VII and the E.E.O.C. guidelines in helping establish pregnancy as a temporary disability depends upon their acceptance by the courts as valid propositions. The practical application of the E.E.O.C. guidelines as the basis for pregnant teachers' arguments requesting maternity leave pay can be somewhat diminished in strength by judicial opinions. A recent Iowa district court decision, *Jordan v. West Des Moines School District*,[45] held the term "personal illness" could not be construed to include pregnancy and childbirth.

The decision in *LaFleur* and the amendment to Title VII do not completely abolish school board mandatory maternity leave policies. School boards may still establish maternity leave policies that do not arbitrarily infringe upon each individual woman's teaching capability. In constructing these maternity policies, school boards must recognize their obligation to treat each pregnant teacher as an individual and justify any mandatory termination and return dates by sufficient evidence. Whether pregnant school teachers can now receive the same employee benefits as other employees depends upon judicial acceptance of the proposition that pregnancy is a temporary disability. This, in turn, may hinge upon the passage of the equal rights amendment. However, school board interests can no longer be based upon cultural assumptions of pregnancy and employment discrimination based upon sex.[46] Only for employment purposes is the pregnant woman considered disabled. Hence, the school districts, in creating these maternity regulations, should no longer be able to penalize the pregnant school teacher for being a woman.

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45. In *Jordan v. West Des Moines School Dist.*, Equity No. 1-475 (Polk Co., filed March 15, 1974), the plaintiff's contended the school board's denial of maternity leave pay violated the fourteenth amendment as well as Title VII. The plaintiffs also contended that section 279.40 of the *Iowa Code* (1973), which allows compensation to teachers for absences due to personal illness, should be construed to include pregnancy and childbirth. However, the court concluded pregnancy is not an illness as contemplated by the provisions within section 279.40. But in *Hutchison v. Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974), a court found a school board's refusal to allow a teacher to apply her accumulated sick leave to pregnancy-related disability a violation of the equal protection clause of the fourteenth amendment and an unfair labor practice under Title VII of the 1964 Civil Rights Act. The court recognized that the Equal Employment Opportunity Commission guidelines are not law; however, they are entitled to great deference by the courts. There is no need to consider whether sex is a suspect classification requiring a compelling state interest in order to be held constitutional because the challenged classification is invalid even under the rational basis equal protection standard. The court concluded that there was no merit to the school board's contention that pregnancy is voluntary and thus may be excluded from equality of treatment. The classification not only penalizes female teachers for being women but discriminates in forcing them to choose between employment and pregnancy.

46. *Cf.* Note, *Equal Protection and The Pregnancy Leave Case*, 34 OHIO STATE L.J. 628 (1973).

CONSTITUTIONAL LAW—EQUAL PROTECTION—THE SIXTY DAY NOTICE OF CLAIM STATUTE APPLICABLE TO TORT ACTIONS AGAINST MUNICIPALITIES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.—*Lunday v. Vogelmann* (Iowa 1973).

Plaintiff was severely injured when run over by a lawn mower while chasing a ball during a physical education class supervised by Vogelmann, an employee of the Denison Community School District. The lawn mower was operated by an employee of the City of Denison. Plaintiff brought suit against defendants Vogelmann, the school district and the City. Iowa law requires a plaintiff seeking damages for injury from any municipality to commence the action therefor within three months or to give written notice of the injury and claim for damages within sixty days of the alleged injury and commence the action within two years of such notice.[1] Plaintiff filed his petition alleging negligence on the part of defendants some twenty-two months after his injury without giving the required notice to the school district and the City. They alleged the action was barred by failure to give such notice or to commence the action within three months of the date of the injury. Plaintiff replied by alleging the notice requirement is unconstitutional as a denial of equal protection. The district court sustained the statute's constitutionality and dismissed plaintiff's action against the school district and the City. The Supreme Court of Iowa *held*, affirmed, the sixty day notice of claim statute applicable to tort actions against municipalities does not violate the equal protection clause of the fourteenth amendment. *Lunday v. Vogelmann*, 213 N.W.2d 904 (Iowa 1973).

Municipalities in Iowa are subject to liability for their torts and those of their officers, employees and agents acting within the scope of their employment or duties[2] with certain exceptions.[3] "Municipality" as used in the statutes refers to all governmental subdivisions, including cities and school districts.[4]

The tort liability of governmental subdivisions is subject to limitation by *Iowa Code* section 613A.5. That section states:

> Limitation of actions. Every person who claims damages from any municipality for or on account of any wrongful death, loss or injury within the scope of section 613A.2 shall commence an action therefor within three months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. Failure to state the amount of compensation or other relief demanded shall not invalidate the notice; providing, the claimant shall furnish full information regarding the nature and

1. IOWA CODE § 613A.5 (1973).
2. *Id.* § 613A.2.
3. *Id.* § 613A.4.
4. *Id.* § 613A.1.

> extent of the injuries and damages within fifteen days after demand by the municipality. No action therefor shall be maintained unless such notice has been given unless the action is commenced within two years after such notice. The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by his injury from giving such notice.[5]

The effect of the statute is to require a plaintiff to give notice of claim to municipalities in order to extend the time for filing an action in tort against a municipality while plaintiffs tortiously injured by private parties are allowed two years within which to file their actions without giving such notice within the first sixty days as a precondition.[6] It is alleged that this classification of governmental tort-feasors and private tort-feasors is an unreasonable one because it creates a special notice requirement as a condition precedent for the former but not the latter. It thus creates a special statute of limitations with respect to tort actions against governmental subdivisions. This unreasonable classification, it is alleged, renders the statute unconstitutional as a violation of the equal protection clause of the fourteenth amendment.

An equal protection argument has been successful in several recent cases in which similar notice of claim statutes have been declared unconstitutional.[7] However, it cannot be said that the court in the instant case is not in good company in upholding the statute's constitutionality. There is ample precedent upholding the constitutionaliy of such statutes. They have been upheld as within the power of the legislature to classify,[8] as reasonable classifications,[9] and against claims of due process[10] and equal protection[11] violations or both.[12]

Various state interests have been advanced in justification of the statutes requiring notice of claims. The Supreme Court of Iowa has recognized section 613A.5 as a means for prompt communication of time, place and circumstances of the injury to the municipality so it can investigate while the facts are fresh.[13] Other major purposes satisfying state interests and which are similar or re-

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5. *Id.* § 613A.5.
6. *Id.* § 614.1(2).
7. *See* Reich v. State, 43 Mich. App. 284, 204 N.W.2d 226 (1973); Crook v. Patterson, 42 Mich. App. 241, 201 N.W.2d 676 (1972); Friedman v. Farmington Township School Dist., 40 Mich. App. 197, 198 N.W.2d 785 (1972); Reich v. State Highway Dept., 386 Mich. 617, 194 N.W.2d 700 (1972); Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973); Zipster v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (White Plains City Ct. 1972).
8. Newlun v. City of Portland, 248 Ore. 291, 433 P.2d 816 (1967); O'Neil v. City of Richmond, 141 Va. 168, 126 S.E. 56 (1925).
9. Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962); Tonn v. City of Helena, 42 Mont. 127, 111 P. 715 (1910); Ocampo v. City of Racine, 28 Wis. 2d 506, 137 N.W.2d 477 (1965).
10. Gonclaves v. San Francisco Unified School Dist., 166 Cal. App. 2d 87, 332 P.2d 713 (1958); Workman v. City of Emporia, 200 Kan. 112, 434 P.2d 846 (1967).
11. McCann v. City of Lake Wales, 144 So. 2d 505 (Fla. 1962); Brantley v. City of Dallas, 498 S.W.2d 452 (Tex. Civ. App. 1973); Harris County v. Dowlearn, 489 S.W. 2d 140 (Tex. Civ. App. 1972).
12. Repaskey v. Chicago Transit Authority, 9 Ill. App. 3d 897, 293 N.E.2d 440 (1973); Housewright v. City of LaHarpe, 51 Ill. 2d 357, 282 N.E.2d 437 (1972).
13. Norland v. Mason City, 199 N.W.2d 316, 318 (Iowa 1972).

lated to these[14] include allowing the governmental body time to investigate the case and negotiate a prompt settlement of meritorious claims without the annoyance and expense of needless litigation[15] and thereby facilitate the planning of future municipal budgets,[16] protecting the public treasury from stale and fraudulent claims,[17] and permitting prompt correction of defective conditions after notice.[18] Courts have cited various of these state interests as justifying the existence of the notice of claim statutes and held them to be reasonable in light of these interests.[19]

Granting that the states have certain valid interests in classifying governmental tort-feasors and private tort-feasors differently, it must be determined which test of constitutionality is to be applied. Classifications based upon the suspect criteria of race, alienage or national origin[20] and those which involve fundamental rights[21] are subject to a strict standard of judicial review, while a traditional equal protection analysis will apply where none of these factors is present.

The majority in the instant case held that since the classification in question was not based upon any of the suspect criteria and did not involve any of the fundamental rights recognized by the United States Supreme Court[22] it is subject to the traditional reasonableness test.[23] Justice Reynoldson in dissent criticizes the majority for rejecting the granting of "fundamental right" status to access to the court simply because it did not fit into one of the categories of fundamental rights[24] already recognized by the United States Supreme Court.[25] He argues that all persons are possessed of certain inalienable rights recognized by both the United States and Iowa Constitutions, including life, liberty and property, and that nothing could be more "fundamental" than protecting these inalienable rights through reasonable access to courts.[26] The right of access to the courts in matters of "inalienable rights" rises to the same level as those "fundamental rights" already recognized.[27] The dissent relies upon *Boddie v. Connecticut*,[28] albeit a due process case, as confirming the funda-

14. *See* Farrall, *Delay in Notice of Tort Claim Against a Government Agency*, 20 CLEV. ST. L. REV. 23 (1971); 46 IND. L.J. 428 (1971).
15. Aune v. City of Mandan, 167 N.W.2d 754 (N.D. 1969).
16. King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970).
17. Mapley v. Bd. of Educ., 13 Misc. 2d 88, 175 N.Y.S.2d 354 (Sup. Ct. 1958); Thomann v. City of Rochester, 230 App. Div. 612, 245 N.Y.S. 680 (1930).
18. Cornett v. City of Neodesha, 187 Kan. 60, 353 P.2d 975 (1960).
19. *See, e.g.*, Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962); Housewright v. City of LaHarpe, 51 Ill. 2d 357, 282 N.E.2d 437 (1972).
20. Frontiero v. Richardson, 411 U.S. 677 (1973).
21. Shapiro v. Thompson, 394 U.S. 618 (1969).
22. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).
23. Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973).
24. *See* note 22 *supra*.
25. *See* Lunday v. Vogelmann, 213 N.W.2d 904, 908 (Iowa 1973) (dissenting opinion).
26. *Id.*
27. *Id.* at 909.
28. 401 U.S. 371 (1971).

mental nature of the right to access to the courts where there are basic values at stake.[29] It then concludes that the right to seek redress in the courts is a fundamental right and thus subject to the doctrine of close judicial scrutiny.[30]

While it may be said that access to courts is among the basic rights and one of the fundamental values which inhere in our system of justice,[31] *Boddie* does not hold that access to courts is a "fundamental right."[32] Thus, the view advanced by the dissent would represent a significant extension of the principle enunciated in *Boddie*, if adopted by the majority. It seems reasonably certain that section 613A.5 would fall if the stricter test were applied to it.[33] This may be a tempting argument to many. However, the application of a strict standard of scrutiny has not been necessary to a finding that notice of claim statutes are unconstitutional.

Under the traditional reasonableness test of equal protection the classification established by statute must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest.[34] The legislature has wide discretion in adopting laws which may affect some groups of citizens differently than others.[35] The fact that, in practice, the laws result in some inequality does not mean the legislature has denied equal protection to some citizens.[36] A classification will not be set aside if any state of facts may reasonably be conceived to justify it.[37] It is not for the judiciary to determine whether acts of the legislature are wise or unwise.[38]

Various state courts have applied this test in recent years to notice of claim statutes with differing results. Their constitutionality has been upheld as being based upon reasonable and rational classifications.[39] But they have

29. *See* Lunday v. Vogelmann, 213 N.W.2d 904, 909 (Iowa 1973) (dissenting opinion).

30. *Id.*

31. *See* Boddie v. Connecticut, 401 U.S. 371, 375-80 (1971).

32. However, the Court in *Boddie* did give constitutional protection to access to the courts in certain circumstances. Likewise, the Court has made it clear that citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens within the jurisdiction even though the right to vote per se is not a constitutionally protected right. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34-35, nn.74, 78 (1973).

33. *See* Boddie v. Connecticut, 401 U.S. 371, 381-82 (1971); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1102 (1969); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 442 (1967).

34. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Lee Enterprises, Inc. v. Iowa State Tax Comm'n, 162 N.W.2d 730 (Iowa 1968).

35. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Cedar Memorial Park Cemetery Ass'n, 178 N.W.2d 343 (Iowa 1970).

36. Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

37. *Id.*

38. Peel v. Burk, 197 N.W.2d 617 (Iowa 1972).

39. Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962); Repaskey v. Chicago Transit Authority, 9 Ill. App. 3d 897, 293 N.E.2d 440 (1973); Housewright v. City of LaHarpe, 51 Ill. 2d 357, 282 N.E.2d 437 (1972); Brantley v. City of Dallas, 498 S.W.2d 452 (Tex. Civ. App. 1973); Harris County v. Dowlearn, 489 S.W.2d 140 (Tex. Civ. App. 1972); Ocampo v. City of Racine, 28 Wis. 2d 506, 137 N.W.2d 477 (1965).

also been struck down recently as being arbitrary and unreasonable,[40] as unreasonably[41] and unjustly[42] favoring governmental tort-feasors, and as serving no real benefit within our present scheme of government.[43] Thus, while notice of claim statutes are still being upheld in many states, there seems to be a movement toward holding such statutes to be unconstitutional.

Often when upholding the constitutionality of these statutes the courts leave much of the rationale of application of the reasonableness test unsaid, simply basing their finding upon established authority.[44] Others frame the reasonableness in terms of certain recognized purposes[45] as does the majority in the instant case. The rationale and holding of the majority deserve more careful analysis and comparison with the cases declaring these statutes unconstitutional than a mere prefunctory application of the traditional reasonableness test has provided.

The thrust of the equal protection arguments is that notice of claim statutes create arbitrary and unreasonable classes in two ways. First, the natural class of tort-feasors is divided into private tort-feasors to whom no notice is owed and public tort-feasors to whom notice is owed, and is an unreasonable and arbitrary variance in the treatment of a natural class.[46] Second, the natural class of victims of negligent conduct is arbitrarily split into two sub-classes: the victims of governmental negligence, who must meet the notice requirement, and the victims of private negligence, who need not meet such a requirement.[47] Such requirements give the municipality an unfair advantage over a private litigant by giving the municipality an artificial cloak of a special short-time limit.[48]

The application of a reasonableness test involves examining the classification to see whether it is rationally related to a legitimate government objective.[49] Legislative intent bears upon the purpose or object of the legislation.

The Michigan statute on governmental tort liability is similar to the Iowa statute in question and was adopted as a whole in 1965.[50] However, it is not a general waiver of governmental immunity. Rather it retains the state's immunity[51] except as to injuries arising from defective highways,[52] negligent op-

40. Reich v. State Highway Dept., 386 Mich. 617, 620, 194 N.W.2d 700, 702 (1972).
41. *Id.*; Reich v. State, 43 Mich. App. 284, 287, 204 N.W.2d 226, 228 (1973).
42. Zipster v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (White Plains City Ct. 1972).
43. Turner v. Staggs, 89 Nev. 230, 235, 510 P.2d 879, 882 (1973).
44. *See, e.g.*, Harris County v. Dowlearn, 489 S.W.2d 140, 146 (Tex. Civ. App. 1972).
45. *See* Housewright v. City of LaHarpe, 51 Ill. 2d 357, 361, 282 N.E.2d 437, 440 (1972); King v. Johnson, 47 Ill. 2d 247, 250, 265 N.E.2d 874, 876 1970).
46. Reich v. State Highway Dept., 386 Mich. 617, 620, 194 N.W.2d 700, 702 (1972); Turner v. Staggs, 89 Nev. 230, 235, 510 P.2d 879, 882 (1973).
47. *Id.*
48. Zipster v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (White Plains City Ct. 1972).
49. *See* note 34 *supra.*
50. *See* IOWA CODE ANN. §§ 613A.1-.11 (Supp. 1974-75); MICH. COMP. LAWS ANN. §§ 691.1401-.1415 (1968).
51. MICH. COMP. LAWS ANN. § 691.1407 (1968).
52. *Id.* § 691.1402.

eration of government owned motor vehicles,[53] dangerous or defective government buildings,[54] and the performance of proprietary functions by the state.[55]

The case of *Reich v. State Highway Department*[56] arose out of a claim against the state for injuries sustained by reason of alleged defective highways. Plaintiffs seeking damages under the applicable statute[57] are allowed two years in which to file their claims.[58] However, their right to recovery was conditioned upon the giving of notice to the applicable government agency within sixty days of the occurrence of the injury.[59] Thus, in order to bring their actions within the two year period plaintiffs were required to give notice of their claim within sixty days.

In viewing as a whole the legislation which had been adopted the Michigan supreme court stated:

> The object of the legislation under consideration is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on an equal footing with private tort-feasors. However, the notice provisions of the statute arbitrarily split the natural class, i.e., all tort-feasors, into two differently treated sub-classes: private tort-feasors to whom no notice of claim is owed and governmental tort-feasors to whom notice is owed.
>
> The diverse treatment of members of a class along the lines of governmental and private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act.[60]

The court notes that victims of negligent conduct are also arbitrarily split into two sub-classes by the notice requirement. "Contrary to the legislature's intention to place victims of negligent conduct on equal footing, the notice requirement acts as a *special statute of limitations* which arbitrarily bars the actions of the victims of governmental negligence after only 60 days."[61] Victims of private negligence have three years in which to bring their actions with no notice provision.[62] The court holds this to be arbitrary treatment which clearly violates equal protection guarantees and is thus void.[63]

The Nevada notice of claim statute in question in *Turner v. Staggs*[64] required claims to be presented to the county within six months as a precondition

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53. *Id.* § 691.1405.
54. *Id.* § 691.1406.
55. *Id.* § 691.1413.
56. 386 Mich. 617, 194 N.W.2d 700 (1972).
57. MICH. COMP. LAWS ANN. § 691.1402 (1968).
58. *Id.* § 691.1411(2).
59. *Id.* § 691.1404. This section had been amended to 120 days in 1970. *Id.* § 691.1404(1) (Supp. 1973-74).
60. Reich v. State Highway Dept., 386 Mich. 617, 620, 194 N.W.2d 700, 702 (1972).
61. *Id.* (Emphasis added).
62. MICH. COMP. LAWS ANN. § 600.5805(7) (1968).
63. *See* Reich v. State Highway Dept., 386 Mich. 617, 620, 194 N.W.2d 700, 702 (1972). However, see Cooperrider, *Torts, 1971 Annual Survey of Mich. Law*, 18 WAYNE L. REV. 503, 525-29 (1972) anticipating the result in *Reich*.
64. 89 Nev. 230, 510 P.2d 879 (1973).

to suing the county.[65] That statute has been a part of Nevada law since 1865.[66] The legislature waived immunity from liability and action for both the states and its sub-divisions by statute in 1965.[67] The state and its subdivisions consented by this statute to have their liability determined in accordance with the same rules of law as applied to civil actions against private individuals and corporations "*provided the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive . . .*."[68] Section 41.036 specifically states that no action shall be brought under NRS 41.031 against a county without complying with the notice requirements of NRS 244.245 and 244.250.[69] Thus, the existing notice of claim statute was specifically included by reference when the waiver of immunity statute was adopted.

In spite of this the Nevada supreme court stated:

> Within our present scheme of government, claim statutes serve no real beneficial use but they are indeed a trap for the unwary. . . .
>
> The stated object of NRS 41.031 is to waive the immunity of governmental units and agencies from liability for injuries caused by negligent conduct, thus putting them on an equal footing with private tort-feasors. However, the notice provisions of NRS 244.245 and NRS 244.250 have the effect of arbitrarily dividing all tort-feasors into classes of tort-feasors: (1) private tort-feasors to whom no notice of claim is owed and (2) governmental tort-feasors to whom notice is owed.[70]

Citing the legislature's intent to place victims of negligent conduct on equal footing, the Nevada court holds that the notice requirement arbitrarily bars victims of governmental torts, while victims of private torts suffer no bar, and that this arbitrary treatment clearly violates equal protection guarantees.[71]

Iowa law has long placed a duty on cities and towns to care for, supervise and control public streets, highways, etc., within the city or town and keep them open, in repair and free from nuisances.[72] Such a statute has been a part of Iowa law since 1858.[73] Actions founded upon injury on account of defective streets were required to be brought within three months unless written notice, specifying the time, place and circumstances of the injury was given within sixty days of the injury.[74] That statute had been a part of the *Iowa Code* since 1888 and was amended from six months and ninety days to three months and sixty days in 1896.[75] Actions founded on injuries to the person had to be brought within two years.[76] Thus, notice had to be given within sixty days in order to file claims against governmental tort-feasors beyond the

65. NEV. REV. STAT. §§ 244.245, 244.250 (1973).
66. *Id.*
67. *Id.* § 41.031.
68. *Id.* (emphasis added).
69. *Id.* § 41.036.
70. Turner v. Staggs, 89 Nev. 230, 235, 510 P.2d 879, 882 (1973).
71. *Id.* at 236, 510 P.2d at 882-83.
72. IOWA CODE § 389.12 (1973).
73. IOWA CODE ANN. § 389.12 (1949).
74. IOWA CODE § 614.1(1) (1966). *See also* IOWA CODE § 420.45.
75. IOWA CODE ANN. § 614.1 (1950).
76. IOWA CODE § 614.1(3) (1966).

three month period.[77] This requirement was included with virtually the same essential elements in the waiver of immunity for governmental subdivisions as section 613A.5,[78] and the requirement deleted from section 614.1.[79]

Thus, like the legislatures of Michigan and Nevada, the Iowa legislature has included a notice of claim statute in its tort claims statute applicable to governmental subdivisions. Like the Michigan statute, the included notice of claim requirement had to be met in order to take advantage of the full statute of limitations. Like the Nevada statute, it pre-existed the governmental tort liability statute. The courts in Michigan and Nevada have held that the purpose of these tort claim statutes is to put governmental tort-feasors and private tort-feasors, and the victims of governmental and private negligence, on an equal footing and that the notice of claim requirements are contrary to this purpose and thus void[80] in spite of the fact that the notice requirements were specifically included in each of the tort claim statutes.[81]

Instead of viewing the entire tort claims statute as the Michigan and Nevada courts had done in order to ascertain the statute's purpose, the Iowa court took a narrow view in considering only the traditional purposes of the notice statute itself, rather than the tort claims statute as a whole, to establish the legislative purpose to which the reasonableness test was applied.[82] The Iowa court found the notice requirement to be reasonably related to these traditional purposes of notice statutes and that, since it had been enacted as part of the statute abrogating sovereign immunity, it is a constitutionally valid condition to liability and suit under the statute.[83] *Reich* is distinguished (*Turner* is not mentioned) by the majority upon the basis of the difference in legislative intent recognized by the Michigan court.[84]

One of the important factors complicating the determination of legislative purposes or objectives is that they are rarely expressly articulated in the statutes themselves. This has led to rationalizations in applying the traditional equal protection test which are created by prefunctory judicial hypothesizing about the legislative purposes. Legislative purposes have more basis in judicial conjecture than actuality.[85] Certainly nothing in the statutes discussed *supra* compels a finding of specific purposes or objectives in question here. The contradictory findings of the courts provide excellent examples of the latitude available to the courts in recognizing particular statutory purposes or objectives.

With respect to the tort liability of Iowa governmental subdivisions, it is suggested here that examining the broad purpose of the statute as a whole is

77. IOWA CODE § 614.1(1) (1966).
78. *See* IOWA CODE § 613A.5 (1973); IOWA CODE § 641.1(1) (1966).
79. *See* IOWA CODE ANN. § 641.1 (Supp. 1974-75).
80. *See* notes 60-61, 63 and 70-71 *supra*.
81. *See* notes 59 and 69 *supra*.
82. *See* Lunday v. Vogelmann, 213 N.W.2d 904, 907-08 (Iowa 1973).
83. *Id.*
84. *Id.* at 908.
85. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-21 (1972).

the better approach. It is further suggested that the notice of claim requirement need not be viewed as a limit to abolition of sovereign immunity, but rather as another general statute of limitation to which applicable rules of interpretation may be applied.

The Iowa court construed the State Tort Claims Act adopted in 1965[86] in *Graham v. Worthington.*[87] Just two years prior to *Graham* the Iowa court had refused to judicially abrogate governmental immunity in Iowa.[88] The dissent, in criticizing the majority's unwillingness to abrogate governmental immunity, quoted with approval this classic observation:

> The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be born without hardship upon any individual, and where it justly belongs.[89]

In passing on the subsequently adopted state tort claims statute in *Graham* the court reflected this observation in its findings of the legislative purpose of the act:

> The general purpose of chapter 25A is to impose upon all the people of this state the burden, expense and costs which arise from tortious damage to property or injuries to persons by the officers, agents and employees of our state government. This is a valid means of prompting the general welfare of the state. . . .
>
> We can only conclude the General Assembly saw no ultimate advantage to the state by continuing to cast upon some unfortunate individuals the full burden of damage done by the tortious conduct of state officers, agents or employees.[90]

This recognition of general legislative purpose seems as applicable to the tort liability statute of governmental subdivisions, chapter 613A, as it does to the state tort claims statute, chapter 25A. No sixty day notice is required in chapter 25A despite the fact that the state would have as many interests, actual or conjectural, served by it as its subdivisions would.

However, the majority in *Lunday* looked to the narrow purposes of section 613A.5 instead of the broader purposes of chapter 613A as a whole. It recognized several interests which the section serves: timely investigation after notice, opportunity to remedy the defect after notice, protection from stale and

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86. IOWA CODE §§ 25A.1-.20 (1973).
87. 259 Iowa 845, 146 N.W.2d 626 (1966).
88. Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 127 N.W.2d 606 (1964).
89. *Id.* at 349-50, 613 (dissenting opinion). *See also* Note, *Assault on the Citadel: De-immunizing Municipal Corporations*, 4 SUFFOLK U.L. REV. 832 (1969).
90. Graham v. Worthington, 259 Iowa 845, 860-61, 146 N.W.2d 626, 636-37 (1966).

fraudulent claims, settlement of valid claims and avoidance of unnecessary litigation, and facilitation of budgeting.[91] These purposes seem to be an example of those based upon judicial conjecture rather than actuality.

The court ignored what common knowledge tells us. Municipalities do receive notice of municipality-caused injuries while plaintiffs are repeatedly denied their day in court by the notice of claim statute in case after case.[92] Municipalities rarely budget for claims but carry liability insurance as the statutes permit[93] and thus fears of fiscal disasters are exaggerated.[94] Municipalities have the same opportunity for settlement prior to suit as any other tort-feasor, and municipalities are protected from stale and fraudulent claims in the same manner as the private sector, by statutes of limitation.[95] Language of the Michigan court is pertinent:

> Even if we assume the above original policy considerations were once valid, 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 tort-feasors to whom no notice privileges have been granted by the legislature.[96]

And yet those interests identified by the Iowa court as being served by the notice requirement are equally applicable to all private tort-feasors.

The practical effect of the notice requirement is to give the municipalities a sixty day statute of limitations which repeatedly cuts off unwary victims from recovery.[97] Such results are contrary to the general purpose of the tort liability statutes. In view of the existence of these considerations the court would have done well to consider its own language when examining the provisions of chapter 613A: "For the purpose of ascertaining whether or not the classification is arbitrary and unreasonable, we must take into consideration matters of common knowledge and common report and the history of the times."[98]

In addition to enunciating the purposes of chapter 25A in *Graham* the Iowa court examines the nature of the legislation. The court states that the chapter does *not* create a new cause of action. Rather it gives recognition to and remedy for a cause action already existing by reason of a wrong done for

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91. *See* Lunday v. Vogelmann, 213 N.W.2d 904, 907-08 (Iowa 1973).
92. *Id.* at 910 (dissenting opinion).
93. *See, e.g.*, IOWA CODE §§ 332.3(20), 347.14(9), 517A.1, 613A.7 (1973).
94. *See* Comment, *The Role of the Courts in Abolishing Governmental Immunity*, 1964 DUKE L.J. 888, 897-98 (1964); Note, *Assault on the Citadel: De-immunizing Municipal Corporations*, 4 SUFFOLK U.L. REV. 832, 866-67 (1969).
95. *See* Farrall, *Delay in Notice of Tort Claim Against a Government Agency*, 20 CLEV. ST. L. REV. 23, 30 (1971).
96. Grubaugh v. City of St. Johns, 384 Mich. 165, 173, 180 N.W.2d 778, 784 (1970).
97. *See* Farrall, *Delay in Notice of Tort Claim Against a Government Agency*, 20 CLEV. ST. L. REV. 23 (1971); cf. 46 IND. L.J. 428, 441 (1971).
98. State v. Bartels, 191 Iowa 1060, 1073, 181 N.W. 508, 515 (1921).

which redress could not be previously had because of the common law doctrine of governmental immunity.[99] Under that doctrine the state is immune from suit rather than liability. Thus, the chapter does not create a new cause of action but accepts liability under circumstances that would bring private liability into existence and therefore affects the remedy, not the right itself.[100]

The court specifically states in *Graham* that chapter 25A discloses no intent on the part of the legislature to waive existing governmental immunities of the political subdivisions of the state.[101] Thus, rather than eliminating any common law rights and immunities with respect to the state's subdivisions, chapter 25A would seem to have no affect at all upon them. Like the state, from which their powers flow, the subdivisions of the state are immune from suit rather than liability. They therefor continue to be protected by the common law doctrine of governmental immunity against causes of action already existing by reason of wrongs done.[102]

Yet in examining chapter 613A abolishing tort liability for governmental subdivisions, the court states that chapter 613A created a new right which was not available at common law.[103] No authority or rationale is provided for this statement and it appears to be inconsistent with the court's language in *Graham*.[104] The chapter and section 613A.5 are then referred to as a statute of creation rather than a statute of limitations. Further, chapter 613A creates a new liability (as chapter 25A had)[105] and fixes the time limits within which recovery can be commenced. The court then states that being a statute of creation, meeting the time requirements is a condition precedent to both the liability and action permited. The time element therefore limits both the remedy and the right.[106]

There is an important distinction between statutes which affect the liability or remedy only and to which general statutes of limitation apply, and those which affect the remedy *and* the right and to which special statutes of limitation, which are conditions precedent to suit, apply.[107] Courts do not favor the defense of the statute of limitations,[108] while greater deference is given to legislative judgment in setting conditions precedent to newly created statutory rights unknown at common law.[109]

The majority in *Lunday* found the notice requirement to be a condition placed upon its abolition of sovereign immunity.[110] Yet it is difficult to understand why chapter 25A covering state tort liability creates only a new liability

99. *See* Graham v. Worthington, 259 Iowa 845, 861, 146 N.W.2d 626, 637 (1966).
100. *Id.*
101. *Id.* at 855, 146 N.W.2d at 633.
102. *See id.* at 855, 861, 146 N.W.2d at 633, 637.
103. Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970).
104. *See* text at notes 101 and 102 *supra.*
105. *See* Graham v. Worthington, 259 Iowa 845, 861, 146 N.W.2d 626, 637 (1966).
106. *See* Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970).
107. *Id.*
108. *Id.*; Vermeer v. Sneller, 190 N.W.2d 389, 394 (Iowa 1971).
109. *See* Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970).
110. *See* Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973).

or remedy to which a general statute of limitations applies,[111] while chapter 613A covering state subdivision tort liability created a new right of action, as well as a remedy, to which a special statute of limitations or condition precedent applies.[112] These holdings seem directly contrary since the two chapters give essentially the same tort liability to the state and its subdivisions. If chapter 25A creates only a new liability or remedy to which the general statute of limitations applies, then chapter 613A creates nothing more than that. The mere fact that an already existing notice of claim statute was included in chapter 613A doesn't mean it somehow has been transformed into a special limitation on the tort liability provided by the chapter and should therefore be given special deference by the court.[113] Rather, it is better viewed as a general statute of limitations affecting a remedy only and, being procedural rather substantive, as subject to the ordinary rules of restriction which apply to all limitation statutes generally. It requires no greater deference. Indeed, the court itself has applied these ordinary rules of restriction to section 613A.5, *i.e.*, that "courts do not favor the defense of statute of limitations."[114]

Governmental tort claims acts evidence an intent to grant a remedy to victims of tortious actions on the part of those governments and allow recovery in order to spread the loss incurred by those victims. Notice of claim statutes of limitation unduly restrict this right of recovery. Such restriction is contrary to the general intent and purpose of the acts and to the trend to limiting sovereign immunity. "The law should be progressive; it should advance with changing conditions."[115] The weight of authority is not yet on the appellant's side but justice is. As a result of this decision large numbers of plaintiffs seeking recovery against municipalities for their damages will continue to be denied their day in court.

DEAN POWELL

111. *See* IOWA CODE § 25A.13 (1973).
112. *See* Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970).
113. *See* text *supra* at notes 80 and 81.
114. Vermeer v. Sneller, 190 N.W.2d 389, 394 (Iowa 1971); Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970).
115. *See* Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 357, 127 N.W.2d 606, 618 (1964) (dissenting opinion).

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