

Liabilities and immunities: An outline of the Illinois Local Governmental and Governmental Employees Tort Immunity Act

By Mike Bersani, Itasca

I. Introduction.

A. Tort Immunity Act was enacted in 1965 in response to Illinois Supreme Court's abolishment of common law sovereign immunity. *See Moliter v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

B. 1970 Constitution, Article XIII, section 4, abolished all forms of governmental immunity except as provided for by the General Assembly.

C. Act is divided into 10 Articles. The focus of this presentation will be on the most litigated immunities particularly those contained in Article 2 (general immunities), Article 3 (injuries on public property), Article 4 (police), and Article 5 (fire).

II. Overview of the Act (745 ILCS 10/1-101 *et seq.*).

A. Purpose of Act.

1. To protect public entities and employees from liability arising from the operation of government (745 ILCS 10/1-101.1).

2. Act grants only immunities and defenses. It does not create duties (although it may codify some common law duties).

B. "Local Public Entity" broadly defined (745 ILCS 10/1-206).

* Includes not-for-profit corporation organized for the purpose of conducting public business.

* *McQueen v. Shelby County*, 730 F. Supp. 1449 (C.D. Ill. 1990)(not for profit mental health center receiving 90% of funding from county and formed to serve mental health interests of the people of the county was a local public entity).

* But see

* *Hills v. Bridgeview Little League Association*, 713 N.E.2d 616 (1st Dist. 1999)(little league associations is not a local public entity).

* *Johnson v. Decatur Park District*, 301 Ill. App. 3d 798, 704 N.E.2d 416 (4th Dist. 1998)(YWCA is not a local public entity).

C. "Employee" does not include independent contractors (745 ILCS 10/1-202).

D. Act does not affect liability based on contract, operation of a common carrier, any entity organized under the Metropolitan Transit Authority Act, workers' compensation, wrongful demolition, Illinois Criminal Conviction Act (745 ILCS 10/2-101).

E. Absent an express statutory exception, the Act provides immunities to negligence and willful and wanton conduct. *Henrich v. Libertyville High School*, 186 Ill.2d 381, 712 N.E.2d 298 (1998).

III. General immunities and defenses.

A. Punitive damages are not recoverable against local public entities, or against public officials who serve in official executive, legislative, quasi-legislative, or quasi-judicial capacities (745 ILCS 10/2-102, 2-213).

* Local public entity may not indemnify employees for punitive damages

(745 ILCS 10/2-302).

B. No liability for adopting a law, failing to adopt an enactment, or failing to enforce any law (745 ILCS 10/2-103, 2-205).

C. No liability for issuing, denying, suspending or revoking permits and licenses or similar authorizations (745 ILCS 10/2-104, 2-206).

D. No liability for failing to inspect or negligently inspecting property other than municipally owned property (745 ILCS 10/2-105, 2-207).

1. No liability for negligent building code inspection. *Rascher v. City of Champaign*, 262 Ill. App. 3d 592, 634 N.E.2d 1121 (4th Dist. 1994).

2. No liability for negligent enforcement of health/safety codes. *Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 475 N.E.2d 822 (1985).

E. Oral promises and misrepresentations.

1. Local public entity not liable for injury caused by oral promise or misrepresentation of its employee whether negligent or intentional

(745 ILCS 10/2-106).

2. Employee not liable for negligent misrepresentation (745 ILCS 10/2-210).

F. Local public entity not liable for libel or slander committed by its employees

(745 ILCS 10/2-107).

* No immunity for allegedly libelous statements published by village trustee in newsletter mailed to constituents, because statements were not within scope of legislative duties. *Meyer v. McKeown*, 266 Ill. App. 3d 324 (3d Dist. 1994).

G. Local public entity not liable if employee is not liable (745 ILCS 10/2-109)

H. Policy making employees not liable for exercising discretion or discretionary acts or omissions (745 ILCS 10/2-201).

1. Section 2-201 concerned with the type of position held by the employee (policy) and the type of action performed or omitted by the employee (discretionary versus ministerial). Therefore, actions immunized under section 2-201 must be both an exercise of discretion and a policy determination. *Harinek v. 161 North Clark Street Ltd.*, 181 Ill. 2d 335, 692 N.E.2d 1177 (1998).

2. Is employee required to balance competing interests and make a judgment call as to what solution will best serve each of those interests? If so, immunity applies.

3. Is act ministerial, i.e, performed on a given set of facts in a prescribed manner, in obedience to the mandate of legal authority and without reference to the employee's discretion as to the propriety of the act? If so, no immunity.

* *LoCoco v. XL Disposal Corp.*, 307 Ill. App. 3d 684, 717 N.E.2d 823 (3d Dist. 1999) (township road district's placement of stop bar lines on road without corresponding installation of traffic signs as required by intergovernmental agreement with IDOT and State Manual and Specifications was a ministerial act negating applicability of section 2-201 immunity).

I. No liability for executing or enforcing the law except if conduct is wilful and wanton (745 ILCS 10/2-202).

* Police and other emergency responses, high speed pursuits, arrests, etc.

* However, not every activity of police officer is protected by immunity (i.e., routine patrol, transporting prisoners, investigating missing person report)

* Conflicting case law:

* Duty expressed in Illinois Vehicle Code requiring police and emergency personnel to refrain from negligence in driving prevail over statutory immunities under Tort Immunity Act. *Bradshaw v. City of Metropolis*, 293 Ill. App. 3d 389 688 N.E.2d 332 (5th Dist. 1997).

* Tort Immunity Act (Section 2-202) provides broader immunity to public employees than Illinois Vehicle Code, disagreeing with *Bradshaw*. *Carter v. DuPage County Sheriff*, 304

Ill. App. 3d 443, 710 N.E.2d 1263 (2d Dist. 1999).

J. No liability for instituting judicial or administrative proceedings unless malicious and without probable cause (745 ILCS 10/2-208).

K. No liability for entry upon property where entry is authorized by law (745 ILCS 10/2-209).

IV. Immunities and defenses relating to injuries occurring in the use of public property.

A. "Public property" defined as real or personal property owned or leased by a local public entity, but does not include easements, encroachments and other property located on public property but which the public entity does not own, possess or lease (745 ILCS 10/3-101).

* No duty to maintain premises leased to tenant. *Engram v. CHA*, 304 Ill. App. 3d 570, 710 N.E.2d 18 (1st Dist. 1999).

B. Anatomy of section 3-102.

1. Duty of care: to exercise ordinary care to maintain public property in a reasonably safe condition so that a person acting with ordinary care will not be injured.

a. No duty to make initial public improvements.

b. Duty arises only once improvement is made.

c. Duty exists even if plaintiff uses property negligently. Thus, even if duty is breached, even a negligent plaintiff may recover to the extent permitted under principles of comparative negligence. *Wagner v. City of Chicago*, 166 Ill. 2d 144, 651 N.E.2d 1120 (1995).

* Sidewalks--minor defects.

* Courts recognizes that sidewalks cannot be perfectly level. Thus, defects up to 1 - 1/8 inches do not give rise to a duty of care. *Cooks v. United States*, 815 F.2d 34 (7th Cir. 1987); *Warner v. City of Chicago*, 72 Ill. 2d 100, 378 N.E.2d 502 (1978).

* But, defect between 1-1/2 and 2 inches could give rise to liability if city had constructive notice of defect. *Hess v. City of Chicago*, 101 Ill. App. 3d 426, 428 N.E.2d 581 (1981).

* Potholes.

* Liability depends on (a) size and depth of hole (b) whether hole was natural or man made (c) length of time hole was allowed to exist (d) foreseeability of injury (e) notice. *Ten Eicken v. Johnson*, 1 Ill. App. 3d 165, 273 N.E.2d 633 (1st Dist. 1971).

2. Proper plaintiff: intended and permitted user.

a. Test: look to nature of property itself to determine the intended use. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 592 N.E.2d 1098 (1992).

* An intended user of property is, by definition, also a permitted user; but, a permitted user of property is not necessarily an intended user. *Boub v. Township of Wayne*, 183 Ill. 2d 520, 702 N.E.2d 535 (1998).

* It is the intent of the local public entity that controls. Look to ordinances, codes, as well as physical manifestations, including markings, signs, and the historical use of the property. *Boub*.

b. Streets, crosswalks and alleys:

* Crossing street outside protected crosswalk not an intended and permitted use. *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 651 N.E.2d 1115 (1995).

* Narrow exception recognized for pedestrian entering or exiting a legally parked vehicle, (*Curatola v. Village of Niles*, 154 Ill. 2d 201, 608 N.E.2d 882 (1993)), or stepping into street to see if bus is coming. *Evans v. City of Chicago*, 268 Ill. App. 3d 924, 645 N.E.2d 242 (1st Dist. 1994).

* But, no duty of care owed to pedestrian who stepped out of taxicab into traffic lane. *Scarse v. City of Chicago*, 272 Ill. App. 3d 903, 651 N.E.2d 690 (1st Dist. 1995).

* A pedestrian walking in an alley is a permitted but not an intended user of the alley, because alleys are designed for vehicular traffic. *Thomas v. Town of Cicero*, 719 N.E.2d 187 (1st Dist. 1999).

* Additionally, a truck driver who was illegally parked in alley, was not an intended user of alley when he twisted his foot on uneven pavement. *Montano v. City of Chicago*, 1999 WL 973637 (1st Dist. 10/26/99).

* But, a pedestrian who, while crossing an alley from one sidewalk to another, tripped on uneven pavement in the alley was an intended user of area where sidewalk intersected alley.