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INTRODUCTION

With the adoption of a new constitution in 1972, Montana assumed a unique position in the United States on the question of sovereign immunity. While the doctrine of sovereign immunity had been the subject of intense criticism throughout the nation and various jurisdictions had limited or abolished the doctrine by judicial decree[1] or legislative action,[2] no state had constitutionally abrogated the principles of sovereign immunity as completely as Montana.[3] However, the state did not long remain at the forefront. It retreated from this forward position by enacting a constitutional amendment in 1974. In the interim, the case of *Noll v. Bozeman,*[4] which involved the constitutionality of the legislative response to the constitutional abrogation of the doctrine, reached the Supreme Court of Montana. This note will discuss the court's decision in that case and some peripheral issues not dealt with in the opinion.

THE BACKGROUND

The 1972 Montana Constitutional Convention abolished the protection of the sovereign from suit for its own or its employees' torts in Article II, Section 18 of the Montana Constitution, which provided:

> The state, counties, cities, towns, and all other 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.

In response to this constitutional excision, the 43rd Session of the Montana Legislative Assembly enacted the Montana Comprehensive Insurance Plan and Tort Claims Act, which was codified as §§ 82-4301 through 82-4327 of the REVISED CODES OF MONTANA, 1947.[5]

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1. Among the states which have abolished the doctrine of sovereign immunity by judicial decree are Arizona (*Veach v. City of Phoenix,* 102 Ariz. 195, 427 P.2d 335 (1967)), California (*Muscopf v. Corning Hospital Dist.,* 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961)), Colorado (*Evans v. Board of County Commissioners,* 174 Colo. 197, 482 P.2d 968 (1971)), and Idaho (*Smith v. State,* 93 Idaho 795, 473 P.2d 937 (1970)).

2. Among the states which have taken legislative action to eliminate the doctrine of sovereign immunity are Alaska, Nebraska, and Nevada.

3. Illinois abolished the doctrine with these terms in its 1970 Constitution in Article 13, § 4: "Except as may be provided by law, sovereign immunity in this state is abolished."

4. ___ Mont. ___, 534 P.2d 880, 32 St. Rptr. 415 (1975).

5. Ch. 380, Laws of 1973.

At the same time, the legislature repealed or revised sections of Chapter 7 of Title 83 to implement Section 18 of Article II.[6]

The Montana Comprehensive Insurance Plan and Tort Claims Act appears to have been based on Idaho's statute on tort claims against governmental entities.[7] Idaho's statute limits the amount of the state's liability, excludes state liability for certain acts, and imposes certain procedural requirements on claimants.[8] The Montana Act does not exclude state liability for any act or limit the amount of liability the state can incur. However, the Idaho statute's procedural requirements were retained as part of the Montana Act.[9] The procedural requirements include the notice of claim provisions which were contested in *Noll v. Bozeman* and a companion case, *Keneady v. Bozeman.*[10]

Both suits resulted from one accident, which occurred on August 17, 1973, on a Bozeman city street. The plaintiffs, Noll and Keneady, were seated in Keneady's car, parked at a street curb, when a pavement roller struck the car from behind. The roller, which was owned by the State of Montana, was on loan to the city of Bozeman and operated by a city employee. Both Noll and Keneady suffered injuries as a result of the accident. In the months following the accident, the city's insurance adjuster investigated the accident, contacted the occupants of the car and discussed their claims with them. The adjuster attempted unsuccessfully to settle Keneady's claim. On April 8, 1974, more than seven months after the accident, Noll and Keneady filed separate actions against the State of Montana, the City of Bozeman, and the employee-operator of the roller.[11] The initial complaints were dismissed with leave to refile. Upon refiling, all the defendants again moved for dismissal. The District Court, while denying the motions of the city and its employee, granted the motion of the State of Montana on the ground that the plaintiffs had failed to comply with the notice of claim requirements of § 82-4311, R.C.M. 1947, and that therefore, their claims were barred under § 82-4314, R.C.M. 1947. Section 82-4311 provides:

All claims against the state arising under the provisions of this .

6. Section 83-701 was revised and § 83-706 was repealed and replaced by § 83-706.1 in Chapter 93, Laws of 1973.

7. IDAHO CODE ANNOTATED, § 6-901 *et seq.* (1947) [hereinafter cited as I.C.A. 1947].

8. I.C.A. 1947, §§ 6-904, 6-924.

9. This information was gained from an unpublished manuscript of D. Robert Lohn, which was made available to the author.

10. Noll, *supra* note 4; Keneady v. Bozeman, ___ Mont. ___, 534 P.2d 880, 32 St. Rptr. 415 (1975).

11. State ex rel. Bozeman v. District Court, ___ Mont. ___, 531 P. 2d 1343, 32 St. Rptr. 205 (1975).

> act shall be presented to and filed with the secretary of state within one hundred twenty (120) days from the date of the occurrence from which the claim arose or when the injury should reasonably have been discovered, whichever is later.

A similar provision, § 82-4312 R.C.M. 1947, relates to claims against the political subdivisions of the state. Such claims must be filed within the same time period with the clerk or secretary of the subdivision. Section 82-4314 provides the penalty for failure to comply with the filing requirements. It states that no action shall be allowed against any governmental entity unless the claim was filed within the one hundred twenty day time period.

THE COURT'S OPINION

The plaintiffs appealed from the District Court's order, arguing that §§ 82-4311 and 82-4314 were unconstitutional violations of Section 18 of Article II of the 1972 Montana Constitution and that the statutory provisions denied them equal protection of the laws as guaranteed by the United States and Montana constitutions. The Supreme Court of Montana did not reach the equal protection question, but unanimously accepted the plaintiffs' contention that the sections relied upon by the District Court in its order violated Article II, Section 18. The court, in an opinion by Justice Haswell, viewed the challenged statutes as an attempt to reinstate a limited form of sovereign immunity. This, the court found, was clearly contrary to the intent of Article II, Section 18. The court's examination of the history of Section 18 revealed that the Constitutional Convention intended to eliminate the doctrine of sovereign immunity and did not intend to grant the legislature the authority to impose limitations upon that resolve.[12] The Convention considered a provision abolishing sovereign immunity which was drawn from the proposed North Dakota Constitution of 1972. That provision would have allowed the legislature to impose reasonable limitations upon the initiation of suits against the state and its subdivisions. The delegates discussed that provision but chose not to adopt it.

Justice Haswell's opinion rejected the defendant's argument that Article II, Section 18 merely denied the state the right to raise the defense of sovereign immunity. The court appeared to view this as an argument based on semantics. For it, the important fact was that the constitution had denied the state immunity from suit. The court also rejected the argument that the challenged sections were, in effect, a statute of limitations. Justice Haswell pointed out that § 82-4317, R.C.M. 1947, provided a time limitation upon the bring-

12. *Id.* at 417-418.

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ing of suits against governmental entities and adequately protected those entities from stale and fraudulent claims. On the other hand, Justice Haswell thought that §§ 82-4311 and 82-4314 sought to impose a condition precedent to the maintenance of actions against governmental entities.

It should be noted that some difficulty is likely to arise concerning this point. Section 82-4317 states that a claim is barred if not brought within two years after the claim is presented to the governmental entity. Thus, the operation of the statute of limitation contained in § 82-4317 depends on the filing requirements of § 82-4311. With the latter section no longer operative, the effect of the statute of limitation provision is unclear. The court did not anticipate this problem and its resolution is left for another case or for legislative action.

THE AMENDED SECTION EIGHTEEN

The court also did not consider the effect of the recent amendment of Article II, Section 18, which became effective on July 1, 1975, but which did not apply to the facts of this case. Section 18 now 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, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.[13]

It is interesting to note that the Montana Compreshensive Insurance and Tort Claims Act was unanimously passed by the Montana Senate and, with some amendments, passed the House of Representatives by a vote of 89 to 5.[14] The House amendments were subsequently accepted unanimously by the Senate.[15] These figures lose their significance when it is observed that the usual rule is that "an unconstitutional statute is wholly void from the time of its enactment and is not validated by a subsequent constitutional change which would allow enactment of such a statute."[16] Montana follows this rule. In *State ex rel. Woodahl v. District Court,*[17] the Montana supreme court held that previously invalidated gambling statutes were not revived by the passage of the 1972 Montana Constitution which contained Article III, Section 9, permitting the legislature to authorize forms of gambling.[18] However, a constitutional amend-

13. MONT. CONST. art. 2 § 18.
14. 1973 Montana Senate Journal 557; 1973 Montana House Journal 908.
15. 1973 Montana Senate Journal 891.
16. Fellows v. Shultz, 81 N. M. 496, 469 P. 2d 141, 146 (1970).
17. 162 Mont. 283, 511 P.2d 318 (1973).
18. *See also* State v. Safeway Stores, 106 Mont. 182, 76 P.2d 81 (1938).

ment can validate prior unconstitutional statutes when the amendment, expressly or impliedly, ratifies or confirms those statutes.[19] But the amended Section 18 of Article II does not expressly mention those portions of the Tort Claims Act held invalid in *Noll.* Furthermore, it cannot be said to impliedly ratify those sections because it had been drafted and enacted before *Noll* was decided. Thus, it remains to a future legislature to determine whether the filing requirements of §§ 82-4311 and 82-4314 will be reimposed.

It may still be argued, however, that other constitutional grounds exist for an attack on notice of claim provisions. The amended Section 18 declares that the state and its subdivisions "shall have no immunity from suit . . . , except as may be specifically provided by law by a 2/3 vote of each house of the legislature."[20] Taking those terms on their face, it can be argued that the legislature is empowered to provide only full or partial immunity from suit for governmental entities, but nothing less. For example, immunity might be provided for such entities when engaged in certain activities. Section 18 does not appear to empower the legislature to impose lesser restrictions on the right of injured parties to bring tort actions against the state and its subdivisions.[21] Thus, notice of claim provisions, limits on the amount of liability, exclusions of punitive damages, attorneys' fees and interest,[22] may be prohibited under the terms of Section 18 and the legislature would have no power to re-enact the notice of claim provisions of Title 82, Chapter 43.

Such a result would be consistent with recent judicial views of the doctrine of sovereign immunity. Courts have been carefully examining the doctrine and many have found it unjustifiable. As mentioned before, a number of courts have judicially abolished the doctrine, while other courts have found methods to limit it.[23] The Oregon supreme court, while stating that it could not judicially abrogate a principle which was embodied in the state's constitution, held that the constitutional language should be construed as nar-

19. Fellows v. Shultz, *supra* note 15 at 147.

20. MONT. CONST. art. 2, § 18.

21. Argument found in the unpublished manuscript of D.R. Lohn, *supra* note 9.

22. REVISED CODES OF MONTANA § 82-4324 (1947) [hereinafter cited as R.C.M. 1947], prohibits awards of punitive damages, attorneys' fees, or interest to those who sue the State of Montana under the terms of the Montana Comprehensive Insurance Plan and Tort Claims Act.

23. Some states have held that the doctrine of sovereign immunity does not apply when the government engages in proprietary activities. Gillespie v. City of Los Angeles, 114 Cal. App.2d 513, 250 P.2d 717 (1952); Youngstown Mines Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328 (1963). Other states have held that a state gives implied consent to be sued on a contract when it enters one. Ace Flying Service, Inc. v. Colorado Dept. of Agriculture, 136 Colo. 19, 314 P.2d 278 (1957).

rowly as possible because the court viewed the concept of sovereign immunity as "indefensible."[24] Should a case similar to *Noll* ever again reach the Montana court, it could justifiably reach the same conclusion.

EQUAL PROTECTION AND NOTICE OF CLAIM PROVISIONS

The plaintiffs in *Noll* also argued that the filing requirements of §§ 82-4311 and 82-4314 denied them equal protection of the laws in violation of the United States[25] and Montana[26] constitutions. The court refused to reach the question and rested its decision on the ground discussed above. Nonetheless, the equal protection argument merits a brief discussion.

The Equal Protection Clause requires that statutory classifications have some relationship to legitimate governmental purposes. An exposition of the equal protection question can reveal whether good reasons exist to support the re-enactment of the invalidated notice of claim provisions, and, at the same time, gauge the likelihood of a successful equal protection challenge to any notice of claim requirements which the legislature may enact.

Formulating an equal protection argument presents some difficulty for the advocate, as it is an area of law which is undergoing change. The problem arises in determining the appropriate test to apply to the challenged statute. One established line of precedent requires that legal classifications "bear some rational relationship to a legitimate state end."[27] This "rational basis" test has recently been supplemented with another, which provides that, if a legal classification affects a "fundamental right"[28] or is itself an "inherently suspect"[29] classification, it can stand only if it is necessary to promote a "compelling state interest."[30] Recently, the United States Supreme Court has manifested some discontent with this two-tiered approach to equal protection and appears to have formulated a third test—the rational basis test with an added "bite".[31] This newest equal protection test has been variously phrased to require a classification to "rest on some ground of difference having a fair and

24. State v. Shinkle, ___ Or. ___, 373 P.2d 674, 680 (1962).

25. U.S. CONST. amend. xiv.

26. MONT. CONST. art. 2, § 4.

27. McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969).

28. Such as the right to interstate movement, Shapiro v. Thompson, 394 U.S. 618, 638 (1969); or the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972).

29. Such as race, McLaughlin v. Florida, 379 U.S. 184 (1964); or alienage, Graham v. Richardson, 403 U.S. 365 (1971).

30. Shapiro v. Thompson, *supra* note 27 at 638.

31. *See generally,* Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

substantial relation to the object of the legislation,"[32] or to rationally further "some legitimate, *articulated* state purpose."[33] This test has not replaced the prior tests but its exact application remains uncertain.

Before any test is applied, a statutory classification must be identified. Notice of claim provisions make classifications among tortfeasors and tort victims. The class of tortfeasors is divided into governmental tortfeasors, who are entitled to notice, and non-governmental tortfeasors, to whom notice is not necessary. Similarly, the class of tort victims is split into victims of governmental torts, who must give notice within a specified time period, and victims of private torts, who need not fulfill that requirement.[34] The failure to file notice in tort actions involving the government results in a bar to an action for damages, leaving the tort victim without a remedy and the governmental tortfeasor without liability.

While such a consequence may have disastrous effects on a tort victim, the classification which gives rise to that consequence does not affect a fundamental right or involve a suspect classification. Therefore, the compelling state interest test cannot be applied. In *Boddie v. Connecticut,*[35] the Supreme Court seemed to view access to the courts as a right of some importance. However, in the later cases of *United Staes v. Kras*[36] and *Ortwein v. Schwab,*[37] the Court looked more to the interests affected by lack of access to the courts than to the right of access itself. However, *Kras* and *Ortwein* do point to the equal protection test which is applicable to cases where access to the courts is in question. Both cases involved the payment of filing fees as a condition precedent to court action on the plaintiff's requests. Upon finding no fundamental freedom involved, the Court stated that the appropriate test was the rational basis test.

Are there rational bases for the classification which results from notice of claim provisions? Legislatures and courts have found adequate reasons to support enacting and sustaining notice of claim provisions. The Montana supreme court offered one such reason in the 1910 case of *Tonn v. City of Helena.*[38] The case involved an equal protection challenge to a notice of claim provision. Persons who were injured as a result of a defect in a city street or sidewalk were required to give notice of their claim and of the defect within sixty days of the injury. The court rejected the equal protection argument

32. Reed v. Reed, 404 U.S. 71, 76 (1971).
33. McGinnis v. Royster, 410 U.S. 263, 270 (1973).
34. Reich v. State Highway Department, 386 Mich. 617, 194 N.W.2d 700 (1972).
35. 401 U.S. 371 (1971).
36. 409 U.S. 434 (1973).
37. 410 U.S. 656 (1973).
38. 42 Mont. 127, 111 P. 715 (1910).

and found reason for the filing requirement in the fact that the public officers who governed municipalities had interests so extensive that they could not ascertain the facts of the municipalities' liability as well as an individual or a corporation.[39] This is one of the more common justifications for notice of claim provisions—that a governmental entity needs notice to insure that the facts of its liability are promptly investigated. The Michigan supreme court responded to a similar argument in *Grubaugh v. City of St. Johns,*[40] which was decided on due process grounds. There, the court said:

> Even if we assume the above original policy considerations were once valid [the prompt investigation justification], today they have lost their validity and ceased to exist due to changed circumstances. In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result, these units and agencies are better prepared to investigate and defend negligence suits than are most private tortfeasors to whom no special notice privileges have been granted by the legislature.[41]

In Montana, all governmental entities are authorized to purchase liability insurance.[42] As a consequence, governmental units often have the assistance of insurance investigators. In addition, it must be a rare circumstance for a governmental entity not to have some knowledge of a liability-producing incident. It may be noted that in *Noll,* the employee-operator of the roller reported the accident to his superiors, who notified the city's insurance adjuster. He promptly began an investigation.[43] However, it must be pointed out that the prompt investigation justification would apply in those instances which involve only one governmental employee who fails to report the incident, or isolated government property where the incident does not result in conspicuous side effects, such as the interruption of governmental services. These instances would surely be uncommon. They provide poor justification for legislation which denies tort victims their day in court.

Another justification offered for notification requirements is that it allows a governmental entity to quickly remedy defects in public property which have caused an injury. In response, it can be said that notice of claim provisions are both under- and over-

39. *Id.* at 134.
40. 384 Mich. 165, 180 N.W.2d 778 (1970).
41. *Id.* at 784.
42. R.C.M. 1947, §§ 82-4306, 82-4309.
43. State ex rel. The City of Bozeman v. District Court, *supra* note 11 at 206.

inclusive. Because such provisions apply only to those tort victims who intend to bring suit, the information which a governmental unit receives about defects in public property is limited.[44] On the other hand, the statute applies regardless of whether the injury arose from a defect in public property or from the actions of a public employee. Notice from those injured by governmental employees does not serve the purpose of protecting the public from defective public property. While the rational basis test does not require that categories be precisely drawn or that statutes be narrowly drawn to further the appropriate governmental interest,[45] a seriously over-inclusive classification, such as the one above, may move a court to invalidate it as not rationally related to the state's purpose. For a legislature, intent on enacting notice of claim provisions, the safest course would be to limit notice requirements to claims arising from defects in government property.

A third basis offered for notice of claim provisions is that governments need notice of their liabilities in order to budget properly. This argument loses some of its persuasiveness when it is noted that most governmental entities have insurance coverage. The Washington supreme court replied to this argument in *Hunter v. North Mason High School.*[46] There, the court said that "[s]pecial notice . . . does little to facilitate budget planning, as governmental entities so small as to be unable to use actuarial methods to forecast liabilities and self-insure, usually will purchase insurance."[47]

Finally, many argue that the notice of claim provisions give governmental entities an early opportunity to ascertain their liability and to promptly settle the claim against them. Yet, notice of claim requirements will often require attorneys for claimants to file notice containing an inflated estimate of damages. The claimant may still be hospitalized or under treatment. In such circumstances, attorneys will likely increase their damage estimates rather than take the chance that their estimates may be seriously understated. Such claims would provide little basis for compromise or settlement. The parties are not in a position to negotiate until the true damages are ascertained.[48]

While the deficiencies of these justifications can be pointed out, most cannot be entirely discounted by the existence of liability insurance. The arguments presented above may induce the legislature

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44. Note, *Notice of Claims Provisions: An Equal Protection Perspective,* 60 CORNELL L. REV. 417, 442 (1975).

45. Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

46. ___ Wash.2d ___, 539 P.2d 845 (1975).

47. *Id.* at 849.

48. Comment, *The Constitutionality of California's Public Entity Tort Claims Statutes,* 6 PAC. L. J. 30, 38 (1975).

to forego the re-enactment of notice of claim requirements. But, they may not move a court to invalidate such provisions on equal protection grounds. The rational basis test is applied to legislative decisions with a great deal of deference. If any possible basis can be found for a challenged statute, the court will sustain it. Equal protection challenges to notice of claim statutes have not faired well, having been accepted in only three states.[49] For these reasons, an equal protection challenge to notice of claim provisions is not a strong argument, and the *Tonn* precedent complicates the problem in Montana.

The judicial deference inherent in the rational basis test is illustrated in two of the three cases which accept the equal protection argument. In the latest case, *Hunter,* the court systematically reviewed the rationale of notice of claim statutes. After discounting the justifications presented above, the court looked to the position of the state, as expressed by the legislature, on suits against the state. The Washington legislature had abolished sovereign immunity and stated its intention to hold the state and its subdivisions liable for their torts as if they were individuals or corporations. Further, the legislature had repealed a statue which stated that the state's consent to be sued did not affect notice requirements. Finding that the legislative policy was to forego placing procedural roadblocks in the way of claimants, the court held it could not sustain the notice requirements "simply because they serve to protect the public treasury. Absent that justification, there is no basis, substantial or even rational, on which their discrimination between governmental plaintiffs [sic] and others can be supported."[50] The Supreme Court of Michigan in *Reich v. State Highway Department*[51] also looked to their legislature for an expression of intent to place all tort victims on an equal footing before holding notice requirements violative of the Equal Protection Clause. In Montana, the intent of the Constitutional Convention no longer controls in this area. The re-enactment of notice of claim provisions would be an expression of legislative intent that the state not have the same tort liability of individuals or corporations.

CONCLUSION

Montana is now without a notice of claim requirement. Although § 82-4312 was not affected by the ruling in *Noll* and therefore

49. *Nevada:* Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973); *Michigan:* Reich v. State Highway Department, *supra* note 33; and *Washington:* Hunter v. North Mason High School, *supra* note 45.

50. Hunter v. North Mason High School, *supra* note 45 at 850.

51. Reich v. State Highway Department, *supra* note 33.

still applies to claims against the political subdivisions of the state, it depends for its enforcement upon § 82-4314, which was declared invalid. Hopefully, Montana will remain without notice of claim provisions. Whether it does seems to be a determination which rests solely with the legislature. The justifications for such provisions have some limited validity but they do not carry the weight they appear to on first glance. Their remaining validity may require a court to uphold notice of claim provisions, if challenged on equal protection grounds. However, their makeweight character should move the legislature to forego the re-enactment of such requirements. Should the legislature nonetheless reimpose these provisions in Montana, her citizens' only hope to avoid their effect may rest on the narrow language of the amended Section 18 of Article II.[52]

52. The Senate-House Interim Judiciary Committee of the Montana Legislature has recommended against restoring substantial sovereign immunity for the state. The committee has tentatively recommended legislation to:

—Limit damages to actual economic loss such as medical bills and loss of wages.

—Prohibit punitive damages and recovery for intangible damages such as pain and suffering and emotional distress.

—Limit the amount each person can recover for each occurrence and the amount that can be recovered for a single occurrence injuring or damaging many persons.

A. Hutchinson, Panel Advising Against Return to State Sovereign Immunity, The Missoulian, Nov. 25, 1975, p. 13 at col. 1-4.