Building Code Enforcement and Inspections

A Look at Municipal Liabilities, Immunities, and the E2 Nightclub Case

— by Michael D. Bersani and Christopher J. Beck —

On February 17, 2003, in a tragedy that made news across the nation, 21 club-goers died while trying to evacuate the E2 nightclub in Chicago.[1] Just a few days later, a similar tragedy occurred at a club in Rhode Island, where a fire killed 98 people attending a rock concert.[2] Even before the shock of the tragedies had worn off, questions inevitably turned to the issues of fault and liability. As more facts became public in the E2 disaster, it was discovered that the City of Chicago had previously cited the nightclub for violations of its building codes, and that the club's continued operation violated a court order.[3] Subsequently, lawsuits were filed against the club owners and the City of Chicago.

As a result of the E2 nightclub and Rhode Island tragedies, public officials naturally wondered whether similar tragedies could occur in their communities. Many local governments have stepped up their code enforcement activities to prevent such occurrences. In addition, municipal attorneys around the country are being asked for opinions on the liability risks that their clients face for building code enforcement and inspection activities. Using the facts surrounding the E2 nightclub tragedy against the backdrop of Illinois law, this article will provide municipal attorneys with a primer on municipal liability and immunity with regard to such issues.

The E2 Nightclub Tragedy

In May 2002, the City of Chicago filed a housing complaint against the E2 nightclub owners based upon the City's allegation that the building was "dangerous, unsafe and uncompleted for use by patrons."[4] In particular, the owners were cited for failing to provide adequate exits at the ground and second floor levels. There was also evidence that the building was unsafe and unsound relative to the structural integrity of the roof trusses. In July 2002, a housing court issued an order stating that the second floor of the premises, where the nightclub was located, could not be occupied. The court order was renewed on several occasions in the ensuing months, and the parties were scheduled to appear in court again in March 2003 to determine if the violations had been remedied.

In the months preceding the tragedy, city employees allegedly observed the building's second floor being used by patrons of the nightclub. The police department was routinely called in response to disturbances in and around the nightclub. Reportedly, it was not uncommon to see long lines of people waiting to enter the club. In addition, the police department had allegedly issued a "special attention order" which advised police districts and beat officers that the club was operating in violation of court orders, and that the premises should be monitored to ensure compliance. Thus, the City allegedly allowed the club to continue to operate with the knowledge of the court order and the dangerous conditions of the premises.

In the early morning hours of February 17, 2003, the nightclub was filled with over 1,100 patrons. A disturbance broke out. One of the club's security guards sprayed mace or pepper spray inside the club, causing much of the crowd to panic and rush towards the exit. Reports indicated that some of the exit doors to the nightclub were either blocked or obstructed.[5] As the patrons ran down the stairs from the second floor, an obstruction occurred in the doorway, resulting in a pile-up of people in the stairwell. When it was all over, 21 people were dead and 57 injured as a result of being crushed or suffocated.

Victims and families of victims subsequently brought lawsuits alleging a variety of claims against the City. The principal allegations were that the City knew of the hazardous conditions, including the lack of adequate exits, but nevertheless, allowed the night club to continue operating in violation of the building code and a court order. The City will undoubtedly assert that it owed no duty of care to the patrons of the nightclub. The City will also most certainly assert certain defenses and immunities pursuant to Illinois statute.

Illinois—The Legal Background

In 1965, the Illinois Legislature enacted the Local Governmental and Governmental Employees Tort Immunity Act,[6] which conferred a variety of immunities and defenses on local governments and their officials and employees from civil lawsuits. The statute provides protections in the operation and functioning of local governments, i.e., discretionary and policy-making acts and decisions, ownership and maintenance of public property, law enforcement, jail operations, and fire protection services. In revamping the Illinois Constitution in 1970, the Tort Immunity Act was reinforced,[7] and the General Assembly, therefore, became "the ultimate authority in determining whether a unit of local government is immune from tort liability."[8]

However, in the decades following enactment of the Tort Immunity Act, Illinois courts consistently expanded governmental tort liability. At common law, under what was referred to as the "public duty" rule, a local government could not be held liable for failing to provide adequate municipal services.[9] The rationale was that a municipality owed a duty to provide services to the public at large, and not to specific individuals.[10] A judicial exception was created, however, under circumstances where the municipality had established a special relationship with the injured person such that a duty arose to exercise care not to harm that person.[11] Typically, such a special duty arose in situations where the government affirmatively exercised control or custody over a person and then placed the person in a position of peril.[12]

The fundamental problem with the special duty doctrine was that it had been applied by Illinois courts as an exception to statutory tort immunity, as opposed to tort immunity limiting liability for the breach of a duty of care.[13] In other words, rather than applying the immunities and defenses outlined in the Tort Immunity Act, as mandated by the Illinois Constitution, the Illinois judiciary imposed its own set of rules concerning when and how a local government could be held liable in tort. This misapplication of Illinois law ended with the 1998 decision of the Illinois Supreme Court in *Harinek v. 161 North Clark Street Ltd. Partnership*.[14] In *Harinek*, the court affirmed that duty and immunity were separate issues, and that, therefore, the special duty doctrine had no bearing on whether the Tort Immunity Act immunized local governments from tort liability.[15] Accordingly, in the wake of *Harinek* and subsequent Illinois cases, the proper analysis of a tort case against an Illinois municipality starts first with the question of duty. If an injured plaintiff can establish that the municipality owed a duty of care, it must then overcome some significant statutory immunities conferred upon Illinois municipalities under the Illinois Tort Immunity Act.[16]

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The Duty of Care

The initial question in the E2 nightclub case will be whether the City of Chicago owed the nightclub patrons a duty of care.

In *Ferentchak v. Village of Frankfort*,[17] a village was sued for water damage to a home caused by the foundation grade level being too low to prevent water seepage, although it was not in violation of the village's minimum height regulation. The village had inspected the construction of the house, required compliance with its minimum code requirements, and suggested alterations to the house's design in order to meet those requirements. While the plaintiff claimed that the village assumed a duty once it took these affirmative actions, the Illinois Supreme Court disagreed, holding that the village owed no duty of care merely because it enforced the minimum safety standards for homes built in its community.[18]

The duty question was also addressed in *Fryman v. JMK/Skewer*,[19] which involved a suit brought by some restaurant patrons who became sick with food poisoning. They alleged that the county had become aware that the restaurant was serving contaminated food, but had taken no action to close the restaurant or warn patrons of the potential contamination. The Illinois Appellate Court held that the county owed no duty of care merely by failing to enforce its laws.[20] At most, the duty to enforce laws was owed to the general public, and Illinois law did not recognize a duty of care to the particular plaintiffs.[21] In *Arizzi v. City of Chicago*,[22] a mother brought suit against the city for injuries her child suffered when playing on a defective porch on property that the city had previously

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declared a nuisance. Similar to the situation with the E2 nightclub, the city had obtained a court order directing the building owner to board up and secure the building for numerous safety violations, including the defective porch. The court held that the city owed no duty of care to the plaintiff, stating that, although the city was aware of the dangerous porch, it did not know that the particular plaintiff was on the porch or that she was in any particular danger.[23] The *Arizzi* court relied principally on *Stigler v. City of Chicago*.[24] In *Stigler*, the mother of a child injured from ingesting lead paint brought suit against the City of Chicago for its negligent failure to enforce certain provisions of its housing code. The Illinois Supreme Court found no duty of care existed, as liability under such circumstances could dissuade the city from enacting ordinances which protected the public and therefore, the public would lose the benefit of such salutary legislation.[25]

In contrast to the above decisions, the Illinois Appellate Court, in *Marshall-Putnam Farm Bureau, Inc. v. Shaver*,[26] found that a special duty of care existed in a case involving a city's alleged failure to seek the demolition or repair of an abandoned building which had collapsed and damaged an adjacent building. The plaintiff alleged that the city actually knew of the dangerous condition and had been asked by the plaintiff to remedy the condition. However, the decision in *Marshall-Putnam* has been called into question by several subsequent cases.[27]

In light of the above case law, it should prove difficult for the E2 plaintiffs to state a cause of action based on the existence of a legal duty of care. While the E2 plaintiffs have alleged that the City of Chicago had actual knowledge of dangerous conditions and failed to act, the City will undoubtedly argue that these facts do not create a duty of care under the weight of authority in Illinois.

The Illinois Tort Immunity Act

Should the E2 plaintiffs establish that the City of Chicago owed them a duty of care, the plaintiffs must then negate the applicability of the Illinois Tort Immunity Act. Specifically, local public entities and employees are immune from liability for injuries resulting from a failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property other than its own property.[28] The Act also immunizes local governments from liability for failing to enforce any laws,[29] and from liability caused by the issuance, denial, suspension or revocation of any permit, license or similar authorization.[30] The language of the above statutes is unqualified and, therefore, the immunities are absolute.[31]

In *Rascher v. City of Champaign*,[32] a fire occurred in a building resulting in the death of a tenant. The city had inspected the building prior to the fire, and allegedly failed to discover the absence of self-closing doors, which were a code requirement. The plaintiff argued that the city voluntarily undertook to inspect the building and accordingly, could be held liable for negligence, notwithstanding tort immunity. The plaintiff also argued that the city failed to warn tenants of the dangerous conditions. The Illinois Appellate Court soundly rejected these arguments, holding that the city's immunity for liability arising out of building code inspections was very broad and included any negligence resulting from the inspection process, the failure to discover dangerous conditions, or give warning of the conditions.[33]

In *Devonshire v. Harper*,[34] a city was sued for failing to cause the demolition of a partially collapsed building. It was alleged that the city had inspected the building and had mailed a demolition notice to the owner, but thereafter, failed to take any further action. The court affirmed a dismissal of the suit based on statutory immunity grounds, finding that the city enjoyed immunity from claims arising out of its failure to seek demolition of the building, failure to enforce its laws, and failure to conduct an adequate inspection.

The above provisions of the Illinois Tort Immunity Act, as applied in *Rascher* and *Devonshire*, present significant impediments to a successful lawsuit by the E2 plaintiffs. The City will argue persuasively that the alleged misconduct was nothing more than a failure to enforce its building code more aggressively, or the fault of an inadequate building code inspection. The City may also invoke another provision of the Tort Immunity Act, which immunizes public employees from liability for making discretionary decisions.[35] In other words, the City's decision not to close down the nightclub or seek more aggressive remedies was discretionary and involved policy considerations which do not give rise to tort liability, even if such discretion is abused.[36] To the extent that the E2 plaintiffs claim that the City failed to provide adequate police protection, the City would also be entitled to statutory immunity from such liability.[37]

The E2 plaintiffs may also claim that the City had already begun to enforce the law and, therefore, Chicago could be held liable if the conduct of its personnel was found to be wilful and wanton. A provision of the Illinois Tort Immunity Act immunizes public employees from liability for enforcing or executing the law, except where the employee acts in a wilful and wanton manner.[38] However, this claim will likely fail because the crux of the E2 litigation against the City is that it *failed* to act in enforcing the law, not that it enforced the law in a wrongful manner.

Other Jurisdictions

Other state courts have reached similar conclusions in reviewing municipal liability for failing to enforce building codes or negligently conducting code inspections. For example, in *Hoffert v. Owatonna Inn Towne Motel, Inc.*,[39] the plaintiffs alleged that the city was liable for allowing stairways to be built in violation of the city's building codes. The Minnesota Supreme Court rejected municipal liability, stating that building codes and inspections were intended to ensure that construction met certain standards in order to protect the public, but were not meant as an insurance policy or a guarantee that every building complied with those standards.[40]

In *Bosch v. Hain*,[41] the plaintiffs brought suit against the City of

Hoboken, New Jersey after 21 people were killed in a multiple-unit dwelling fire. In the course of a prior inspection of the property, a city inspector found one-hundred and ninety life-threatening building code violations. However, the fire occurred before the owner could respond to the city's notice of violation. The court sided with the city, stating that the allegations related to a failure to enforce the law, rather than any wrongdoing in the actual inspection. Applying the New Jersey immunity statute, the court found that the city was absolutely immune from liability.

It is insightful to note that the *Bosch* opinion quoted extensively from a 1963 report of the California Law Revision Commission regarding its immunity Act, which served as the model for Illinois and other states.[42] The report cited the salutary benefits of building codes and inspections, and stated that governmental entities should not be dissuaded from such activities for fear of liability.[43] The report stated that the better public policy was to leave the injured person with a claim against the person who actually caused the injury, rather than imposing additional liability on the local government for negligently failing to prevent the injury.[44]

Another New Jersey case, *Bombace v. City of Newark*,[45] had facts similar to the E2 case. In *Bombace*, four children died in an apartment fire. The city had initiated legal proceedings against the building owner for building code violations, but ultimately terminated the court proceedings before the fire. At issue was whether the city's conduct was a *failure to enforce* the law, for which the city would be absolutely immune, or whether the conduct constituted *enforcement* of the law, for which the city would only be entitled to good faith immunity. The court concluded that the termination of the enforcement proceedings was simply a failure to enforce the law, for which the city was immune.[46]

Conclusion

In a world of limited resources it is simply not possible for public entities to find every building code violation or ensure that every code violation is remedied in a timely, effective, and good faith manner. Many states like Illinois have recognized this reality and have attempted to protect local governments from potentially limitless liability through a narrow view of the duty doctrine and expansive application of statutory immunity. The E2 case should not prove anything different.

Notes

1. *See, e.g.*, Jeff Flock, *Chicago overwhelmed by nightclub deaths*, CNN News, February 25, 2003 at http://www.cnn.com/2003/US/Midwest/02/18/btsc.flock.
2. *See, e.g.*, Amy Forliti, *Nobody Had a Chance*, ABC News, Feb. 21, 2003 at http://abcnews.go.com/sections/us/Primetime/clubfire030221.html.
3. *See, e.g.*, *Judge Blocks Charges Against E2 Owners*, CNN News, February 19, 2003 at http://www.cnn.com/2003/US/Midwest/02/18/chicago.nightclub.
4. The following facts were taken from a variety of newspaper and Internet articles, as well as from the complaints of some of the plaintiffs, and, in particular, the complaint filed in Jefferson v. Epitome Restaurant and Night Club d/b/a E2, et al., No. 03 002202 (Cook County Cir. Ct., filed Feb. 21, 2003).
5. Some of the E2 complaints allege, on information and belief, that the doors in question "were jammed closed and locked by an unknown Chicago police officer." *Id.* at par. 16, count 7. While such an allegation has obvious implications on the litigation, such intentional acts are beyond the scope of this article, and will not be addressed in the remainder of the discussion.
6. 745 Ill. Comp. Stat. 10/1-101, *et seq.* (2002).
7. The Illinois Constitution states: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished." Ill. Comp. Stat. Constitution, Art. XIII, § 4 (2002).
8. Burdinie v. Village of Glendale Heights, 565 N.E.2d 654, 660 (Ill. 1990).
9. *See* , *e.g.*, Huey v. Town of Cicero, 243 N.E.2d 214 (Ill. 1968).
10. *Id.* at 216.
11. *Id.*
12. *Id.*
13. Harinek v. 161 North Clark Street Ltd. Partnership, 692 N.E.2d 1177, 1183-84 (Ill. 1998).
14. *Id.*
15. *Id.* at 1183.
16. Obviously, the issues of proximate cause and damages are the final elements to any tort case. However, those issues are beyond the scope of this article.
17. 475 N.E.2d 822 (Ill. 1985).
18. *Id.* at 827.
19. 484 N.E.2d 909 (Ill. App. Ct. 1985).
20. *Id.* at 911.
21. *Id.*
22. 559 N.E.2d 68 (Ill. App. Ct. 1990).
23. *Id.* at 71.
24. 268 N.E.2d 26 (Ill. 1971)
25. *Id.* at 29.
26. 299 N.E.2d 10 (Ill. App. Ct. 1973).
27. *See* Devonshire v. R.W. Harper, 416 N.E.2d 59, 60 (Ill. App. Ct. 1981) and Lakeside Condominium C Ass'n by Bd. of Directors v. Frediani Developers, Inc., 482 N.E.2d 665, 667 (Ill. App. Ct. 1985).
28. 745 Ill. Comp. Stat. 10/2-105, 10/2-207 (2002).
29. *See id.* 10/2-103 and 10/2-205.
30. *See id.* 10/2-104 and 10/2-206.
31. *See* Village of Bloomingdale v. CDG Enterprises, Inc., 752 N.E.2d 1090, 1099-1101 (Ill. 2001) (absent express exceptions for wilful and wanton misconduct or corrupt or malicious motives in the language of the immunity statute, absolute immunity was conferred upon the local government).
32. 634 N.E.2d 1121 (Ill. App. Dist. 1994).
33. *Id.* at 1123.
34. 416 N.E.2d 59 (Ill. App. Dist. 1981).
35. 745 Ill. Comp. Stat. 10/2-201 (2002).
36. *Id.*; In re Chicago Flood Litigation, 680 N.E.2d 265, 273 (Ill. 1997).
37. 745 Ill. Comp. Stat. 10/4-102 (2002).
38. *See id.* 10/2-202.
39. 199 N.W.2d 158 (Minn. 1972).
40. *Id.* at 160.
41. 445 A.2d 465 (N.J. Super. Ct. Law Div. 1982).
42. Cal. Law Revision Commission, Recommendation Relating to Sovereign Immunity (1963).
43. 445 A.2d at 471.
44. *Id.*
45. 593 A.2d 335 (N.J. 1991)
46. *Id.* at 341. **ML**

In Our Next Issue: In the September/October issue, the *Municipal Lawyer* looks at SARS—dealing with a potential epidemic from the Toronto perspective; the "prompt judicial review" requirement in licensing; holiday displays on public property; and do's and don'ts in regulating parades and demonstrations.