enacted a new *temporary* damage limitation statute that does not distinguish between economic and noneconomic damages.[76] The dollar limitation was maintained and thus applies to both kinds of damages. It is important to note that the statute terminates on June 30, 1985.[77]

The legislature cited several reasons for readopting a damages limitation. Unlimited liability makes it increasingly difficult if not impossible for governmental entities to purchase adequate insurance coverage at a reasonable cost.[78] Certain essential government functions carry inherently great risks.[79] Finally, unlimited liability for tort damages could have a profound effect in the reduction in governmental revenues and "would eventually have the effect of reallocating state resources to a degree that would result in involuntary choices between critical state and local programs."[80]

---

75. *Linder*, ___ Mont. at ___, 629 P.2d at 1190.

76. Mont. Code Ann. § 2-9-107 (1983) provides:

(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

77. Mont. Code Ann. § 2-9-107 also applies retroactively to all claims arising after July 1, 1977. *See* Act of Apr. 29, 1983, ch. 675, §§ 7-9, 1983 Mont. Laws 1619.

78. Mont. Code Ann. § 2-9-106(1) (1983).

79. These functions include responsibility for criminals and mental patients, construction and maintenance of highways, operation of transportation systems and airports, and operation of schools and athletic facilities. *See* Mont. Code Ann. § 2-9-106(2) (1983).

80. Mont. Code Ann. § 2-9-106(3) (1983). Enacted as part of the response to *White*, § 2-9-106 contains an unusually long explanation of legislative purposes. These purposes are stated in the form of legislative findings, the conclusion of which is also expressly stated:

To determine whether these reasons justify any limitation on governmental liability, the limitation must be analyzed in relation to the practical implications of sovereign immunity in Montana.

V. Practical Implications

A. *The State*

The legislature's contention that the state is unable to purchase adequate insurance is undoubtedly true. The Department of Administration, the state agency responsible for procuring insurance, has been unable to find an insurance company that would write a policy providing adequate coverage for the state.[81] As a result the state has been self-insured since 1977.

For fiscal 1983, the legislature appropriated an estimated $1,500,000 to pay for claims against the state. An estimated $750,000 was also appropriated for catastrophic or unexpected claims.[82] The state actually paid $2,300,000 in claims for the same fiscal year. As of Sept. 1983, 625 claims had been filed against the state since 1977, of which 185 went to trial.[83]

The abolishment of sovereign immunity has obviously cost Montana taxpayers a great deal of money. Whether this cost to the state treasury constitutes a "compelling interest" justifying the damages limitation, however, is not clear. The cost of relaxing governmental immunity is but a small percentage of the total state budget.[84] And, as the court noted in *White*, the payment of claims is simply "a cost of doing business."[85] The *White* majority further acknowledged that "there is no evidence in the record that the payment of such claims would impair the State's ability to function as a governmental entity or create a financial crisis."[86]

"forced reduction in critical governmental services that could result from unlimited liability . . . constitutes a compelling state interest requiring the application of the limitations on liability and damages" found in § 2-9-107 and elsewhere in the Tort Claims Act. Whether the Montana Supreme Court will agree with this "compelling state interest" analysis is of course another question.

81. Telephone interview with J. Michael Young, Gen. Counsel, Insurance and Legal Division, Montana Dep't of Admin. (Sept. 16, 1983).

82. *Id.* These figures do not include automobile and aircraft insurance, which is carried by a private insurance company at an estimated annual cost of $300,000. Also, civil rights claims are not included.

83. *Id.*

84. The executive budget proposed to spend $597,900,000 of the general fund during the 1983 biennium. Budget Analysis 1983 Biennium 2 (1981).

85. *White*, ___ Mont. at ___, 661 P.2d at 1275.

86. *Id.*

B. *Political Subdivisions*

The practical implications of governmental immunity apply not only to the state, but also to all political subdivisions.[87] Several political subdivisions expressed their concern about the *White* case, and its possible repercussions on them, by submitting amicus curiae briefs to the supreme court arguing for the state against White.

The County of Yellowstone, the City of Billings, and the Montana League of Cities and Towns argued that "[t]he threat of unlimited liability creates realistic concerns of unmanageable financial burdens on local governments."[88] They went on to point out that political subdivisions face a greater possibility of economic disaster than the state, because smaller entities have a limited tax base from which they can accumulate funds to satisfy claims.[89]

C. *Legislative Alternatives*

The damage limitation statute adopted by the 1983 legislature will terminate on June 30, 1985.[90] The legislature will have to pass a new statute or all governmental entities will be faced with unlimited liability. In light of *White*, the legislature has three alternatives. It can readopt the current liability limitation; let the current statute lapse and thus incur unlimited liability; or pass a new law that increases or decreases the amount of damages allowed.

The legislature has indicated its intent to limit governmental liability; the House and Senate votes in favor of new section 2-9-107 were overwhelming.[91] The 1985 legislature will therefore probably either readopt the current liability limitation or change the amount of damages allowed.

In 1972 Montana was a leader in relaxing the doctrine of sovereign immunity.[92] Today, however, the state can be categorized as

---

87. MONT. CODE ANN. § 2-9-101(5) (1983) defines a political subdivision as "any county, city, municipal corporation, school district, special improvement or taxing district, or any other political subdivision or public corporation."

88. Amicus Curiae Brief of the County of Yellowstone, the City of Billings, and the Montana League of Cities and Towns at 5, White v. State, ___ Mont. ___, 661 P.2d 1272 (1983).

89. *Id.* An amicus curiae brief was also submitted by the County of Cascade and City of Great Falls.

90. *See supra* note 77 and accompanying text.

91. The vote on Senate Bill 465 in the Senate was 44-3, with two members excused and one not voting. MONTANA LEGISLATIVE COUNCIL, SENATE JOURNAL, 48th Sess. 1623 (1983). The vote in the House was 91-5, with four members excused. MONTANA LEGISLATIVE COUNCIL, HOUSE JOURNAL, 48th Sess. 2343 (1983).

92. At that time Montana was the only jurisdiction that had absolutely abolished the doctrine of sovereign immunity by constitutional provision. *See* Comment, *supra* note 38, at

"middle of the road" compared to other states in the region. California[93] and Washington[94] have constitutionally abolished governmental immunity, subject to limitations enacted by their respective legislatures. Neither state has limited by statute the amount of damages recoverable from the state. Oregon[95] and Idaho[96] have enacted laws limiting such recovery. Neither state explicitly distinguishes between economic and noneconomic damages.

Montana's damages limitation appears to be more liberal than that of most other jurisdictions.[97] It is arguable that it should be, because the framers intended article II, section 18 to provide redress for all victims of governmental or private torts.[98] Also, the supreme court has construed the purpose of the Tort Claims Act to be to attach liability to the state in the same manner and to the same extent that liability is attached to a private citizen.[99]

VI. CONCLUSION

The status of governmental immunity in Montana is far from settled. Some legislative and judicial trends, however, have emerged. The legislature appears intent on limiting governmental liability for damages and for specific governmental entities and employees. The Montana Supreme Court, meanwhile, has held that governmental entities and their employees can be held liable in tort, except in situations where the legislature has specifically granted immunity. The court continues to recognize the rule that some government entities and their agents are protected from tort

---

283.

93. CAL. CONST. art. III, § 5.

94. WASH. CONST. art. II, § 26.

95. OR. REV. STAT. § 30.270 (1983). Oregon limits recovery of damages arising out of a single accident or occurrence to $50,000 for property damages per claimant, and $100,000 for all other damages per claimant, up to a maximum of $300,000 for all claims arising out of a single act or occurrence.

96. IDAHO CODE § 6-926 (1979). Idaho limits recovery to $100,000 for all claims of property damage arising out of one occurrence, and $100,000 per person for death or personal injury claims, up to a maximum of $300,000 for all death or personal injury claims per occurrence. The Idaho statute adds that if a governmental entity has purchased liability insurance in excess of the statutory limits, the policy limits will determine the maximum liability. In Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983), the Idaho Supreme Court upheld the constitutionality of § 6-926.

97. *See, e.g.*, ILL. ANN. STAT. ch. 37, § 439.8(d) (Smith-Hurd 1983) (tort claim limit of $100,000 per claimant; limit does not apply to damages arising from operation of state vehicle by state employee); NEV. REV. STAT. § 41.035 (1979) (limit of $50,000 for any tort action, exclusive of interest); N.H. REV. STAT. ANN. § 507-B:4 (1983) ($100,000 limit for all damages sustained by one person in a single incident or occurrence).

98. Noll v. City of Bozeman, 166 Mont. 504, 534 P.2d 880 (1975).

99. State *ex rel.* Byorth v. District Court, 175 Mont. 63, 572 P.2d 201 (1977).

liability by prosecutorial immunity.

The major unsettled issue is what action the legislature will take when the current damages limitation statute expires in 1985. As other Montana commentators have noted, unlimited liability for governmental entities is not a practical alternative.[100] There is merit, however, to the argument that the legislature should increase the amount of damages recoverable under the Tort Claims Act.

By raising the statutory limitation for each claimant, the legislature could protect the severely injured claimant who might not be adequately compensated under the current scheme. The legislature should also increase the ceiling for each occurrence, because governmental entities are often involved in activities that could have serious repercussions on a large number of people.

Although these proposals might increase the burden on government, the legislature could adopt a provision, as was done in California,[101] that permits a governmental entity to satisfy a claim over a number of years. This would ease the economic burden on the state treasury and on political subdivisions because they would not have to bear the strain of satisfying a large judgment in one payment. After all, the purpose of the Montana Tort Claims Act is not to subject undue hardship on government, but to provide redress for a person injured by a government tortfeasor.

100. *See* Comment, *supra* note 38, at 295-99; MONTANA LEGISLATIVE COUNCIL, LIMITATION ON THE WAIVER OF SOVEREIGN IMMUNITY (1976).

101. In California, if a governmental entity demonstrates that it will endure unreasonable hardship in satisfying a judgment, the court may require the governmental entity to pay the judgment in 10 or less equal annual installments, with interest. CAL. GOV'T CODE 970.6 (West 1980).