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Illinois Governmental Tort Immunity Handbook

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Tort Immunity Handbook

ABOUT THE AUTHORS

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., was founded in 1931, and represents many municipalities, school and park districts and special governmental bodies, both as regular and special counsel. The law firm has the highest rating granted by the *Martindale-Hubbell Law Directory* and is a listed firm in *Best's Directory of Recommended Insurance Attorneys*. Over thirty years ago, the firm attorneys helped to develop the first governmental self-insurance pool in Illinois. The firm represents many pools as corporate and defense attorney. It is also employed as defense counsel by insurance companies and self-insured entities. The firm's 35 or more attorneys work out of permanent offices in Chicago and Vernon Hills, with satellite offices in DuPage, McLean and McHenry counties.

Stewart H. Diamond was educated at the University of Chicago and University College at Oxford University. He is a past chairman of the Local Government Section Council of the Illinois State Bar Association and served as the founding editor of the *Illinois School Law* and *Municipal Law and Practice in Illinois* Handbooks published by the Illinois Institute for Continuing Legal Education. He has participated in the drafting of major amendments to the Tort Immunity Act and has tried a number of landmark cases at the appellate court level which have interpreted that Act.

Thomas G. DiCianni received his undergraduate degree from the University of Illinois in Chicago and his J.D. Degree from DePaul University. He is one of the principal trial court attorneys for the law firm and has defended many cases in Cook and the collar counties. He is past Chairman of the Chicago Bar Association's Federal Practice Committee, and Vice-Chair of the national Defense Research Institute's Governmental Liability Committee. He has written and lectured on school and municipal law, employment matters, tort law, trial advocacy and public entity liability.

Robert K. Bush received his Bachelor's Degree from the College of William and Mary and his J.D. Degree from Boston University School of Law. He has handled many cases at the trial and appellate court levels relating to the tort liability of a variety of governmental bodies. He has helped organize many Illinois governmental self-insurance pools and serves as the corporate and chief defense attorney for pools representing municipalities, school districts and park districts. He has given numerous presentations at state and national conferences on municipal law, employment law, civil rights, tort liability and worker's compensation topics.

CHAPTER I. ACKNOWLEDGMENT

The authors wish to acknowledge John Reding for his assistance in updating this edition of the Handbook.

ILLINOIS GOVERNMENTAL TORT IMMUNITY HANDBOOK

INTRODUCTION -- WHO CAN USE THIS HANDBOOK

This Handbook can provide assistance to officials of all types of Illinois local governments and school districts. There are separate sections devoted to schools and other sections relating to claims arising out of property ownership and maintenance which will be especially useful for municipalities, park districts and townships. There are sections relating to liability centered on law enforcement, fire protection and the provision of medical services. These special risks are blended with a general discussion of the scope of Illinois governmental tort immunity. More than thirty years ago, members of this law firm played a prominent role in the development of the first governmental self-insurance pools in Illinois. As part of that process, we prevailed before the Illinois Supreme Court in the case of *Antiporek v. Vill. of Hillside*, 135 Ill. App. 3d 871, 482 N.E.2d 415 (1st Dist. 1985), *aff'd and remanded*, 14 Ill. 2d 246, 499 N.E.2d 1307 (1986), which established that governmental self-insurance pools were entitled to the protections provided by the Illinois Tort Immunity Act. That ruling distinguished governmental pools from conventional insurance companies which were, at that time, precluded by law from availing themselves of any statutory immunities on behalf of their governmental insureds. In 1986, we contributed in helping to draft Tort Immunity Act amendments which enhanced the protections provided by the Act and extended tort immunity benefits to insurance companies providing coverage for public entities. Over the last thirty years, we have defended several thousand cases at the trial court level, and have taken many cases to appellate courts, where the provisions of the Tort Immunity Act have been interpreted and generally expanded. This Handbook describes the origins, development, and current status of this important and beneficial legislation.

Before the creation of governmental pools and before the *Antiporek* decision, the only entities which could use the Tort Immunity Act in Illinois were individually self-insured governmental bodies or their employees and officers. Thus, most governmental officials, insurance brokers, insurance companies, claims adjusters, and attorneys who specialized in tort law had little knowledge or experience with the use and effect of tort immunity defenses. Attorneys who filed lawsuits against governmental bodies assumed that settlements could easily be negotiated with insurance companies at some "rule-of-thumb" standard.

Soon, however, plaintiffs' lawyers began to discover that lawsuits filed against pools were not being defended in the usual manner. Most pools directed their defense attorneys to put up a vigorous fight and use the Tort Immunity Act to devise imaginative means of disposing of claims. The change of attitude came about because the defense attorneys encouraged their clients that a reasonable interpretation of the Tort Immunity Act would turn many plaintiff "sure winners" into "sure losers." Our argument, still in effect today, was that the use of immunities and other defenses would be cost effective.

In those early years, the surprise in the plaintiffs' bar was matched by similar feelings amongst insurance professionals, including some of the companies which served as third-party administrators ("TPAs"). These TPAs were familiar with processing claims on behalf of insurance companies. It was unclear to them why the attorneys for these new governmental self-insurance pools were working so aggressively to defend cases, many of which had previously

resulted in settlements. There was some skepticism among the claims administrators that the more aggressive defense would simply increase costs without any beneficial effect on the total claim expense. But, after several years, during which many cases were dismissed without the payment of anything to plaintiffs or their lawyers, sophisticated third-party administrators began to appreciate that an aggressive use of the Tort Immunity Act would reduce the overall contributions from members to the governmental pools. Now most TPAs work knowledgeably with attorneys to fully utilize the provisions of the Tort Immunity Act.

This aggressive defense authorized by many pools also surprised two other groups. Some trial court judges, in the beginning, gave less than a full consideration to tort immunity defenses assuming that, as always, the parties could be pushed towards a traditional settlement. Governmental pools, while choosing their cases carefully, did not hesitate to call these judges to task. Cases where judges refused to reasonably extend tort immunity defenses to governmental bodies were appealed. The results were extremely positive. The appellate courts understood that the General Assembly meant for the Tort Immunity Act to reduce the costs paid by the government for tort judgments. Appellate courts, by and large, supported both standard and innovative tort immunity defenses. The trial court judges, who, for both political and personal reasons, detested being reversed, eventually began paying more attention to legitimate arguments centered on the Tort Immunity Act.

The plaintiffs' bar also viewed these appellate cases with great attention. Soon, governmental pools were seeing fewer cases filed against them in areas where strong tort immunity defenses were available. Even where cases were filed, plaintiffs' lawyers were much more prone to settle the cases at reduced amounts at an early stage, before full tort immunity defenses were completely presented. Third-party administrators saw fewer and fewer "nuisance" cases from high-volume law firms whose lawyers had always assumed that settlements could quickly be reached against "deep pocket" governmental defendants.

The purpose of this Handbook is to present, principally for non-lawyers, the history of the Tort Immunity Act and how it has been used in the actual defense of cases. It is designed first for elected and appointed public officials who are curious about how their contributions to governmental self-insurance pools or insurance premiums are spent. A review of its pages should allow those officials to explain to their citizens why their government no longer pays claims which might, in earlier times, have been paid by insurance companies. We will explain why governments are granted certain immunities and how those immunities affect certain kinds of lawsuits. Governmental officials must understand these immunities to be vigilant and to defend them against repeated efforts in the legislature to cut back on what we have fought so hard to create and maintain. All governmental bodies should be prepared to settle cases with bad fact patterns and shabby tort immunity defenses. The old proverb that "Bad cases make bad law," continues in effect today. This Handbook can also serve as a primer for those who are asked to serve on the board of a governmental self-insurance pool, or who are trying to decide whether their governments should join such a pool.

Finally, it is written for insurance professionals, including third-party administrators, who may not be familiar with the ways in which the defense of governmental bodies differs from the approach taken by entities in the private sector. This Handbook will be especially helpful for claims administrators who have had extensive experience with private sector clients and have begun to represent public sector defendants. It should help such third-party administrators to understand why public sector defense attorneys will frequently recommend further defense efforts before settlement discussions begin.

At many places in this Handbook, we refer to particular cases and include the place where they can be found in the published reports of cases. In almost every case, our reference is to a decision of an appellate court. Your attorney can easily furnish you with copies of any of these decisions. At many places shown in the Table of Contents, there are sections entitled Claim Evaluation Checklist and Loss Prevention Ideas. Our hope is that this pamphlet will not only increase your knowledge in these areas, but point you in a direction where claims can be avoided or lessened.

We dedicate this Handbook to the wisdom, courage, and foresight of those governmental officials and insurance professionals whose efforts helped governmental self-insurance pooling to begin. It is also written for a new generation of professionals who, armed with some history and a survey of current law, can keep self-insurance programs financially and creatively competitive. Insurance companies which can be in charge of the defense of cases either at a primary or excess level should be prepared to carry out a defense strategy which fully utilizes the benefits of the Tort Immunity Act. Insurance companies and their claims administrators should be able to use and build upon the expansion of tort immunity where governmental pools have been the pioneers. Ancel Glink attorneys now in our 87th year representing governmental bodies have more experience than any other firm in Illinois in this decades-old process. We look forward to helping our clients continue their philosophy of fairly paying justified claims and actively resisting frivolous claims and excessive demands.

OUTLINE

The materials contained in this Handbook provide an overview of governmental tort liability and the immunities available to public entities and their employees in Illinois when involved in litigation either in state or federal court. The Handbook is categorized by the type of claim alleged in the litigation. Chapter I addresses general principles of tort liability. Chapter II addresses the immunities generally available to all governmental entities and their employees under the Tort Immunity Act. Chapter III relates to claims involving governmental property. Chapter IV addresses *in loco parentis* immunity available to school districts and their employees under the Illinois School Code. Chapter V discusses the immunities and defenses available for police services. Chapter VI discusses tort immunity for fire and emergency medical services. Chapter VII discusses the immunities which apply to federal civil rights claims. Chapter VIII covers tort immunity available to medical, hospital, and public health activities.

TABLE OF CONTENTS

CHAPTER II. GENERAL PRINCIPLES OF TORT LIABILITY

A. Historical Background

The concept of governmental immunity has long been recognized in Illinois. Prior to 1959, governmental bodies and their employees and officers enjoyed broad common law immunity under the doctrine of sovereign immunity—the principle that the "King can do no wrong." In 1959, in the case of *Molitor v. Kaneland Cmty. Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960), the Illinois Supreme Court effectively abolished sovereign immunity from tort liability. In response to the *Molitor* decision and other cases which followed, the Illinois legislature enacted the Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act").[1]

The purpose of the Tort Immunity Act is to protect local public entities and public employees from some, but not all, liability arising from the operation of government. 745 ILCS 10/1-101.1(a). The Act does not create any new duties that governmental officials must follow. Nor did it create liabilities for negligent conduct which did not previously exist. *Hannon v. Counihan*, 54 Ill. App. 3d 509, 369 N.E.2d 917 (2nd Dist. 1977). In addition, the Act expressly provides that any defense or immunity, granted by common law or statute, available to public entities and their employees before the Act was enacted, may also be asserted.[2]

B. Local Public Entities

The Tort Immunity Act applies to "*local public entities*," a term which excludes the state or any state office, officer, department, division, bureau, board, commissioner, university, or similar agency. Otherwise, local public entities are broadly defined to include: counties, townships, municipalities, municipal corporations, school districts, school boards, community college districts, community college boards, forest preserve districts, park districts, fire protection districts, sanitary districts, museum districts, library systems, all other local governmental bodies, any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act, and any not-for-profit corporation organized for the purpose of conducting public business.[3] See *O'Toole v. Chicago Zoological Soc.*, 2014 IL App (1st) 132652, ¶ 28 (holding that, while the Brookfield Zoo was a not-for-profit corporation, it was not a local public entity under the Act because it did not conduct public business).

C. Public Employees

The immunities found in the Tort Immunity Act protect "*public employees*" from liability from certain acts or omissions performed while working at their jobs. Section 1-207 of the Act

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[1] 745 ILCS 10/1-101, *et seq*.

[2] 745 ILCS 10/1-101.1(b).

[3] 745 ILCS 10/1-206.

defines "Public Employee" as an employee of a local public entity. The term "employee" is also broadly defined to include any present or former:

a. Officer;

b. Member of a board, commission or committee; and

c. Agent, volunteer, servant or employee whether or not compensated.

The term employee does not include an independent contractor.[4] For example, a road contractor hired by a local entity to repave a local road would not be considered a public employee under Section 1-207. See *In re Elk Grove Rural Fire Prot. Dist.*, 148 Ill. App. 3d 921 (1st Dist. 1986) (holding that an independent contractor hired by fire protection district to provide "fire protection services" was not considered an "employee" under the Tort Immunity Act). Similarly, in *Warren v. Williams*, 313 Ill. App. 3d 450, 457 (1st Dist. 2000), the court ruled that a Village attorney was not covered by the Act's protections, where the attorney worked independently from the Village, using his own office and equipment, representing other clients and determining for himself how to conduct his job.

D. Indemnification

Under Section 2-302 of the Tort Immunity Act, if a lawsuit is instituted against a public employee based on an injury to some other person allegedly arising out of conduct which occurred within the scope of that person's employment, the public employer may elect to do one or more of the following:

a. Appear and defend against the claim or action;

b. Indemnify the employee or former employee for the employee's court costs or reasonable attorney's fees, or both, incurred in the defense of such claim or action;

c. Pay or indemnify the employee or former employee for a judgment based on such claim or action, or

d. Pay or indemnify the employee or former employee for a compromise or settlement of such a claim or action.[5]

Courts have held that the local public entity has a choice of which option to pursue. For example, a local public entity may choose to wait until a case is over and only then reimburse the public employee for the amount actually paid by the employee. Most self-insured governments, pools, and insurance companies will involve themselves in the case from the beginning, provide a defense, and pay a judgment or settlement on behalf of the public employee. Sometimes where there is a question about the scope of coverage to be furnished and the ultimate payment of a settlement or judgment, the public employee or the government itself will be defended under a reservation of rights. In that case, a written notice should be provided to the covered party explaining the limitations or questions remaining about the coverage. Usually, a full defense will be provided, but the covered party will be invited to add an attorney at his or her expense if there is a desire to supplement the defense being provided. If a public employee is charged with a

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[4] 745 ILCS 10/1-202.

[5] 745 ILCS 10/2-302.

crime rather than with a tort, and is convicted, the local public entity cannot pay for the employee's criminal defense. *Wright v. City of Danville*, 174 Ill. 2d 391, 675 N.E.2d 110 (1996).

There are also indemnification provisions found in the Illinois School Code[6] and the Illinois Park District Code.[7] Such indemnification and protection from suit extends to persons who are employees of a school or park district, members of school or park board, authorized park district volunteer personnel, school staff mentors, or student teachers whose negligent or wrongful acts are committed within the scope of employment or under the direction of the school or park board. 105 ILCS 5/10-20.20; 70 ILCS 1205/8-20.

E. Scope of Employment and Punitive Damages

Under Illinois law, a public employer may be held liable for the negligent, willful, malicious, or even criminal acts of its employees when those acts are committed "in the course and scope of employment" and in furtherance of the employer's business. *Stern v. Ritz Carlton Chicago*, 299 Ill. App. 3d 674 (1st Dist. 1998). Illinois courts use an objective test in determining whether an employee's acts are within the *scope of employment*. The inquiry will focus not on the employee's subjective intent at the time of the challenged conduct, but instead on the employee's actions, objectively viewed. Acts which are closely connected with what the employee is employed to do will be considered as falling within the meaning of the term "scope of employment." *Wright v. City of Danville, supra*.

However, certain acts may fall within the scope of a person's employment even if the conduct was unauthorized or forbidden by the employer. *Rodman v. CSX Intermodal, Inc.*, 405 Ill. App. 3d 332 (1st Dist. 2010). The outrageousness of an act may be evidence that the employee has gone beyond the scope of his or her employment, but it is not conclusive. For example, in *Sunseri*,[8] the question of whether a bartender exceeded the scope of employment when he bit off a patron's ear in a barroom scuffle was one for the jury. The Local Governmental and Governmental Employees Tort Immunity Act provides that a local public entity may not indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages. 745 ILCS 10/2-302.

F. Relationship between Public Employer and Employees

A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable. 745 ILCS 10/2-109. Because a local government can only act through its employees, the potential tort liability of a public entity is co-extensive with the liability of its employees. For example, if a public employee is immune from suit by virtue of the Tort Immunity Act or other defenses, the public entity for which that employee works is afforded similar protection under Section 2-109 of the Act.[9]

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[6] 105 ILCS 5/10-20.20.

[7] 70 ILCS 1205/8-20.

[8] *Sunseri v. Puccia*, 97 Ill. App. 3d 488, 422 N.E.2d 925, 52 Ill. Dec 716 (1st Dist. 1981).

[9] *Harris v. Thompson*, 2012 IL 112525.

G. Purchase of Liability Insurance Does Not Waive Immunities

When originally enacted in 1965, the Tort Immunity Act contained a provision which waived the immunities available under the Act when a local unit of government purchased liability insurance. In 1986, the Illinois General Assembly revised the Tort Immunity Act. One of the most significant changes in the Act related to the purchase of liability insurance by a local public entity.

When the Act was amended in 1986, Section 9-103 was revised and the waiver provision was eliminated. Section 9-103 now provides: "any insurance company that provides insurance coverage to a local public entity shall utilize any immunities or may assert any defenses to which the insured local public entity or its employees are entitled." 745 ILCS 10/9-103(c). As a result, a public entity may invoke any of the immunities available under the Tort Immunity Act regardless of whether it is self-insured or has purchased conventional insurance. Self-insured governments and pools continue to enjoy certain benefits not available to insurance companies since they are typically not subject to state regulations which cover conventional insurance companies.[10] There are only a few instances in which the statutes that regulate insurance companies make any mention of governmental pools. 215 ILCS 5/107a.03, 5/122-1.

H. Scope of Protection

Although the Tort Immunity Act provides a broad grant of immunities to local public entities and their employees, it does not provide absolute protection against all claims. For instance, the Act applies only to claims which seek monetary damages. The Act expressly provides that it does not apply to cases brought under a breach of contract theory nor does it apply to, among others, claims brought under the Worker's Compensation Act. 745 ILCS 10/2-101. It does not protect against injunction, mandamus or other equitable remedies. *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248, 261 (2004) (deeming Tort Immunity Act inapplicable in context of complaint seeking equitable relief). In addition, the Act does not provide immunities for any claims brought under rights granted by federal law. There are however certain immunities even under federal tort law. They are discussed in Chapter VII.

I. Statute of Limitations and Notice

Before the 1986 Tort Immunity Act amendments, any party bringing an action against a local public entity was required to give the local government written notice that a potential claim existed against it one year from the date that the injury or cause of action accrued.[11] Once notice was given, a lawsuit could be filed within two years of the date of the injury. When the Act was amended in 1986, the notice requirement was repealed, but a shorter statute of limitations of one year was implemented. 745 ILCS 10/8-101.

For claims involving minors and persons under legal disability, the one-year limitation period found in Section 8-101 is tolled by virtue of Section 5/13-211 of the Code of Civil Procedure. As a result, a minor's claim against a local public entity or its employee is timely as long as it is filed within one year of the minor's 18th birthday.[12] This same rule applies to claims

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[10] 5 ILCS 220/6, 220/16.

[11] Ill.Rev.Stat. 1981, ch. 85, par. 8-102.

[12] *Ferguson v. McKenzie*, 202 Ill. 2d 304, 312-13, 780 N.E.2d 660 (2001).

brought by individuals suffering from a "legal disability" as defined by Section 5/13-211. Therefore, an injured party is required to file a cause of action within one year after he or she is no longer legally disabled. A person is not under a legal disability where he or she can comprehend and understand the nature of the injury and its implications.[13]

Significantly, in 2003, the Illinois legislature extended the one-year limitation period for actions arising from "patient care" to two (2) years after the date on which the claimant knew, or through the use of reasonable diligence should have known of the existence of the injury or death for which damages are claimed, but in no event shall such action be brought more than four (4) years after the date of the act, omission or occurrence which caused the injury or death.[14]

The one-year limitation in section 8-101 statute of limitations applies to all civil actions, "whether based upon the common law or statutes or Constitution of this State." See *Snyder v. Vill. of Midlothian*, 302 F.R.D. 231, 234 (N.D. Ill. 2014) (applying the one-year statute of limitations to all common law counts). Furthermore, Section 8-101 applies even if tort immunity does not. In *Copperwood v. Farmer,* the court held that even though the Tort Immunity Act did not extend immunity to acts of public entities, officers, or employees that are willful and wanton, the statute of limitations under the Act still applies. *Copperwood v. Farmer*, 315 F.R.D. 493, 500 (N.D. Ill. 2016).

However, a number of appellate court opinions following *Raintree Homes*, *supra*, have held that Section 8-101 statute of limitations does not apply to any enumerated exceptions under section 2-101, including contract actions, claims for equitable relief, and federal civil rights claims. *Collins v. Town of Normal*, 951 N.E.2d 1285, 1287, 351 Ill. Dec. 621 (4th Dist. 2011); see also *Harvest Church v. City of E. St. Louis*, 943 N.E.2d 1230 (5th Dist. 2011); *United Airlines, Inc. v. City of Chicago*, 954 N.E.2d 710, 352 Ill. Dec. 627 (1st Dist. 2011); *Ballinger v. City of Danville*, 2012 IL App (4th) 110637, ¶ 17 (holding that the one-year statute of limitations contained in Section 8-101 does not apply to claims of wrongful demolition under Section 1-4-7 of the Municipal Code).In *Doe v. Hinsdale Twp. High Sch. Dist. 86*, 388 Ill. App. 3d 995, 1002 (2nd Dist. 2009), the court held that the childhood sexual abuse limitations period in Section 13-202.2 of the Illinois Code of Civil Procedure applied over the Tort Immunity Act reasoning that because Section 13-202.2 began with language stating that "notwithstanding any other provision of law" the legislature intended Section 13-202.2 to control over any other limitations period.

A public entity can also be barred from asserting a statute of limitations defense under the doctrine of *equitable estoppel*. This doctrine applies if the plaintiff can demonstrate some conduct on the part of the public entity or its third-party administrator which misled the plaintiff into believing a claim would be settled regardless of the limitations period or concealed its status as a public entity.[15] In addition, the statute of limitations for filing a federal civil rights claim is not governed by the Tort Immunity Act and is two years rather than one year. *Farrell v. McDonough*, 966 F. 2d 279 (7th Cir. 1992). See *Snyder v. Vill. of Midlothian*, *supra* at 234 (applying a two year statute of limitations).

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[13] *Basham v. Hunt*, 332 Ill. App. 3d 980, 989, 773 N.E.2d 1213, 1222 (1st Dist. 2002).

[14] 745 ILCS 10/8-101(b).

[15] *Halleck v. Cty. of Cook*, 264 Ill. App. 3d 887, 637 N.E.2d 1110 (1st Dist. 1994); *Feiler v. Covenant Med. Ctr. of Champaign-Urbana*, 232 Ill. App. 3d 1088, 598 N.E.2d 376 (4th Dist. 1992).

J. Duty of Care

A basic concept of tort law is that a party cannot recover damages for negligence unless a defendant owed a *duty of care* to the plaintiff and violated that duty. The first issue which your attorney will address when any claim is made is whether any duty of care is owed to the plaintiff under the circumstances. If there is no duty, there is no liability. *Bruns v. City of City of Centralia*, 21 N.E.3d 684 (Ill. 2014). For example, if an injury is caused by a dangerous condition on property owned by the State of Illinois, but which runs through a municipality or other local entity, there is no duty on the part of the local entity to maintain that property absent some agreement. However, if an injury is caused by a defective condition on a local government-owned sidewalk, there is a duty to maintain such property in a reasonably safe condition. But, there may still be an immunity from liability, *i.e.*, on lack of notice, which will protect the local entity from paying any damages. Often tort cases are dismissed against governments when there is no special or specific duty extended or assumed by the government. *Repede v. Community Unit School District No. 300,* 335 Ill. App. 3d 140 (2d Dist. 2002).

K. Ordinary Negligence and Willful and Wanton Conduct

The standard for determining ordinary negligence is whether a governmental entity acted "*unreasonably*" under the circumstances. A governmental entity is not an insurer against all accidents happening within its confines. To be liable, a governmental entity must actually cause an injury by acting unreasonably. Many of the immunities available under the Tort Immunity Act require a plaintiff to establish that the governmental conduct is willful and wanton before liability attaches. The Tort Immunity Act has defined the term "*willful and wanton conduct*" as a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. 745 ILCS 10/1-210.

Willful and wanton conduct goes beyond mere inadvertence and requires a conscious choice of a course of action, either with knowledge of a serious danger to others, or with knowledge of facts that would disclose a danger to a reasonable person.[16] For example, "willful and wanton conduct" may be found where a governmental entity takes no action to correct a dangerous condition, even though it was informed about the condition and it knew that other persons had previously been injured because of the condition. *Dunbar v. Latting*, 250 Ill. App. 3d 786, 621 N.E.2d 232 (3rd Dist. 1993). Traditionally, whether specific acts constitute willful and wanton conduct is a question of fact that is reserved for the jury. However, where the record shows absolutely no evidence that the defendant displayed either an utter indifference to or a conscious disregard for the plaintiff's safety, then the court may properly decide the issue as a matter of law. *Mitchell v. Special Educ. Joint Agreement School Dist. No. 208*, 386 Ill. App. 3d 106, 109 (1st Dist. 2008).

Although the phrase "willful and wanton" has a meaning under the common law, only the statutory meaning is relevant with regard to its use in the Tort Immunity Act. *Tagliere v. W. Springs Park Dist.*, 944 N.E.2d 884, 891 (1st Dist. 2011) ("the legislature [. . .] clearly indicated that it requires the use of the statutory definition of willful and wanton to evaluate the conduct of public entities in Tort Immunity cases to the exclusion of common law definitions").

However, in *In re Estate of Stewart*, the court disagreed with the approach taken in *Tagliere*. The court in *Stewart* stated that "to the extent that common-law precedent is consistent

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[16] *Bezanis v. Fox Waterway Agency*, 967 N.E.2d 393, 359 Ill. Dec. 663 (2nd Dist 2012).

with the statutory definition, it remains instructive. We read the legislator's reference to "other" common-law definitions to mean "inconsistent common-law definitions, as opposed to "all" common-law definitions." *In re Estate of Stewart*, 60 N.E.3d 896, 911, 406 Ill. Dec 345, 360 (2nd Dist. 2016). The court determined that common law precedent on willful and wanton conduct may continue to provide guidance.

L. Contribution Claims

In Illinois, where two or more persons are subject to liability in tort arising out of the same injury to a person or property, there is a right of contribution. Joint Tortfeasor Contribution Among Tortfeasors Act, 740 ILCS 100/2(a). "*Contribution*" is a statutory remedy which involves a sharing of payment of a damage award and is available to all parties who are subject to tort liability arising out of the same injury. For example, in a case where a negligence claim is brought against a public entity arising from an automobile accident resulting from an alleged traffic signal malfunction, the public entity can assert a contribution claim against the electrical contractor responsible for maintaining the light.

Illinois courts have applied the two-year statute of limitations found in Section 5/13-204 of the Code of Civil Procedure to contribution claims brought pursuant to the Illinois Contribution Act, rather than one-year limitations period under Section 8-101 of the Act.[17] However, a plaintiff may not add a third-party contribution defendant as a direct defendant if the relevant statute of limitations has run. *Ponto v. Levan*, 2012 IL App (2d) 110355. In *Ponto*, a plaintiff was injured by a drunk driver whose truck slid on an ice patch caused by a broken water main. The plaintiff could not add the city that maintained the water main as a direct defendant because the one-year limitations period under Section 8-101 had run, even though the city was added as a third-party defendant more than one year after the cause of action arose.

Before a local public entity can be held liable in a contribution action, the entity itself must be subject to tort liability to the plaintiff. If there is no duty owed by a governmental entity or its employees to the plaintiff, the entity is not subject to liability in tort and cannot be sued for contribution.[18] For instance, if a negligence claim is made against a public entity arising from an injury caused by a defect in a roadway which is not owned or maintained by the entity, there is no duty owed to the plaintiff and, therefore, there is no right of contribution. Further, if the plaintiff in a contribution action is an employee of the entity, the amount of the employer's contribution is limited by the Worker's Compensation Act. 820 ILCS 305/1 *et. seq*. No employer may be held liable for a contribution exceeding its obligations under that Act. *Kotecki v. Cyclops Welding Corp.,* 585 N.E.2d 1023, 1027, 146 Ill. 2d 155, 166 Ill. Dec. 1 (1991). Finally, if the public entity and its employee are immune from liability under the Tort Immunity Act, there is no contribution claim.

M. Joint and Several Liability

Before 1986, under Illinois law, all defendants against whom a judgment was entered were jointly and severally liable for the entire verdict. For example, if a defendant was found 1% at fault in causing an injury, that defendant was potentially liable for the entire verdict. However, in 1986, the Illinois legislature enacted Section 2-1117 of the Illinois Code of Civil Procedure,

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[17] *Brooks v. Illinois Cent. R.R. Co.*, 364 Ill. App. 3d 120, 846 N.E.2d 931 (1st Dist. 2005).

[18] *Martin v. Lion Unif. Co.*, 180 Ill. App. 3d 955, 536 N.E.2d 736 (1st Dist. 1989).

which modified the traditional principles of joint and several liability. Under the 1986 amendment, any defendant found less than 25% at fault in causing an injury was only required to pay its own percentage of an injured party's non-medical damages (*i.e.*, disability, pain and suffering and lost income). Joint and several liability remains for past and future medical expenses.

The Illinois legislature amended Section 2-1117 to provide that the fault of the plaintiff's employer cannot be included in this section's calculation of fault when determining joint and several liability. Public Act 93-0010. Similarly, in *Ready v. United Goedelke Servs., Inc.*, 232 Ill. 2d 369 (2008), the Illinois Supreme Court held that the fault of a settling party cannot be considered by a jury when apportioning fault under Section 2-1117. These issues become important matters in trying cases because a strategy cannot be effectively used pointing to the empty chair of a missing defendant with little insurance or assets who settles for the limit of the insurance. Experienced attorneys must be able to deal with the challenges of these cases.

N. Plaintiff's Comparative Negligence

Under Illinois law, a plaintiff's own fault can reduce the amount of recoverable damages. The *comparative negligence* rule allows that a plaintiff's recovery be reduced in proportion to the plaintiff's degree of fault in causing or contributing to the plaintiff's injuries or damages.

Under Section 2-1116 of the Illinois Code of Civil Procedure, if a plaintiff's fault is found to be greater than 50% of the total fault causing the accident, a plaintiff is barred from any recovery. 735 ILCS 5/2-1116. If, for example, there is a verdict for the plaintiff in the amount of $100,000 and the plaintiff is found to be 80% at fault for the accident, plaintiff receives nothing. However, if the plaintiff's fault is 50% or less of the total fault that contributed to an accident, the plaintiff's recovery will be reduced only in accordance with plaintiff's *pro rata* share of fault in causing or contributing to the cause of the accident and injuries. For example, if the verdict for plaintiff is $100,000 and the plaintiff is found to be 25% at fault for the accident, the verdict is reduced to $75,000.

O. Compensatory Damages

The primary purpose of tort law is to compensate persons who are injured as a result of negligent or wrongful conduct. Compensatory damages are aimed at placing an injured plaintiff in the position he or she would have been in had no wrong occurred. *Clark v. Children's Memorial Hosp.*, 955 N.E.2d 1065, 1073 (Ill. 2011). A plaintiff in a negligence action is only entitled to compensatory damages for his or her proven losses after the defendant's liability is found. *Haizen v. Yellow Cab Co.*, 41 Ill. App. 2d 330, 190 N.E.2d 514 (1st Dist. 1963).

In Illinois, to recover compensatory damages, the plaintiff must prove he or she suffered a compensable injury. *Ellens v. Chicago Area Office Fed. Credit Union*, 216 Ill. App. 3d 1011001, 576 N.E.2d 263 (1st Dist. 1991). Examples of compensatory damages include past and future pain and suffering,[19] disability and disfigurement,[20] past and future medical expenses,[21]

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[19] *Donk Bros. Coal & Coke Co. v. Thil,* 228 Ill. 233, 241, 81 N.E. 857, 860 (1907).

[20] *Krichbaum v. Chicago City R.R. Co*., 207 Ill. App. 44 (1st Dist. 1917); *Simon v. Kaplan*, 321 Ill. App. 203, 52 N.E.2d 832 (1st Dist. 1944).

[21] *Horan v. Klein's-Sheridan, Inc*., 62 Ill. App. 2d 455, 459, 211 N.E.2d 116, 118 (3rd Dist. 1965).

and lost earnings.[22] Before a plaintiff can recover future damages, however, he or she must demonstrate that these damages are reasonably certain to occur and cannot be based on speculation. *Richardson v. Chapman*, 175 Ill. 2d 98, 676 N.E.2d 621 (1997).

P. Punitive Damages

Under Illinois common law, governmental bodies are not liable for *punitive damages*. The purpose of punitive damages is to punish a defendant, to teach the defendant not to repeat any intentional, deliberate and outrageous conduct, and to deter others from similar conduct. Because the burden of punitive damages assessed against a governmental entity would be borne by its taxpayers, there is no justification for punishing taxpayers or attempting to deter them from future misconduct of public employees over whom they have no control. *George v. Chicago Transit Auth.*, 58 Ill. App. 3d 692, 374 N.E.2d 679 (1st Dist. 1978).

The Tort Immunity Act expressly provides that a local public entity is not liable to pay punitive or exemplary damages in any state action brought directly or indirectly against it by the injured party or a third party. 745 ILCS 10/2-102. Pursuant to Section 2-102, a local public entity may not be held liable for punitive damages in a personal injury action. Its employees, however, can, in an appropriate case, be made to *personally* pay punitive damages. Under the Federal Civil Rights Act, governmental bodies, but not their employees, are exempt from punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The Attorney General of Illinois has issued an opinion that although governmental bodies may not pay punitive damages, they can buy coverage under a conventional insurance policy to offer that protection to its officers and employees. Attorney General Opinion 96-034.

[22] *Jackson v. Illinois Cent. Gulf R.R. Co*., 18 Ill. App. 3d 680, 309 N.E.2d 680 (1st Dist. 1974).

CHAPTER I IN REVIEW

GENERAL PRINCIPLES OF TORT LIABILITY

CLAIM EVALUATION CHECKLIST

- ❑ **Is the public entity properly named? A police department, for example, is merely an organizational division of a public entity and cannot be sued on its own.**
- ❑ **Is the governmental entity a "local public entity" as defined by the Illinois Tort Immunity Act in 745 ILCS 10/1-206? (*See page 1*).**
- ❑ **Is the employee a "public employee" as defined by the Illinois Tort Immunity Act in 745 ILCS 10/1-207? (*See page 2*).**
- ❑ **Was the public employee acting within the scope of his or her employment at the time of the challenged conduct? (*See page 3*).**
- ❑ **Is indemnification available to the public employee under Section 2-302 and has it been requested? (*See page 2*).**
- ❑ **Is the tort claim at issue afforded protection under the Illinois Tort Immunity Act? (*See page 4*).**
- ❑ **Is the public employee immune from suit by virtue of the Illinois Tort Immunity Act or other defense? If so, the public employer for which that employee works is also immune. (*See pages 3-4*).**
- ❑ **Was the plaintiff's lawsuit filed within one year from the date of the alleged injury? (*See pages 4-6*).**
- ❑ **If plaintiff is a minor or under some disability, was the lawsuit filed within one year after plaintiff's 18th birthday or the date plaintiff was no longer subject to the disability? (*See page 5*).**
- ❑ **If plaintiff's action arises from "patient care," the limitations period is no less than two (2) years but no more than four (4) years to file an action after the claimant knows or should know of the injury or death for which damages are claimed. (*See page 5*).**
- ❑ **Is there a duty of care owed to the plaintiff under the circumstances? If there is no duty, there is no liability. (*See page 6*).**
- ❑ **Which standard of liability applies to the challenged conduct? Is it ordinary negligence or willful and wanton conduct? (*See pages 6-7*).**
- ❑ **Is there a contribution claim against an existing party or possible third-party complaint against a person or entity who is not a party to the lawsuit? (*See pages 7-8*).**
- ❑ **If a lawsuit involves other parties, has the rule of joint and several liability been considered? (*See page 8*).**

- ❑ **Is there any comparative negligence on plaintiff's part which could reduce or even eliminate any amount of recoverable damages? (*See page 8*).**
- ❑ **Identify the compensable damages claimed by plaintiff. (*See page 9*).**
- ❑ **Is plaintiff seeking punitive damages against both the governmental entity and its employee? Remember, a governmental entity is not liable for punitive damages. Punitive damages may only be recovered from the employee personally, but private insurance can cover the claim. (*See page 10*).**

CHAPTER III. TORT IMMUNITIES GENERALLY AVAILABLE TO ALL GOVERNMENTS

A. Supervision Immunity

Section 3-108 of the Tort Immunity Act provides that neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury. 745 ILCS 10/3-108. Section 3-108 further provides that neither a local public entity nor public employee is liable for an injury caused by a failure to supervise an activity on, or the use of, any public property unless (1) a duty to supervise is imposed by common law, statute, ordinance, code, or regulation; and (2) the entity or employee is guilty of willful and wanton conduct that proximately caused the injury. *Id*.

See *Brooks v. McLean Cty. Unit Dist. No. 5*, 2014 IL App (4th) 130503, ¶ 42 (finding a district immune where a student died after playing a punching game in the school restroom because the district did not willfully fail to supervise the students). See also *Perez v. Chicago Park Dist.,* 2016 IL App (1st) 153101 (the court determined that a public entity or employee has no common law duty to supervise the tortious behavior by third parties); *Barr v. Cunningham*, 2017 IL 120751 (holding that a school employee did not demonstrate willful and wanton conduct for failing to provide protective eyewear for student during a game of floor hockey.) This section provides immunity from liability for ordinary negligence where a claim involves the failure to properly supervise an activity on governmental property.[23] In granting this immunity, the legislature has acknowledged the fact that governments simply cannot employ enough workers to fully prevent all injuries by providing an error-proof level of supervision. This section does not, however, provide immunity to a public entity or its employees for willful or wanton conduct that causes injuries to individuals participating in a hazardous activity.[24] The distinction between discretionary and ministerial duties is irrelevant with regard to supervisory immunity under Section 3-108.[25]

Section 3-108 can apply to many activities which occur on public streets, sidewalks, parking lots, parks, and school grounds. Examples of activities protected under this Section include:

- a city which fails to post personnel in order to monitor construction activities that abut public sidewalks;
- a school district whose teacher fails to adequately supervise a student who sexually assaults another student in the school restroom;
- a park district which does not provide a staff person to supervise a public playground;

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[23] *Jane Doe v. McLean Cnty Unit Dist. No. 5 Bd. of Dirs.,* 2012 IL 112479 (2012).

[24] *Murray v. Chicago Youth Ctr.*, 224 Ill. 2d 213, 864 N.E.2d 176 (2007).

[25] *Repede ex rel. Repede v. Cmty. Unit Sch. Dist. No. 300*, 335 Ill. App. 3d 140, 779 N.E.2d 372 (2nd Dist. 2002).

- a school district whose gymnastics coach fails to properly supervise a gymnast working on the high bar;
- a park district which fails to supervise the activities of a volunteer coach who molests a player;
- a city which fails to post personnel at a railroad grade crossing to prohibit pedestrians from proceeding around warning gates;
- a park district that failed to supervise a volunteer operating an inflatable water slide on which a park district employee was injured;
- a school district whose staff fails to supervise students who play "body-shots," a punching game, in the school restroom;
- a city whose employees failed to adequately monitor the diving board area of a pool where a flotation device was improperly positioned under the diving board;
- a school district that did not provide crossing guards for voluntary after-school events; and
- a park district who fails to supervise park visitors who set off fireworks illegally and injured another park visitor.

B. Discretionary Immunity

Under Section 2-201 of the Tort Immunity Act,[26] governmental entities and their employees are afforded *absolute* immunity for discretionary decisions.[27] Section 2-201 only applies to discretionary acts and not to ministerial acts. Discretionary acts involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner the act should be performed. In contrast, ministerial acts are acts "a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Brooks v. Daley*, 2015 IL App (1st) 140392, ¶ 17.

The purpose of Section 2-201 is to protect local governments from discretionary decisions made in the course of their official duties. If the immunity is found not to apply then the public entity may be liable in tort just like a private individual would be.[28] The scope of this immunity can be quite broad. However, the legislature indicated that Section 2–201 immunity is contingent upon whether other provisions, either within the Act or some other statute, create exceptions to or limitations on the immunity. See *Robles v. City of Chicago*, 2014 IL App (1st) 131599, ¶ 12.

Illinois courts have found that a variety of governmental functions are discretionary acts to which Section 2-201 immunity applies. For example, in *In re Chicago Flood Litig.*, 176 Ill. 2d 179, 680 N.E.2d 265 (1997), this immunity applied to the city's approval of the pile-driving plan and the decisions made by the city after learning of the flooding including who would repair the tunnel, how the contractor would be hired, and whether warning the public would cause panic.

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[26] 745 ILCS 10/2-201.

[27] *Murray v. Chicago Youth Ctr.*, 224 Ill.2d 213 (2007).

[28] *Vill. of Bloomingdale v. CDG Enterprises, Inc*. 196 Ill.2d 484, 752 N.E. 2d 1090 (2001).

Discretionary immunity also applied to a decision by a public employee to clear brush from a roadway,[29] a public employee's decision with respect to whether a rise in the roadway should be removed,[30] a fire marshal's instructions during a fire drill, a highway commissioner's decision to improve culverts to alter the flow of surface water along a road, and a county coroner's decision to order an autopsy. See *Harinek v. 161 N. Clark St., Ltd.,* 181 Ill. 2d 335, 341, 692 N.E.2d 1177 (1998); *Pleasant Hill Cemetery Ass'n v. Morefield*, 2013 IL App (4th) 120645, ¶ 37; *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶ 37; *Wright v. Moss*, 2015 IL App (5th) 140021, ¶ 13 (reasoning that the coroner was in a position involving the determination of policy because he bears sole and final responsibility for autopsies performed in the county). In some cases, a person does not have to be employed by a government entity in order to be immune from liability. In *Lorenc v. Forest Preserve Dist. of Will County,* 2016 IL App (3d) 150424, ¶ 26, Court found a volunteer for the local forest preserve was entitled to discretionary immunity when he stepped out onto the bike path during a race.

Recently, Illinois courts have found schools not liable for bullying. For example, the Principal, Superintendent and School Board were immune under Section 2-201 where a student alleged that they failed to respond appropriately to bullying incidents. The court explained that the determination of whether bullying has occurred, the appropriate consequences, and the choice of remedial actions are discretionary acts even where the School Code requires each district to "create, maintain, and implement a policy on bullying." *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶¶ 26-28; 105 ILCS 5/27-23.7(d); see also *Eilenfeldt v. United C.U.S.D. #304 Bd. of Educ.*, 30 F. Supp. 3d 780, 792 (C.D. Ill. 2014) (finding that the defendants' acts and omissions in handling bullying incidents were both policy determinations and exercises of discretion.) In *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615, students brought a claim against their high school alleging they were willful and wanton for failing to enforce the anti-bulling policies in their handbook. By statute all school districts are required to have in place such policies. The plaintiff's attorneys thought they had a rigid set of rules in place that were required to be followed perfectly by the school. The Court disagreed holding that the school's implementation of the anti-bullying policy is discretionary in nature and does not mandate a specific response to a given set of facts. Thus, the Court concluded, the high school was immune under Section 2-201. Similarly, in *Castillo v. Bd. of Ed. of Chicago*, 2018 IL App (1st) 171053, discretionary immunity applied in case involving off-campus bullying.

In contrast, courts have not applied Section 2-201 immunity when an employee's actions simply involve the obedience of orders or the performance of a task for which the employee has no choice and nothing is left for the employee's judgment or discretion. See *In re Estate of Stewart*, 60 N.E.3d 896, Ill. Dec. 345 (2nd Dist. 2016), (court found discretionary immunity not applicable because teacher did not determine policy; he failed to follow existing policy). Courts often find that discretionary immunity does not apply where state laws or regulations prescribe specific actions or the manner of those actions.

For example, in *Doe v. Dimovski*, 336 Ill. App. 3d 292, 783 N.E.2d 193 (2nd Dist. 2003), the court found that once a School Board was informed that its employee had sexually abused a female student, any discretion the Board may have had was removed by the reporting requirement mandated under the Abused and Neglected Child Reporting Act. 325 ILCS 5/1 *et*

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[29] *Bainter v. Chalmers Twp*., 198 Ill. App. 3d 540, 555 N.E.2d 1195 (3rd Dist. 1988); *Kirschbaum v. Vill. of Homer Glen*, 365 Ill. App. 3d 486 (3rd Dist. 2006).

[30] *Kennel v. Clayton Twp.*, 239 Ill. App. 3d 634, 606 N.E.2d 812 (4th Dist. 1982).

seq. Further, in *Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 806 (5th Dist. 2008), an insurance company brought a lawsuit against the city to recover for damages when a sewer backed up into a homeowner's basement. The city was not immune under Section 2-201 as a discretionary act because its acts and omissions in ensuring that the work on the sewer system was done in a safe and skillful manner were not discretionary but ministerial because of the state standards governing the operation of sewer systems. Recently, in *Monson v. City of Danville*, a person was injured as she tripped over a sidewalk. The City of Danville argued that the decision of whether or not to repair certain downtown sidewalk sections was a discretionary decision left up to the discretion of the director of public works and thus immune from liability. However, the Illinois Supreme Court held that while decisions involving repairs to public property *can* be a discretionary matter subject to immunity, the City of Danville had not met its burden of establishing that the alleged acts or omissions in this case constituted an exercise of discretion within the meaning of Section 2-201. *Monson v. City of Danville*, 2018 IL 122486.

Additionally, discretionary immunity does not apply where state law prohibits specific discretionary acts, such as retaliatory discharges. In *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111 (2008), overruling *Cross v. City of Chicago*, 352 Ill. App. 3d 1, 815 N.E.2d 956 (1st Dist. 2004), the court explained, that even if the discharge was a discretionary act the Tort Immunity Act states that "nothing in this Act affects the liability, if any, of a local public entity or public employee, based on:…the Workers Compensation Act." But see, *Brooks v. Daley, supra* at ¶ 19 (hiring and firing decisions can be considered policy determinations where the decision is not against the law, but involves balancing a set of given circumstances, even if the action is performed with corrupt or malicious motives).

In sum, there is no bright line test for when a court may find that an act is discretionary or ministerial. However, the Illinois Supreme Court has offered some guidance by creating a two part test. First, an employee may qualify for immunity if he "holds either a position involving the determination of policy or a position involving the exercise of discretion." After satisfying the first part of the test, the employee must then show he engaged in both the determination of policy and the exercise of discretion when performing the act or omission for which the plaintiff's injury resulted. Most recent cases have granted discretionary immunity involving decisions that took place at the executive or policy-making level. See *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 929 N.E.680 (1st Dist. 2010).

C. Immunity for the Adoption or the Failure to Adopt or Enforce Any Law

Sections 2-103 and 2-205 of the Tort Immunity Act provide immunity to local public entities and their employees for injuries caused by the adoption or the failure to adopt an enactment or failure to enforce any law. 745 ILCS 10/2-103; 745 ILCS 10/2-205. For example, in *Ferentchak v. Vill. of Frankfort*, 105 Ill. 2d 474, 475 N.E.2d 822 (1985), the Illinois Supreme Court held a local public entity is not liable for the negligent enforcement of its building code which resulted in damage to plaintiff's property due to an alleged failure by the village's building inspector to adequately inspect plaintiff's residence. See also *Pouk v. Vill. of Romeoville*, 937 N.E.2d 800 (3rd Dist. 2010) granting Village absolute immunity under Section 2-103 for any failure to force property owner to trim the bushes and bring them into compliance with village ordinance.

And in *Anthony v. City of Chicago*, the court found the city immune from liability stemming from its failure to shut down a nightclub after the club opened in violation of court orders. *Anthony v. City of Chicago*, 382 Ill. App. 3d 983 (1st Dist. 2008). This immunity further applied to a county and forest preserve district's approval of a snowmobile trail that illegally directed snowmobilers to travel against the flow of automobile traffic, resulting in the death of a

snowmobile passenger. *Jost v. Bailey*, 286 Ill. App. 3d 872, 676 N.E.2d 1033 (2nd Dist. 1997). As with many of the other immunities under the Act, the language of Section 2-103 and 2-205 does not refer to willful and wanton conduct, and Illinois courts have concluded this immunity applies even to claims of willful and wanton conduct.[31]

In *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 582-83 (1st Dist. 2007), the court held that Sections 2-103 and 2-205 immunized city building inspectors for their failure to properly inspect a porch that later collapsed resulting in 13 deaths, and their failure to report that the porch construction violated several building codes. In *Doe v. Vill. of Schaumburg*, 955 N.E.2d 566, 572, 353 Ill. Dec. 99 (1st Dist. 2011), Section 2-205 immunized Village for failing to comply with a statutory requirement to report detaining a student enrolled in a public school for aggravated criminal sexual assault of a minor child. The court held that the failure to follow provisions of a statute constituted a failure to "enforce" the statute. *Id*. citing *Bowler v. City of Chicago*, 376 Ill. App. 3d 208, 217, 315 Ill. Dec. 140, 876 N.E.2d 140 (1st Dist. 2007) (failure to comply with provisions of the building code is the same as failure to enforce the building code).

D. Immunity for the Issuance, Denial, Suspension or Revocation of Any Permit, License, or Certificate

Sections 2-104 and 2-206 of the Tort Immunity Act provide an immunity to governmental entities and their employees from claims which result from the "issuance, denial, suspension or revocation" or the "failure to issue, deny, suspend or revoke," any permit, license, certificate, approval, order of similar authorization, regardless of whether that authorization or permit, should have been issued, denied, suspended or revoked.[32] This immunity has been held to be absolute.[33] See *Mack Indus., Ltd. v. Vill. of Dolton*, 2015 IL App (1st) 133620, ¶ 37 (finding that Section 2-206 makes no exception for willful or wanton conduct). In *Vill. of Bloomingdale v. CDG Enterprises, Inc.*, *supra*, the Illinois Supreme Court confirmed that Section 2-104 provides absolute immunity.

State law immunities, however, do not apply to federal civil rights claims which may arise from the same conduct. For example, an immunity in state court will not act as a bar against a federal civil rights case which argues that the revocation of the property right in a license, without a hearing, may be a violation of federal law.

E. Immunity for Failure to Make an Inspection or Negligent Inspection of Property

Sections 2-105 and 2-207 of the Tort Immunity Act provide an immunity to governmental entities and their employees from claims arising out of an alleged failure to make an inspection or by reason of an inadequate or negligent inspection of any property, other than its own, for the purpose of determining whether the property complies with or violates any enactment or poses a hazard to health or safety. *Stigler v. City of Chicago*, 48 Ill.2d 20, 268 N.E.2d 26 (1971). This immunity codifies common law principles that a public entity generally owes no duty to a particular person to enforce governmental ordinances, permit requirements or other regulations. See *Ware v. City of Chicago, supra*, (holding city immune from liability for its

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[31] *Vill. of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 752 N.E.2d 1090 (2001).

[32] 745 ILCS 10/2-104 and 10/2-206.

[33] *Glenn v. City of Chicago*, 256 Ill. App. 3d 825, 628 N.E.2d 844 (1st Dist. 1993).

failure to enforce the building code); *Bowler v. City of Chicago*, *supra* (for performing inadequate inspections of private property pursuant to Sections 2-105 and 2-207.) Importantly, this immunity applies to willful and wanton conduct; *Hess v. Flores*, 408 Ill. App. 3d 631, 647, 948 N.E.2d 1078, 1092 (2011) (concluding that the city was entitled to immunity under Section 2-105 and 2-107 for its allegedly willful and wanton conduct when inspecting a stairwell and enforcing the building code). In *Nourse v. City of Chicago*, the court held that the city of Chicago was not liable under Section 2-105 and 2-207 when the city's elevator inspector allegedly failed to properly inspect an elevator resulting in injury to another. *Nourse v. City of Chicago*, 75 N.E.3d 397, 412 Ill. Dec. 417 (1st Dist. 2017). However, these immunities do not apply to inspections of the public entity's own property.

F. Immunity for Institution or Prosecution of Judicial or Administrative Proceedings

Section 2-208 of the Act provides immunity to a public employee from claims which arise out of the institution or prosecution of any judicial or administrative proceeding within the scope of the public employee's employment unless the employee acts maliciously and without probable cause.[34] See *Mack Indus., Ltd. v. Vill. of Dolton*, *supra* at ¶ 46 (explaining that the language of Section 2-208 requires the plaintiff prove both malice and the absence of probable cause to defeat Section 2-208 immunity). In *Knox Cty. v. Midland Coal Co*., 265 Ill. App. 3d 782, 640 N.E.2d 4 (3rd Dist. 1994), a governmental entity had probable cause to seek preliminary injunction to stop mining activities and, thus, it could claim immunity under Section 2-208. This section, however, does not bar a common law claim for malicious prosecution. The Section 2-208 defense of malice and lack of probable cause are also elements of a common law claim for malicious prosecution. *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 784 N.E.2d 258 (1st Dist. 2002). There is also the possibility of converting such a case to a federal civil rights case showing prejudice against a "class of one". *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000).

G. Immunity for Actions Taken Pursuant to a Law Later Held Unconstitutional

Section 2-203 of the Act provides public employees with immunity for their actions taken with reliance upon a statute, ordinance or regulation that is later found unconstitutional or invalid. For this immunity to apply, the following elements must be established: 1) the employee must act in good faith; 2) the employee must have acted without malicious intent; and 3) the public employee would not have been liable if the law had been constitutional, valid, and applicable. 745 ILCS 10/2-203. This immunity has been applied to bar a claim brought against public officials who relied upon a statute subsequently found unconstitutional which had prohibited handicapped persons from serving as fire fighters. *Melvin v. City of W. Frankfort*, 93 Ill. App. 3d 425, 417 N.E.2d 260 (5th Dist. 1981). This immunity has also been found to bar a claim against police officers following an ordinance permitting them to destroy seized property that is dangerous to store when they destroyed fireworks. *Martel Enterprises v. City of Chicago*, 223, Ill. App. 3d 1028, 584 N.E.2d 157 (1st Dist. 1991).

H. Defamation Immunity

Under Section 2-107 of the Tort Immunity Act, a *local public entity* is not liable for injury caused by any actions of its employees that are alleged to be libelous or slanderous,

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[34] 745 ILCS 10/2-208.

including by providing information orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material.[35] For example, a board of education was immune from liability for its director's alleged slanderous statement concerning an employee of the board. *Meyers v. Bd. of Educ.*, 121 Ill. App. 2d 186, 257 N.E.2d 183 (1st Dist. 1970). A police department's act of distributing an arrestee's photograph which incorrectly identified him as wanted for aggravated criminal sexual abuse was immune even though the police department's act was ministerial rather than a discretionary act. *Ramos v. City of Peru*, 333 Ill. App. 3d 75, 775 N.E.2d 184 (3rd Dist. 2002). Section 2-107 immunity also applies to claims against a public entity alleging willful and wanton conduct.[36] See *Stone St. Partners, LLC v. City of Chicago Dep't of Admin. Hearings*, 2014 IL App (1st) 123654, (immunity provided by section 2–107 is absolute and there are no exceptions).

Public *employees* enjoy certain immunities under Section 2-210 of the Act, as well. Under that section, a public employee, while acting in the scope of his or her employment, will not be liable for negligent misrepresentations nor "the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material." 745 ILCS 10/2-210. However, public employee's statutory immunity from liability for negligent misrepresentation does not extend to willful and wanton conduct. *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. Of Directors*, 2012 IL 112479, ¶ ¶ 43-44. The Illinois Supreme Court in *Jane Doe-3* held that school administrators, who allegedly provided false information on employment verification, were not protected under Section 2-210. Additionally, false statements which are *intentional*, and not merely negligent, are not immune. *Bryant v. Gardner*, 587 F. Supp. 2d 951, 975 (N.D. Ill. 2008).

The common law provides public officials with defamation immunity in certain situations. An executive branch public official or employee may speak about governmental matters within his official duties without defamation liability.[37] A member of a public legislative body, however, may only have immunity for statements made during official meetings. Were it otherwise, the democratic process would be inhibited by fear of personal liability. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). Where defamation liability exists, the public entity may be required to indemnify if it is found that the action was within the employee's scope of employment and not an independent, renegade act. For example, controversial statements by elected officials during meetings fall within this immunity while statements made during press conferences or press releases likely would not.

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[35] 745 ILCS 10/2-107; *Harris v. News-Sun*, 269 Ill. App. 3d 648, 206 Ill. Dec. 876 (2nd Dist. 1995).

[36] *Gavery v. Lake Cty.*, 160 Ill. App. 3d 761, 513 N.E.2d 1127 (2nd Dist. 1987).

[37] *Dolatowski v. Life Printing & Publ'g Co.*, 197 Ill. App. 3d 23, 554 N.E.2d 692 (1st Dist. 1990); *Geick v. Kay*, 236 Ill. App. 3d 868, 177 Ill. Dec. 340 (2nd Dist. 1992).

CHAPTER II IN REVIEW

TORT IMMUNITIES GENERALLY AVAILABLE TO ALL GOVERNMENTS

CLAIM EVALUATION CHECKLIST

- ❑ **Is the immunity absolute or protection against only negligent conduct?**
- ❑ **Does the plaintiff allege negligent supervision of an activity on public property? If so, there is immunity from ordinary negligence liability where a claim involves the failure to properly supervise an activity on, or the use of, governmental property under Section 3-108(a) of the Tort Immunity Act. (*See page 12*).**
- ❑ **Does the plaintiff allege a failure to supervise an activity on public property? If so, there is immunity if no duty to supervise the activity was imposed by common law, statute, ordinance, code, or regulation. Even if such duty was imposed, the failure must have been willful and wanton and must have proximately caused the injury under Section 3-108(b) of the Tort Immunity Act. (*See page 12- 13*).**
- ❑ **Is the plaintiff's claim based on a governmental employee's discretionary decision? Under Section 2-201 public officials have absolute immunity for acts that fall within their official discretion. This immunity should apply where a public employee's conduct requires deliberation, decision or judgment. (*See pages 13-15*).**
- ❑ **Is the plaintiff's claim for retaliatory discharge based on a governmental employee's discretionary decision? Under Section 2-201 public officials have been held to have absolute immunity for such acts that fall within their official discretion. (*See page 15*).**
- ❑ **Is the plaintiff's claim based on the failure to adopt a law or failure to enforce any law? Under Sections 2-103 and 2-205 of the Tort Immunity Act, public entities and their employees have immunity for such governmental functions as failing to enforce Village codes and ordinances. (*See pages 15-16*).**
- ❑ **Does the plaintiff's claim involve the issuance, denial, suspension or revocation of any permit, license or certificate? If so, there should be immunity for this conduct under Sections 2-104 and 2-206 of the Tort Immunity Act. (*See page 16*).**
- ❑ **Does the plaintiff allege a failure to make an inspection or negligent inspection of property other than governmental property? If so, governmental entities and their employees are immune from such claims under Sections 2-105 and 2-207 of the Tort Immunity Act. (*See pages 16-17*).**
- ❑ **Does the plaintiff's claim arise out of the institution or prosecution of any judicial or administrative proceeding? If so, Section 2-208 may provide immunity for that conduct. (*See page 17*).**

- ❑ **Does the plaintiff's claim involve a law which has since been held unconstitutional? If so, there may be immunity under Section 2-203 of the Act. (*See page 18*).**
- ❑ **Does plaintiff's claim allege defamation? If so, a governmental entity has immunity from liability for alleged libelous or slanderous statements made by its employees under Section 2-107 of the Act. An employee can still be individually liable and a local public entity may be required to indemnify that employee if it is found that the action was within the employee's scope of employment and not an independent act. However, a public employee may enjoy common law immunity if the statements are made within the scope of his or her official duties. (*See page 18*).**
- ❑ **Public employees are not immune under Section 2-210 for willful and wanton conduct (*e.g.* provision of false information). (*See page 18*).**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter II.

- **Make sure employees responsible for supervising activities have received appropriate training and that such training is well documented.**
- **Supervisors should avoid active participation in the activity they are responsible for supervising because too active participation can negate the Tort Immunity Act protections.**
- **Ensure all supervisors and employees are aware of any changes to rules and regulations regarding activities they are assigned to supervise.**
- **No job description should be made to sound perfunctory or ministerial. There is generally some discretion in most jobs and the presence of discretionary powers can aid in tort defense.**
- **Ensure that all ordinances and resolutions contain language, such as "whereas" clauses, containing findings and explaining why such ordinances and resolutions are being enacted.**
- **Make sure accurate and descriptive reports of inspections are kept by building inspectors and code enforcers.**
- **Document every request for any permit, license, certificate or order of similar authorization, as well as the reason for granting or denying each.**
- **Use photographs, videos or other types of documents in addition to written reports when conducting inspections.**
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against a public entity or its employees without consulting with an attorney.**
- **Periodically review employee performance and address potential disciplinary action on a timely basis.**
- **Review disciplinary and leave procedures for compliance with State and Federal requirements.**
- **Have policies/ordinances in place describing appropriate procedures for response to license applications and appeals.**
- **Understand that the entire content of every email exchanged by any employee or public official, no matter how seemingly trivial or insignificant, may be subject to public disclosure through the Freedom of Information Act or discovery during litigation and may negatively impact the local government so exercise good judgment in writing emails and avoid unnecessary comments. Sometimes using telephones or a personal meeting to pass on controversial information may be a good choice.**

CHAPTER IV. LIABILITY ARISING FROM THE CONDITION OF PROPERTY

A. Duty to Maintain Generally

As a general rule, a local public entity has a duty to use ordinary care to maintain its property in a reasonably safe condition for the purpose intended. *Bubb v. Springfield Sch. Dist. 186*, 167 Ill. 2d 372, 377, 657 N.E.2d 887, 891 (1995). That duty does not require a governmental entity to construct improvements.[38] As a result, no liability can be imposed for a local public entity's failure to make a public improvement. A duty only arises once a public improvement is undertaken and defects are known and ignored or improperly repaired.

B. Intended and Permitted Users of Property

Under Section 3-102(a),[39] a governmental entity owes a duty of care only to those persons "whom the entity intended and permitted to use the property." Whether an individual is considered an "intended and permitted" user of governmental property must be analyzed on a case-by-case basis. Courts look to the property the entity allegedly failed to maintain, which may not be the same property where the injury occurred. *Pattullo-Banks v. City of Park*, 2014 IL App (1st) 132856, ¶ 4 (finding liability where the plaintiff was injured in the street because the city failed to maintain the sidewalk which caused the plaintiff to enter the street). If the plaintiff is not an *intended and permitted user* of the property at issue, then no duty is owed and no liability will attach. *Boub v. Twp. of Wayne*, 291 Ill. App. 2d 713, 684 N.E.2d 1040 (2nd Dist. 1997). See also *Berz v. City of Evanston*, 2013 IL App (1st) 123763, ¶ ¶ 17, 23 (concluding that the city was not liable to a bicyclist injured in an alley because while the bicyclist was permitted to use the alley he was not an intended user of the alley).

Signs, ordinances, and other regulations may provide important evidence of whom the entity intended and permitted to use the property. For example, a park district owed no duty to protect unsupervised children who wandered into a park and drowned in a lagoon because signs on the property prohibited the use of the playground by unsupervised children under the recommended age of five. *Mostafa v. City of Hickory Hills*, 287 Ill. App. 3d 160, 169, 677 N.E.2d 1312, 1318-1319 (1st Dist. 1997). In *Lipper*, the City owed no duty to adult bicyclist who was injured when his bicycle struck a sidewalk defect because he was not an intended and permitted user of the property based on a municipal ordinance which prohibited persons over the age of twelve from riding bicycles on public sidewalks.[40] See also *First Midwest Trust Co., N.A. v. Britton*, 322 Ill. App. 3d 922 (2nd Dist. 2001) (holding a municipal ordinance prohibiting the operation of motor bikes on public property barred the plaintiff's claim that he was an intended

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[38] *West v. Kirkham*, 147 Ill. 2d 1, 14, 588 N.E.2d 1104, 1110 (1992).

[39] While the Tort Immunity Act states that it creates no additional duties on the part of public entities, courts have interpreted Section 3-102 to codify the common law duty to maintain public property in a reasonably safe condition for intended and permitted users. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 592 N.E.2d 1098 (1992); *Bubb v. Springfield*, *supra* at 891; *Belton v. Forest Pres. Dist*., 943 N.E.2d 221, 227-228, (1st Dist. 2011).

[40] *Lipper v. City of Chicago*, 233 Ill. App. 3d 834, 838, 600 N.E.2d 18, 21 (1st Dist. 1992).

and permitted user of the property despite evidence that municipal property had been used for off-road motorbiking for years). In *Gutstein v. City of Evanston*, *supra*, the City owed the plaintiff a duty and was liable for the plaintiff's injuries in the alley behind her house because she was an intended user of the alley based on City ordinance requiring residents to dispose of garbage in a designated location.

But, the existence of an ordinance or regulation prohibiting certain uses or users is not always sufficient for courts to find immunity. In *Bowman v. Chicago Park Dist.*, 2014 IL App (1st) 132122, ¶ 64, the Appellate Court reversed the trial court's grant of summary judgment to a park district where the park district failed to inform park users of an ordinance that restricted certain parks and playground equipment to children under age 12. Further, in *Gaston v. City of Danville*, 393 Ill. App. 3d 591 (4th Dist. 2009), the court held that decedent's possible violation of the City's trespass ordinance did not preclude his status as an intended user of a staircase in a public parking garage because he was using the stairwell as it was intended, to ascend or descend the stairs on foot to either access or exit the parking garage when it collapsed, and because the trespass ordinance was not designed to combat the type of injury suffered here.

Additionally, in at least one case, where a public entity acquiesces to a particular use of its property, the public entity may owe the user a duty of care. *Walker v. Chicago Hous. Auth.*, 2015 IL App (1st) 133788, ¶ 75. In *Walker*, the Chicago Housing Authority and its management company continued to allow a resident to access the top of an elevator car, despite receiving numerous notifications of the plaintiff's actions. The court reasoned that as a result of the housing authority's acquiescence, the plaintiff was an intended and permitted user of the property and the housing authority owed the plaintiff a duty of care.

Finally, under some circumstances, a person may be an "intended and permitted" user of a public entity's property even though he or she never enters that property. The court in *Belton v. Forest Pres. Dist.*, *supra* at 236, found that Section 3-102 did not immunize a forest preserve district from liability when a dead tree limb fell from the preserve onto a car traveling on an adjacent road. The court found that since the section codifies the common law, the duty it imposes should be consistent with similar common law duties, which include the duty to maintain trees that abut neighboring roadways under certain conditions. ("We find, however, that the summary judgment ruling is in error because [. . .] it lacks support in the common law").

C. Constructive Notice

Under Section 3-102(a), of the Tort Immunity Act, a local public entity is not liable for an injury which occurs on its property unless the plaintiff can establish that it had *actual or constructive notice* of a dangerous condition on its property in sufficient time to take reasonable measures to remedy or protect against such condition. 745 ILCS 10/3-102(a); See also *Perfetti v. Marion Cty.*, 2013 IL App (5th) 110489, ¶ ¶ 19-21 (holding that a county was immune where the plaintiff failed to present evidence that the county had actual notice of the defective condition of the roadway or that the defective condition of the roadway was apparent for such a length of time or was so conspicuous or plainly visible that the county should have known of its existence by exercising reasonable care and diligence). This section of the Act codifies a local public entity's common law duty to maintain its property in a reasonably safe condition. *West v. Kirkham, supra; Barnett v. Zion Park Dist., supra*.

In determining whether a local public entity had constructive notice of a defective condition, courts consider various factors, including the conspicuousness of the defect and the length of time the condition existed. *Ramirez v. City of Chicago*, 318 Ill. App. 3d 18, 251 Ill. Dec. 619 (1st Dist. 2000). A public entity may be found to have constructive notice of a

dangerous condition in a street, sidewalk, or other public property if the condition existed for such a length of time prior to an injury that the authorities, by the exercise of reasonable care and diligence, should have learned of the existence of the condition and remedied it. *Perfetti v. Marion Cty.*, *supra*. Illinois case law fixes no exact limit on what is a sufficient time for a condition to exist before a public entity may be charged with constructive notice. Each case must be determined from the surrounding circumstances. The prolonged existence of a defect may be inferred from its size, character, and appearance.[41] Also relevant is the defect's location and the opportunity for public officials to observe the condition.

For example, in one case, a period of 48 hours between the downing of a stop sign and an accident at the intersection controlled by the sign was held insufficient to establish constructive notice of the condition. *Wilsey v. Schlawin*, 35 Ill. App. 3d 892, 896, 342 N.E.2d 417, 420 (1st Dist. 1975). In another case, a period of only 8½ hours between a similar downing and accident was found sufficient, where the intersection involved was frequently used by county highway employees who were required to watch for downed signs.[42] Furthermore, a photograph can, in some cases, be sufficient to prove notice by showing that the condition was worn and aged enough to infer that it existed for a long time.[43] See *Glass v. City of Chicago*, 323 Ill. App. 3d 158 (1st Dist. 2001) (holding the City had actual or constructive notice of sidewalk defect measuring eight inches wide by three feet long and 2 ½ inches deep based on undisputed evidence that condition existed one or two years before the accident, and that City had been advised of the problem). However, in *Lewis v. Rutland Twp.*, 359 Ill. App. 3d 1076 (3rd Dist. 2005), the court applied Section 3-102 immunity because plaintiff failed to demonstrate the amount of time the unsafe roadway condition existed before the accident. See also *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 24 (holding that prior complaints about the general condition of a sidewalk area were insufficient to establish actual or constructive notice of the defect the plaintiff tripped over). In general, when applying Section 3-102(a) to determine whether a local entity had notice is usually a question of fact, but becomes a question of law if all the evidence when viewed in the light most favorable to the plaintiff so overwhelmingly favors the defendant public entity that no contrary verdict could every stand. *Krivokuca v. City of Chicago*, 2017 IL App (1st) 152397, ¶ 51.

Under Section 3-102(b) of the Tort Immunity Act, a governmental entity will be found not to have constructive notice of a condition of its property if it can establish: (1) the condition would not have been discovered by a reasonably adequate inspection program, or (2) the governmental entity had a reasonable inspection program in place and operated such program with due care and did not discover the condition. See *Siegel v. Vill. of Wilmette*, 324 Ill. App. 3d 903 (1st Dist. 2001) (where a reasonable inspection system fails to uncover a defective condition, local governments are entitled to immunity under Section 3-102(b)).

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[41] *Baker v. Granite City*, 311 Ill. App. 586, 37 N.E.2d 372, 375-376 (4th Dist. 1941); *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 901 N.E.2d 973 (1st Dist. 2009).

[42] *Duewel v. Lahman*, 103 Ill. App. 3d 220, 227-229, 430 N.E.2d 662, 667-669 (2nd Dist. 1981).

[43] *See Baker v. Granite City*, *supra*.

D. Sidewalks

A public entity has no duty to install sidewalks or to extend existing sidewalks.[44] However, once a local public entity provides sidewalks, it has the duty to exercise ordinary care to design and maintain its sidewalks in a reasonably safe condition for their intended use. A local public entity does not have a duty to keep all sidewalks in perfect condition at all times. Slight or *de minimis* defects commonly found in public sidewalks are not actionable.[45]

There is no perfect mathematical standard to define when a defect in a public sidewalk is large enough to require a governmental entity to remove or repair it. The surrounding circumstances, particularly whether the sidewalk is located in a commercial or residential neighborhood and the anticipated volume of pedestrian traffic on the sidewalk, are considered in determining whether a sidewalk defect is, under the legal definition, *de minimis* and not actionable. Generally, Illinois courts have held that if the difference in the level between two concrete slabs is less than two inches, such a defect is *de minimis*. Once a sidewalk defect approaches or exceeds two inches, there will usually be a question of fact for a jury to decide. However, courts have also considered the width and depth of a sidewalk defect in determining whether it is too minor to be actionable. *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 22.

In an interesting twist, one court held that a plaintiff whose foot became wedged against a three to four-inch-high elevation within a crater-like defect in the sidewalk in front of her house could not recover because the condition was open and obvious.[46] However, the holding may be limited to cases where a plaintiff clearly knows of the existence of the defect, such as where the defect has existed outside of the plaintiff's home for months or years. See also *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 31 (holding that a gap between the sidewalk and street was an open and obvious condition where the plaintiff had safely traveled over a similar gap on the opposite side of the street and was familiar with the road construction that caused the gap); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 37 (finding that the City had no duty to protect plaintiff from the open and obvious sidewalk defect and noting that only if a duty is found is the issue of immunity considered). One exception to the open and obvious rule is distraction. However, this exception only applies when it is reasonably foreseeable that a plaintiff might be so distracted that she blunders into an open and obvious danger. The mere possibility that someone might be distracted does not mean that the particular distraction is foreseeable. In *Negron v. City of Chicago,* 2016 IL App (1st) 143432, the court found the city could not have foreseen the distraction that caused plaintiff's injuries thus, finding the defect that cause the plaintiff's injuries to be open and obvious.

Recently the *de minimis* rule has been found to apply to more than deviations in sidewalks. Under the ADA Compliance Guide, municipalities must install warning surfaces at crosswalks to provide a sensory cue to visually impaired individuals of where a sidewalk ends and a roadway begins. In a recent case, a plaintiff tripped over sensory tiles, which were pushed

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[44] *Best v. Richert*, 72 Ill. App. 3d 371, 389 N.E.2d 894 (1979); *Thompson v. Cook Cty. Forest Pres. Dist.*, 231 Ill. App. 3d 88, 172 Ill. Dec. 584 (1st Dist. 1992) (no duty to construct crosswalk).

[45] *Barnhisel v. Vill. of Oak Park*, 311 Ill. App. 3d 108, 724 N.E.2d 194 (1st Dist. 1999); *Siegel v. Vill. of Wilmette*, *supra*; *Putnam v. Vill. of Bensenville*, 337 Ill. App. 3d 197, 786 N.E.2d 203 (2nd Dist. 2003) (the *de minimus* rule also applies to handicap ramps that are part of a public sidewalk).

[46] *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1029, 830 N.E.2d 722, 728 (1st Dist. 2005).

out of alignment and raised above the sidewalk level by ¾ of an inch. The court determined that the defect was *de minimis* and that a reasonably prudent person could would not find the raised tiles dangerous to walk on. *Burns v. City of Chicago, supra*.

E. Ice and Snow

A local public entity is not liable for injuries caused by *natural accumulations of ice and snow* on public property. Illinois courts have recognized that it would be unreasonable to expect a public entity to expend the resources and labor necessary to keep streets and other public ways continuously safe from ice and snow during the winter.[47]

The Illinois Supreme Court has recognized that any natural accumulation of ice and snow that was not caused or aggravated by the property owner is not a basis for liability. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215 (2010).

Section 3-105(a) of the Tort Immunity Act codifies the general rule in Illinois that a public body is not liable for injuries from slippery streets or sidewalks due to natural accumulations of ice and snow. 745 ILCS 10/3-105(a). However, a duty may arise if a public entity voluntarily undertakes to remove natural accumulations of ice and snow and does so negligently, or where the action of the government creates an unnatural accumulation of ice or snow which causes an injury.[48] For example, a public entity was liable when water intended to flood an outdoor skating rink overflowed and froze on a public sidewalk where plaintiff slipped and fell. *Graham v. City of Chicago, supra*. Significantly, in *Moore v. Chicago Park Dist*., the Illinois Supreme Court considered a wrongful death case filed on behalf of a woman who sustained fatal injuries due to a slip and fall while trying to step over a snow pile at the edge of a parking lot which had been plowed. *Moore v. Chicago Park Dist*., 978 N.E.2d 1050 (Ill. 2012). The Court in *Moore* held that snow and ice constitutes a condition of any public property, within the meaning of Section 3-106 of the Tort Immunity Act, which applies to injuries on recreational property. Whether an accumulation is unnatural is irrelevant to the question of Section 3-106 immunity, discussed *infra*. But see *Ziencina v. County of Cook*, *supra* at 745-46 (holding the County liable for unnatural accumulations of ice and snow created by a snow plow driver at highway intersection). In addition, a public entity can be held liable where ice or snow combines with a defect in the sidewalk to cause an injury.[49]

F. Parkways

A parkway must be maintained in a condition reasonably safe for any kind of travel which can be foreseen or expected thereon, including travel by pedestrians and bicyclists, at least where no effort has been made to prevent or discourage such travel. *Marshall v. City of Centralia*, 143 Ill. 2d 1, 570 N.E.2d 315 (1991). The extent to which a parkway must be maintained, however, does not approach the standard of care for a public sidewalk because it is not reasonable to foresee the same volume of public traffic on a parkway as on a sidewalk.

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[47] *Graham v. City of Chicago*, 346 Ill. 638, 178 N.E. 911 (1931); *Ziencina v. County of Cook*, 188 Ill. 2d 1, 719 N.E.2d 739 (1999).

[48] *Kiel v. Girard*, 274 Ill. App. 3d 821, 825, 654 N.E.2d 1101, 1104 (4th Dist. 1995); see also *Pattullo-Banks v. City of Park Ridge*, *supra* at ¶ 4 (breached duty where snow was removed from the street and blocked a sidewalk intended for pedestrians).

[49] *Rios v. City of Chicago*, 331 Ill. App. 3d 763, 769, 771 N.E.2d 1030, 1035 (1st Dist. 2002).

Therefore, a pedestrian who leaves the sidewalk cannot assume the parkway will be free of defects. A public body has no duty to maintain a parkway or any structure thereon in a condition reasonably safe for use in an extraordinary or unintended manner. For example, recovery was denied where a 15-year-old girl fell and was injured while attempting to walk along the top of a parkway fence made of metal pipes.[50] A court has even held that a tree grate set into the sidewalk constitutes a "parkway" and is subject to the lower standard of care. *Mazin v. Chicago White Sox, Ltd.*, 358 Ill. App. 3d 856, 832 N.E.2d 827 (1st Dist. 2005).

Most parkway cases turn on whether the local public entity had notice of the alleged defect. For instance, in *Barr v. Frausto*, the court found that there was neither actual nor constructive notice of the alleged defect because the plaintiff testified that he had never noticed the hole on the grass-covered parkway where he fell. Therefore, the hole was not conspicuous in itself so the city could not have had constructive notice. *Barr v. Frausto*, 2016 IL App (3d) 150014, ¶ 23.

G. Streets

A public entity is only required to maintain its streets for their normal and intended uses.[51] Therefore, the liability of a governmental body with respect to its public streets is generally limited to their use for vehicle traffic. A public body is largely not required to maintain the vehicular lanes of a street in a condition safe for pedestrian travel, except where lanes intersect with crosswalks or other places intended for the joint use of vehicles and pedestrians.[52] Similarly, bicyclists are permitted, but not intended, users of city streets unless marked with a bike lane or otherwise indicated for bicycle travel. In *Boub v. Township of Wayne*, *supra*, a plaintiff rode his bicycle onto a one-lane bridge and was injured when the wheel of his bicycle caught in a groove between wooden planks being used for a reconstruction project. The court found bicyclists were not intended users of the bridge (in the absence of any evidence that defendant intended the road and bridge to be used for bicycles). In *Latimer v. Chicago Park Dist.*, 323 Ill.App.3d 466, 752 N.E.2d 1161 (1st Dist. 2001), the court found no duty to a bicyclist injured on a street not marked for bicycle traffic. In contrast, *see Cole v. City of E. Peoria*, 201 Ill. App. 3d 756, 762, 559 N.E.2d 769, 773 (3rd Dist. 1990), where bicyclists were found to be intended users of a 4-foot strip of roadway demarcated by striping as a bicycle lane.

Where a portion of the street is devoted to the common use of both vehicles and pedestrians, a public body is obligated to make such areas safe for both classes of travelers. Areas such as bus stops,[53] crosswalks, and areas around legal street parking spots must be maintained in a condition reasonably safe for pedestrian travel. Generally, courts look for physical manifestations demonstrating that pedestrians are intended users of a portion of a street to find that a public body owes pedestrians a duty to reasonably maintain the portion of the street

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[50] *Warchol v. City of Chicago*, 75 Ill. App. 3d 289, 393 N.E.2d 725 (1st Dist. 1979).

[51] *Warchol v. City of Chicago*, *supra* at 294; *DiBenedetto v. Flora Twp.*, 153 Ill. 2d 66, 605 N.E.2d 571 (1992).

[52] *Risner v. City of Chicago*, 150 Ill. App. 3d 827, 502 N.E.2d 357 (1st Dist. 1986); *Wojdyla v. City of Park Ridge*, 209 Ill. App. 3d 290, 154 Ill. Dec. 144 (1st Dist. 1991); *Knight v. City of Chicago*, 298 Ill. App. 3d 797, 700 N.E.2d 110 (1st Dist. 1998) (public entity not required to keep safe all areas of roadway like median).

[53] *Simon v. City of Chicago*, 279 Ill. App. 80, 87 (1935).

for pedestrians. *Wolowinski v. City of Chicago*, 238 Ill. App. 3d 639, 606 N.E.2d 273 (1st Dist. 1992) (finding that a city did not owe a bus passenger a duty to maintain the street within a designated bus stop because passenger was not an intended or permitted user of a street where passengers were intended to step directly from bus to curb rather than use the street); *Peters v. Riggs*, 2015 IL App (4th) 140043, ¶ 58.

While pedestrians within crosswalks are intended and permitted users of the street, pedestrians who walk on the street or roadway outside of a crosswalk are not considered "permitted users." As a result, a local public entity does not owe any duty to pedestrians under those circumstances.[54] See also *Williams v. City of Chicago*, 371 Ill. App. 3d 105 (1st Dist. 2007) (holding that City owed no duty to pedestrian because she had jaywalked in order to access the curb upon which she fell); *Harden v. City of Chicago*, 2013 IL App (1st) 120846, ¶ ¶ 37-38 (finding that even when snow renders the crosswalk invisible pedestrians walking outside of crosswalks are not intended and permitted users); *Dunet v. Simmons*, 2013 IL App (1st) 120603, ¶ ¶ 30-32; *Swain v. City of Chicago*, 2014 IL App (1st) 122769, ¶ 26.

Furthermore, a duty is not imposed simply because a local public entity knows that pedestrians frequently cross a highway or street at a given location. For instance, in *Swett v. Village of Algonquin*, 169 Ill. App. 3d 78, 93, 523 N.E.2d 594, 605 (2nd Dist. 1988), the court refused to hold a public entity liable for a claim brought by plaintiffs who alleged the village knew pedestrians crossed the street at the location where their accident occurred. The court held that the use of the street as a crosswalk, even if the village knew of such use, does not convert the street into a crosswalk, and no duty was owed to plaintiffs.[55]

The Illinois Motor Vehicle Code defines a crosswalk as "[t]hat part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway, and in the absence of a sidewalk on one side of the highway, that part of the highway included within the extension of the lateral line of the existing sidewalk to the side of the highway without the sidewalk, with such extension forming a right angle to the centerline of the highway." 625 ILCS 5/1-113(a). Consequently, unmarked or "implied crosswalks" must also be maintained for safe pedestrian travel.

H. Recreational Property

Section 3-106 of the Tort Immunity Act provides governmental entities and their employees with immunity for injuries which occur because of the existence of a condition of public property intended and permitted to be used for *recreational purposes,* unless a plaintiff establishes that the conduct at issue is willful and wanton. This requires the plaintiff to allege and prove something more than ordinary negligence.[56]

While Section 3-106 immunizes a defendant from liability when the condition of the property itself is unsafe, it does not immunize the defendant from unsafe activities conducted

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[54] *Curatola v. Vill. of Niles*, 154 Ill. 2d 201, 208-209, 608 N.E.2d 882, 885-886 (1993); *Vaughn v. City of W. Frankfort*, 166 Ill. 2d 155, 158, 651 N.E.2d 1115, 117 (1995); *Risner v. City of Chicago*, 150 Ill. App. 3d 827, 502 N.E.2d 357 (1st Dist. 1986).

[55] See *Doria v. Vill. of Downers Grove*, 397 Ill. App. 3d 752, 336 Ill. Dec. 854 (2nd Dist. 2009) (village did not intend that gravel area be used for parking and did not owe duty).

[56] *Perez v. Chicago Park Dist.* 2016 IL App (1st) 153101.

upon otherwise safe property. See *Perez v. Chicago Park Dist., supra* at ¶ 17 (*citing Moore v. Chicago Park Dist.*, *supra*, and explaining that "causing" or "allowing" a dangerous condition is not sufficient activity to remove the claim from immunity under Section 3-106). See *Perez v. Chicago Park Dist., supra* (finding immunity where the plaintiff was injured by fireworks being set off at the park. The court found that the lighting of fireworks on a public park to be a dangerous activity, not a dangerous condition of the park).

For example, a cause of action for willful and wanton misconduct was stated where a tennis player alleged that a Board of Education disregarded the defective condition of tennis courts and failed to respond to complaints and inspect the premises, even though it knew others had been injured as a result of the tennis court's defective condition.[57] In contrast, see *Bialek v. Moraine Valley Cmty. Coll. Sch. Dist. 524,* 267 Ill. App. 3d 857, 642 N.E.2d 825 (1st Dist. 1994), in which the court found no willful and wanton conduct under Section 3-106, where a community college failed to warn or protect an adult trespasser, who was injured when he ran into a goalpost during a football game. The court based its holding on the fact that the college neither had notice of prior injuries which had occurred as a result of the goalpost structure nor did it remove any safety features that had been attached to goalpost.

Where a governmental body intends that its property be used for recreation, the immunity found in Section 3-106 should apply.[58] Whether an area is "recreational property" entitled to protection by Section 3-106 depends on the character of the property in question, not the activity being performed at any given time. *Bubb, supra*; *Dinelli v. Cty. of Lake*, 294 Ill. App. 3d 876, 691 N.E.2d 394 (2nd Dist. 1998). See also *Peters v. Herrin Cmty. Unit Sch. Dist. No. 4*, 2015 IL App (5th) 130465, ¶ 45 (finding that a school district was not entitled to summary judgment because there were unresolved issues as to whether the property was intended and permitted to be used as recreational or educational property). Characteristics of the property itself, such as painted markings, are good indicators of the public entity's intent as to the nature of the use. For example, Section 3-106 immunity applied to a sidewalk surrounding a school where there was evidence the school intended children to use the property as a playground. Specifically, there were yellow "4-square" lines painted on the concrete to allow school children to play there, which suggested recreational intent. *Bubb, supra.* See *Fennerty v. City of Chicago*, 2015 IL App (1st) 140679, ¶ 16 (finding that a genuine issue of material fact existed as to whether the grassy area between the eastbound and westbound lanes of a road are recreational property where the plaintiff has observed people sitting and reading).

Where public property is not generally used for a recreational activity, its mere incidental use for a recreational purpose will not trigger immunity under Section 3-106.[59] See also *Abrams v. Oak Lawn-Hometown Middle Sch.*, 2014 IL App (1st) 132987, ¶ 13 (concluding that a combined cafeteria and auditorium was not property intended and permitted to be used for

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[57] *Carter v. New Trier East High Sch*., 272 Ill. App. 3d 551, 650 N.E.2d 657 (1st Dist. 1995).

[58] *Bubb v. Springfield Sch. Dist*., *supra*; *Ozuk v. River Grove Bd. of Educ.*, 281 Ill. App. 3d 239, 666 N.E.2d 687 (1st Dist. 1996) (gymnasium); *Kayser v. Vill. of Warren*, 303 Ill. App. 3d 198, 236 Ill. Dec. 440 (2nd Dist. 1999) (village community building).

[59] *John v. City of Macomb*, 232 Ill. App. 3d 877, 880, 596 N.E.2d 1254, 1256 (3rd Dist. 1992) (Section 3-106 did not apply to injury which occurred at band concert which was held at a courthouse because the holding of the concert without more did not alter the character of the area which was not generally used for recreational activity); *Adamczyk v. Twp. High Sch. Dist. 214*, 324 Ill. App. 3d 920, 257 Ill. Dec. 928 (1st Dist. 2001).

recreational purposes where the property was used for lunch, student assemblies, club meetings, and band or choir programs). In addition, any structures or improvements which increase the usefulness of a recreational facility fall within the protection of 3-106, even though the structure or improvement itself may not be used for a recreational purpose.[60] The Illinois Supreme Court has held that this immunity applies to a parking lot walkway on recreational property. *Sylvester v. Chicago Park Dist.*, 179 Ill. 2d 500, 689 N.E.2d 1119 (1997). See also *Flores v. Palmer Mktg., Inc.*, 361 Ill. App. 3d 172 (1st Dist. 2005) (Section 3-106 immunity applied to a claim involving an inflatable slide leased by park district as part of a summer camp program).

In addition, in *Callaghan v. Vill. of Clarendon Hills*, 401 Ill. App. 3d 287 (2nd Dist. 2010), the village was immune from liability under Section 3-106 for plaintiff's injuries when she fell on an unnatural accumulation of ice and snow on a public sidewalk because the sidewalk was recreational property, and the plaintiff failed to state a cause of action for willful and wanton conduct. Similarly, in *Moore v. Chicago Park Dist.*, *supra*, the park district was immune from liability under Section 3-106 where a woman died from injuries she sustained when she fell on an unnatural accumulation of snow. The accumulation resulted from plowing the parking lot. The court explained that whether snow and ice accumulated naturally or unnaturally is irrelevant to immunity pursuant to Section 3-106 because Section 3-106 does not incorporate the natural accumulation rule.

Recently in *Foust v. Forest Preserve Dist. of Cook County*, 2016 IL App (1st) 160873, the court held that an overhanging limb from a tree near a bicycle path that breaks off and falls onto a cyclist constitutes a condition of property intended to be used for recreational purposes under section 3-106. As a result, the park district was immune from liability.

I. Traffic Signs and Signals

As a general rule, a local public entity is not liable for the failure to install traffic control devices, including signs and signals. *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 674 N.E.2d 929 (1st. Dist. 1996). Section 3-104 of the Tort Immunity Act codifies this immunity as follows:

> Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to *initially* provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device, or marking, signs, overhead lights, traffic separating or restraining devices or barriers.[61]

Section 3-104 provides absolute immunity to claims of negligence and willful and wanton misconduct. *West v. Kirkham, supra*. However, once the decision is made to install a traffic regulating device, the public entity is obligated to install and maintain such device with reasonable care, and ensure that a proper device is used.[62] For example, in *Governmental Interinsurance Exch. v. Judge*, 221 Ill. 2d 195 (2006), the Illinois Supreme Court ruled that the

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[60] *Annen v. Vill. of McNabb*, 192 Ill. App. 3d 711, 548 N.E.2d 1383 (3rd Dist. 1990) (Section 3-106 immunity applied to an injury occurring in a restroom within the confines of a public park); *Johnson ex rel Johnson v. City of Chicago*, 347 Ill. App. 3d 638, 283 Ill. Dec. 259 (1st Dist. 2004).

[61] 745 ILCS 10/3-104 (emphasis added).

[62] *Parsons v. Carbondale Twp.*, 217 Ill. App. 3d 637, 645, 577 N.E.2d 779, 786 (5th Dist. 1991).

County's decision to replace two-direction passing zone with a no-passing zone was immunized under Section 3-104. *Sexton v. City of Chicago*, 2012 IL App (1st) 100010, ¶ 60, provides an additional example. In *Sexton*, the city was immune pursuant to Section 3-104 because it had no duty to install additional warning devices at a railroad crossing simply because it had already erected traffic lights at the intersection. In contrast, the court in *Martinelli v. City of Chicago*, 2013 IL App (1st) 113040, ¶ 18, held that the city was not immune from liability where a telecommunications worker was injured on a city water department work site because the city had initially provided traffic control devices but removed the devices when some of the workers went on a lunch break.

Further, the term "traffic" in Section 3-104 includes pedestrians, *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 487, 778 N.E.2d 285 (1st Dist. 2002). As a result, courts have held Section 3-104 immunizes a municipality against liability from its failure to provide barricades or warning signs to pedestrians. *Id.*; *Postran v. City of Chicago*, 349 Ill. App. 3d 81, 91, 811 N.E.2d 364 (1st Dist. 2004); *Ballog v. City of Chicago*, *supra*.

J. Streetlights

A local public entity has no duty to provide streetlights. However, once a streetlight is installed, a local public entity has a duty to maintain the lighting in a reasonably safe condition.[63] *Cf. Warning v. City of Joliet*, 2012 IL App (3d) 110309, ¶ 28 (holding that a municipality has no common law duty to provide streetlights and no duty to maintain streetlights it does not own). On the other hand, a local public entity's duty only extends to intended and permitted users of its streets.[64]

K. Clearing Brush and Foliage

A public entity has a duty to trim or clear bushes, trees or other vegetation when a traffic sign or signal on its roadway is not visible. For example, a court held that a local public entity had a duty to clear vegetation which blocked the view of a stop sign on a road maintained by the entity.[65] But see *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 566 N.E.2d 1365 (1991), where the court held the landowner had no duty to trim the foliage on his land near a driveway in order to make the driveway visible to travelers on the street. In addition, in *Kirschbaum v. Vill. of Homer Glen*, *supra*, the court reaffirmed rule that local governments owe no duty to clear brush from a controlled intersection where there are clearly visible traffic devices.

L. Access Roads and Trails

Section 3-107 of the Tort Immunity Act, 745 ILCS 10/3-107, provides absolute immunity for accidents or injuries caused by a condition on:

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[63] *Baran v. City of Chicago Heights*, 43 Ill. 2d 177, 180-181, 251 N.E.2d 227, 229 (1969).

[64] *Wojdyla v. City of Park Ridge*, *supra* at 425-426 (Pedestrian, who was fatally injured while walking on dark highway to reach his vehicle, was not an intended or permitted user of the street. As a result, the local public entity had no duty to light the street even though parking was permitted in this area).

[65] *Griglione v. Town of Long Point*, 184 Ill. App. 3d 20, 539 N.E.2d 1348 (4th Dist. 1989).

(a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway, or (3) a township or other road district highway;

(b) Any hiking, riding, fishing or hunting trail.

Section 3-107 has been the subject of two recent Illinois Supreme Court cases which narrowly interpreted the application of this immunity. For example, in *Cohen v. Chicago Park District*, 2017 IL App (1st) 121800, ¶ 5, the Illinois Supreme Court analyzed Section 3-107(a) and held this immunity did not apply to a shared-use path on the Lakefront Trail in Chicago and thus the park district was not afforded immunity from liability for injuries sustained by a bicyclist who was injured when his front wheel got caught in a crack in the pavement and fell. Even though in *Cohen,* the Court found that Section 3-107 immunity did not apply, it did apply recreational property immunity under Section 3-106 of the Act because the conduct of the park district did not rise to the level of willful and wanton in its attempt to repair the crack.

Recently, in *Corbett v. County of Lake,* 2017 IL 121536, the Court analyzed Section 3-107 (b)'s application to a paved bicycle path commonly known as the Skokie Valley Bike Path. The Court determined that the path was not a "trail" within the meaning of this section holding that this immunity was intended to apply only to primitive or rustic trails that retain their original, natural surface and are not improved with asphalt, concrete, crushed aggregate or similar finishes. See also *Colella v. Lombard Park District*, 2017 IL App (2d) 160847 (Section 3-107(b) immunity applied to a "nature and walking path" located in a forest or mountainous region of a forest preserve). The outcomes in these cases turn on the nature of the property at issue and are very fact specific.

M. Hazardous Recreational Activities

Section 3-109 of the Tort Immunity Act provides a local public entity immunity against claims of negligence for certain recreational activities considered to be hazardous by their nature which take place on public property. Section 3-109 provides in part:

(a) Neither a local public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

(b) As used in this Section "hazardous recreational activity" means a recreational activity conducted on property of a local public entity which creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury to a participant or a spectator.[66]

Section 3-109 defines *hazardous recreational activities* to include hazardous water contact activities, diving (where it is prohibited), animal racing, archery, bicycle racing, boat racing, skiing, sledding, hang gliding, kayaking, motorized vehicle racing, shooting, rock

[66] 745 ILCS 10/3-109.

climbing, racketeering, rodeos, sky diving, parachuting, body contact sports, surfing, trampolining, tree climbing, water skiing, white water rafting, and wind surfing. The list is not exclusive. This section specifically excludes willful and wanton conduct from the scope of its protection. 745 ILCS 10/3-109(c)(2).

In *Murray v. Chicago Youth Ctr.*, *supra*, the Illinois Supreme Court held that the immunity from negligence granted by Section 3-109 of the Act takes precedence over the general grant of immunity provided under Sections 2-201 (discretionary immunity) and 3-108(a) (supervision immunity) of the Act. The plaintiff in *Murray* was a student who suffered serious injury to his neck during a trampoline accident and was rendered a quadriplegic. The court held that the defendants were not entitled to summary judgment because there were material triable issues of fact as to whether the defendants were guilty of willful and wanton conduct.

Furthermore, if the hazardous activity that caused the injury was not conducted by a public entity or public employee, section 3-109 does not apply. In *Choice v. YMCA of McHenry County,* 2012 IL App (1st) 102877, campers drowned after sneaking out of their bunkhouse and paddle boating down the Fox River at night. The campers' estates claimed that paddle boating was a hazardous activity conducted on public property and therefore the YMCA was willful and wanton. The court concluded that the paddle boating excursion was not done at the direction of the YMCA and therefore was not 'conducted' within the meaning of Section 3-109. See also *Perez v. Chicago Park Dist., supra,* (Section 3-109 did not apply because the park district did not conduct, sanction, or license the hazardous activity undertaken by private citizens while on public property).

Further, Section 3-109 immunity does not limit liability for failure of a public entity or its employee to guard or warn of a dangerous condition of which it has actual or constructive notice and of which the participant does not have, nor can be reasonably expected to have had, notice. 745 ILCS 10/3-109(c)(1).

CHAPTER III IN REVIEW

LIABILITY ARISING FROM CONDITION OF PROPERTY

CLAIM EVALUATION CHECKLIST

- ❑ **If the plaintiff's claim arises from the condition of governmental property, a public entity has a duty to use reasonable care to maintain its property in a safe condition for the purpose intended. (*See page 24*).**
- ❑ **Is the plaintiff's claim based on a failure to make a public improvement? If so, there is no duty. However, once a public improvement is made, the public entity has a duty to maintain it. (*See page 24*).**
- ❑ **Was the plaintiff an intended and permitted user of the property at issue? If not, there is no duty. (*See page 24*).**
- ❑ **Can the plaintiff establish that the public entity had actual or constructive notice of a dangerous condition on its property? (*See page 25-26*).**
- ❑ **Are there photographs of the alleged defect? If not, the defect should be promptly identified and photographs should be obtained before the condition changes or is repaired. (*See page 25*).**
- ❑ **Consider whether photographs show the size, character and appearance of the defect. If photographs show that the defect was conspicuous or existed for a long time, this would probably be sufficient to demonstrate constructive notice. (*See page 26*).**
- ❑ **In the case of a sidewalk defect, is the defect slight or de minimis? If so, such defects are not actionable. (*See page 27*). It is helpful to take a photograph with a ruler at the deepest point of the defect.**
- ❑ **Does the governmental entity have a reasonable inspection program in place to discover and repair defects on governmental property? If so, there should be immunity under Section 3-102(b) of the Tort Immunity Act if no dangerous condition was discovered. (*See page 26-27*).**
- ❑ **Was plaintiff's injury caused by ice and snow? If the ice and snow accumulation is natural, there may be immunity under Section 3-105(a). (*See page 28*).**
- ❑ **Was plaintiff injured on a parkway? If so, consider the nature of the alleged defect. Remember, parkways are held to lesser standard than sidewalks. (*See page 29*).**
- ❑ **If the plaintiff was injured on a public street, identify where the plaintiff's accident occurred. If the plaintiff was injured due to a condition which exists outside of the crosswalk, there may be no liability. (*See page 29*).**

- ❑ **Was the plaintiff injured on recreational property? If so, governmental bodies are immune from liability under Section 3-106 unless plaintiff can establish willful and wanton conduct. (*See page 31*).**
- ❑ **In determining whether the property is recreational, consider characteristics of the property itself, such as painted markings, to establish public entity's intent. You should also consider how often it is used for recreational purposes. (*See page 31*).**
- ❑ **Was plaintiff's injury caused by a failure to install traffic control devices or warning signs? If so, Section 3-104 of the Tort Immunity provides absolute immunity under these circumstances. (*See page 32*).**
- ❑ **Did plaintiff's injury occur on an access road or hiking, riding, fishing or hunting trail? If so, there may be immunity under Section 3-107 of the Act. (*See page 34*).**
- ❑ **Was plaintiff's injury due to a hazardous recreational activity under Section 3-109 of the Act? If so, there is no liability unless plaintiff can demonstrate willful and wanton conduct. (*See page 35*).**
- ❑ **Did the injury occur on a State-owned or maintained roadway or right-of-way? A local government is not liable for negligent maintenance or inspection of State-owned property unless it has entered a construction or maintenance agreement with the State.**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter III.

- **Establish inspection program for sidewalks, streets, parks and parkways and keep good records.**
- **Establish regular maintenance/repair programs.**
- **Implement 50/50 sidewalk replacement program.**
- **Use complaint procedure for every complaint including telephone calls and walk-ins. Complaint form should include the name of the public employee who takes the complaint and identify actions taken. Complaints should be promptly investigated.**
- **During progress of public improvement make sure proper safety protection devices and warnings are used, and not just at one end of the improvement.**
- **Where contracting with a third party for the construction of improvements, make sure that the contract protects the municipality by requiring the contractor to have an adequate insurance policy that names the municipality as an additional insured and it cannot be cancelled or changed without notice to the governmental body.**
- **Consider ordinance imposing duty on homeowners to repair sidewalks in front of their property. Courts have held such ordinances valid.**
- **Inspect and maintain both marked and unmarked crosswalks.**
- **Be sure that areas intended for pedestrian travel are maintained safe for such travel including unmarked crosswalks.**
- **Use signage or other markings to inform, advise, and notify public of intent and permitted (or prohibited) uses.**
- **Be aware of weather conditions. Keep entrances to governmental property clear of ice and snow.**
- **Do not rely on property owners to clear ice and snow from public sidewalks.**
- **Remember that a sidewalk defect which measures 1½ inches or more may create liability.**
- **Beware of buffalo boxes. Know where they are and inspect them to be sure box is flush with ground.**
- **Inspect parkways regularly. Be sure parkway is back filled properly and be sure ground has not settled along curb lines.**
- **Regularly inspect traffic signs and signals. If you note a replacement is required, do it quickly.**
- **Remember that a stop sign down for more than 24 hours may impose liability.**

- **Conduct regular inspections of street lights to ensure that the lights are working and are maintained in a safe condition.**
- **If you are going to use traffic control devices, make sure they comply with current version of the *Manual of Uniform Traffic Control Devices.***
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against a public entity or its employees without consulting with an attorney.**
- **Make sure that any contractor performing new construction is adequately insured, has added the local government as additional insured on the contractor's policy and has included appropriate indemnity language in the contract documents.**

CHAPTER V. ILLINOIS SCHOOL CODE IMMUNITY

A. Historical Background

Both the Illinois School Code and the Tort Immunity Act provide school districts with certain protections from tort liability. The immunities contained in the School Code are found in 105 ILCS 5/24-24 for school districts of less than 500,000 population. (105 ILCS 5/34-84a applies to school districts of greater than 500,000 population.) The immunity is known as *in loco parentis* immunity. The scope of this immunity is based on a legislative determination that educators should *stand in the place of a parent or guardian* in matters relating to discipline and the conduct of the schools. *Kobylanski v. Chicago Bd. of Educ.*, 63 Ill. 2d 165, 174, 347 N.E.2d 705 (1976); *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 712 N.E.2d 298 (1998).

B. In Loco Parentis Immunity

The immunities available to school districts and their employees under the School Code are separate and distinct from those provided under the Tort Immunity Act. Sections 5/24-24 and 5/34-84(a) of the School Code both provide that:

> Teachers . . . shall maintain discipline in the schools . . . . In all matters relating to the discipline in and conduct of the schools and of the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program . . . and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

This immunity applies to (1) educators (2) who engage in school-related activities, and (3) when the employee's negligence causing injury is not willful and wanton. All three elements must be satisfied before *in loco parentis* immunity will apply. For example, Section 34-84a provided immunity from liability for a claim of negligence against a school that failed to properly supervise one of its teachers who provided drugs and alcohol to and had sex with a student outside of school hours. *Doe v. Lawrence Hall Youth Servs.*, 966 N.E.2d 52, 358 Ill. Dec. 867 (1st Dist. 2012).

1. "Educators" Defined

The School Code provides immunity to educators and other certified educational employees and other persons, whether or not certified, who provide related services to students within the State of Illinois. 105 ILCS 5/24-24, 5/34-84a. The term "certified educational employees" under the Code applies to all classroom teachers[67] and has also been applied by the

[67] *Knapp v. Hill*, 276 Ill. App. 3d 376, 657 N.E.2d 1068 (1st Dist. 1995).

courts to principals, superintendents,[68] dean of students,[69] physical education teachers and gymnastics coaches.[70]

In 1995, the School Code was revised and this immunity was broadened to include non-certified educational employees who provide related services. 105 ILCS 5/24-24, 5/34-84a, amended by Public Act 89-184, effective July 19, 1995. Now, this immunity affords protection to teacher's aides, playground supervisors or study hall monitors. In cases where *in loco parentis* immunity does not apply, immunity may still be found in the broader definition of "employee" found in the Tort Immunity Act.

2. School Activities

Educators must be engaged in "school activities" to be cloaked with *in loco parentis* immunity. The term "school activities" includes classroom teaching,[71] physical education classes,[72] extracurricular sporting programs,[73] field trips,[74] administrative activities and record keeping,[75] and daycare programs.[76] Even though the concept of *in loco parentis* is derived from the role of parents in discipline, immunity under the School Code is not limited to disciplinary matters, but its protection only extends to activities connected with a school program. *O'Brien v. Township High Sch. Dist*., 83 Ill. 2d 462, 415 N.E.2d 1015 (1980). For example, when teachers provide medical treatment to a student, they are not engaged in an educational activity, and their conduct is not protected by the School Code immunity.

3. Willful and Wanton Misconduct under Illinois School Code

The School Code requires a plaintiff to prove willful and wanton misconduct before tort liability will attach against educators for injuries suffered by students in school-related activities. Educators are immune for conduct causing injuries to students which arises from ordinary negligence. *Hopwood v. Elmwood, supra.* This is because parents and guardians are not liable to their children for ordinary negligence, but are liable for willful and wanton misconduct. *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 238 Ill. Dec. 576, 712 N.E.2d 298, 303 (1998).

The statutory standard (745 ILCS 10/1-210) for determining whether conduct is willful and wanton applies to claims that fall under the Tort Immunity Act as well as *in loco parentis* immunity. The statutory standard states that willful and wanton conduct means "a course of

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[68] *Pomrehn v. Crete-Monee High Sch. Dist*., 101 Ill. App. 3d 331, 427 N.E.2d 1387 (3rd Dist. 1981).

[69] *In re E.M.*, 262 Ill. App. 3d 302, 634 N.E.2d 395 (2nd Dist. 1994).

[70] *Kobylanski v. Chicago Bd. of Educ.*, *supra*; *Montag v. Bd. of Educ. Sch. Dist. No 40*, 112 Ill. App. 3d 1039, 446 N.E.2d 299 (3rd Dist. 1983); *Henrich v. Libertyville High Sch.*, *supra.*.

[71] *Kain v. Rockridge*, 117 Ill. App .3d 681, 453 N.E.2d 118 (3rd Dist. 1983).

[72] *Kobylanski v. Chicago Bd. of Educ.*, *supra*.

[73] *Thomas v. Chicago Bd. of Educ*., 77 Ill. 2d 165, 395 N.E.2d 538 (1979).

[74] *Mancha v. Field Museum of Nat. History*, 5 Ill. App. 3d 699, 283 N.E.2d 899 (1st Dist. 1972).

[75] *Hopwood v. Elmwood Cmty. High Sch. Dist.*, 171 Ill. App. 3d 280, 525 N.E.2d 247 (3rd Dist. 1988).

[76] *Hilgendorf v. First Baptist Church*, 157 Ill. App. 3d 428, 510 N.E.2d 527 (4th Dist. 1987).

action that shows an actual or deliberate intention to cause harm, or that, if not intentional, shows an utter indifference to, or conscious disregard for, the safety of others or their property." Common law definitions of willful and wanton simply provide guidance. See *In re Estate of Stewart*, *supra*.

This standard has been considered in a variety of circumstances. For example, a teacher's failure to take down wrestling mats during gym class established negligent, not willful and wanton, misconduct. *Gara by Gara v. Lomonaco*, 199 Ill. App. 3d 633, 557 N.E.2d 483 (1st Dist. 1990). In another case, a student's complaint that his wrestling coach, who had no medical training, attempted to manipulate the student's injured knee, had allowed the student to return to practice, and had failed to seek medical attention were sufficient, if proven, to state a claim against the coach for willful and wanton conduct.[77] Similarly, a student's complaint that her gym teacher disregarded her physician's note and forced her to play dodge ball during gym class although she was injured was sufficient to state a claim against the school for willful and wanton conduct.[78] Further, a student's complaint that his teacher failed to provide eye protection during an experiment in chemistry class was sufficient to state a claim for willful and wanton conduct. *Hill v. Galesburg Cmty. Unit Sch. Dist. 205*, 346 Ill. App. 3d 515, 805 N.E.2d 299 (3rd Dist. 2004).

In a recent case, a teacher's initial reaction to a student collapsing in his class room was not enough to overcome his subsequent inaction. After the student's collapse the teacher immediately ran to his side. However, the teacher failed to follow school policy and call 911, instead opting for the school nurse and wasting valuable time. In the end seven to ten minutes passed before anyone called 911 resulting in the death of the student. The court reasoned that taking *any* action in response to a known danger is not enough to insulate a defendant from willful and wanton conduct.[79]

Illinois courts have recognized an exception to the *in loco parentis* immunity when a case involves the furnishing of equipment. A school district may be liable for ordinary negligence when providing equipment when it knew or should have known that it was defective or dangerous.[80] This exception has been used against school districts to get around the willful and wanton standard imposed by the *in loco parentis* immunity found in the Illinois School Code relating to the supervision of students in physical education classes. For example, a school district was found liable when it provided a dangerous climbing apparatus which caused a student to fall during gym class. *Jastram v. Lake Villa Sch. Dist. 41*, 192 Ill. App. 3d 599, 549 N.E.2d 9 (2nd Dist. 1989).

C. Educational Malpractice

Illinois courts generally do not recognize a tort claim against a school district or its employees for not educating a student or "*educational malpractice*." See *Donovan v. Cmty. Unit Sch. Dist. 303*, 2015 IL App (2d) 140704, ¶ 10 ("Illinois does not recognize the tort of

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[77] *Halper v. Vayo*, 210 Ill. App. 3d 81, 568 N.E.2d 914 (2nd Dist. 1991).

[78] *Brugger v. Joseph Acad., Inc.*, 326 Ill. App. 3d 328, 760 N.E.2d 135 (1st Dist. 2001).

[79] *In re Estate of Stewart, supra*.

[80] *Nielsen v. Cmty. Unit Sch. Dist. No. 3*, 90 Ill. App. 3d 243, 412 N.E.2d 1177 (4th Dist. 1980); *Grandalski v. Lyons Twp. High Sch. Dist. 204*, 305 Ill. App. 3d 1, 711 N.E.2d 372 (1st Dist. 1999).

educational malpractice"). Additionally, the majority of the other states that have considered this type of claim have refused to allow it. There are several sound policy reasons against allowing claims for educational malpractice. They include: (1) the lack of a standard of care by which to evaluate an educator;[81] (2) the existence of inherent uncertainties with respect to the cause and nature of damages with this type of claim;[82] and (3) the great potential for a flood of litigation against schools. *Ross v. Creighton Univ*., *supra*. If the Illinois Supreme Court is called upon to decide the issue, it is doubtful that such a claim would be recognized here for the policy considerations noted. The Illinois Supreme Court has already rejected similar claims brought under the state Constitution. *Lewis v. Spagnolo*, 186 Ill. 2d 198, 710 N.E.2d 798 (1999).

D. Interplay with the Tort Immunity Act

The Illinois School Code and the Tort Immunity Act are to be interpreted independently of one another.[83] The Tort Immunity Act affords additional protections and immunities to school districts and their employees. Specifically, a school district is included as a "local public entity" entitled to the protections of the Tort Immunity Act, and school district employees are certainly "public employees" under the Act.

For public schools, some of the immunities found in the Tort Immunity Act may apply to willful and wanton behavior not covered by *in loco parentis* immunity. *Henrich v. Libertyville High Sch.*, *supra*; *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 898 N.E.2d 631, 642 (2008). These immunities are separate and distinct from those provided under the School Code. They include: Section 3-106, Recreational Property; Section 3-108, Supervision Immunity; Section 2-201, Discretionary Immunity; Section 3-102, Notice of a Defective Condition; and Section 2-103, Failure To Adopt Or Enforce Any Law. See *Donovan v. Cmty. Unit Sch. Dist. 303*, *supra* at ¶ 20 (finding that the trial court properly determined that section 2–103 of the Tort Immunity Act barred plaintiffs' claims regarding a school district's adoption of a school improvement plan and its failure to provide choice in contravention of the School Code and NCLB). Each of these immunities is discussed in Chapters II and III of this Handbook.

Recent Appellate Court cases illustrate the additional protections that the Tort Immunity Act may provide for school districts in an increasing topic of litigation - bullying. In *Hascall v. Williams*, *supra* at ¶¶ 26-28, discretionary immunity applied where a student alleged the Principal, Superintendent and School Board failed to respond appropriately to bullying incidents. The court reasoned that the determination of whether bullying has occurred; the appropriate consequences, and the choice of remedial actions are discretionary acts even where the School

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[81] *Ross v. Creighton Univ*., 957 F.2d 410, 414 (7th Cir. 1992) ("[t]heories of education are not uniform, and 'different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services.' (citations omitted.)").

[82] *Donohue v. Copiague Union Free Sch. Dist*., 47 N.Y. 2d 440, 391 N.E. 2d 1352, 1355 (1979) ("[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.").

[83] *Bowers v. DuPage Cty. Reg'l Bd. of Sch. Tr.*, 183 Ill. App. 3d 367, 539 N.E.2d 246 (2nd Dist. 1989); *Arteman v. Clinton Cmty. Unit Sch. Dist.*, 198 Ill. 2d 475, 763 N.E.2d 756 (2002) (recognizing the Tort Immunity Act gives immunity to a school district even though the school district may have breached a duty to the plaintiff under the School Code; in other words, the immunity provision in the School Code does not displace the immunity provided by the Tort Immunity Act).

Code requires each district to "create and maintain a policy on bullying." In *Malinksi v. Grayslake Cmty. High Sch. Dist. 127*, 2014 IL App (2d) 130685, ¶ 14, the court also held that a school district was entitled to discretionary immunity because implementing a bullying policy is not a ministerial act. The court stated that "a policy may afford a school district with the discretion to determine whether bullying occurred, what consequences will result, and any appropriate remedial actions." Similarly, in *Mulvey v. Carl Sandburg High School,* 2016 IL App (1st) 151615, and in *Castillo v. Bd. of Ed. of City of Chicago*, 2018 IL App (1st) 171053, the First District Appellate Court applied Section 2-201 discretionary immunity to school's response and handling of bullying reports from students.

However, some of the immunities in the Tort Immunity Act may not immunize a school district where the conduct is willful and wanton. Section 4-102 immunity, which provides immunity for the provision of police protection services, did not apply to a school board's furnishing of a bus attendant for the transportation of special needs students to and from school. *Doe, Ortega-Piron v. Chicago Bd. of Educ.*, 213 Ill. 2d 19, 820 N.E.2d 418 (2004). Rather, Section 3-108 applied and Section 3-108 does not immunize willful and wanton conduct. The court explained that the allegations that a student's sexual assault on a school bus by another student who had been declared sexually aggressive and was never to be left unsupervised, but was left unsupervised at the time of the assault, sufficiently stated a claim for willful and wanton conduct. Section 3-108 immunity and Section 4-102 immunity are discussed in Chapter II and Chapter V of this Handbook.

Section 3-108 immunity also does not immunize a school district where the conduct is willful and wanton. In *Brooks v. McLean Cty. Unit Dist. No. 5*, *supra* at ¶ 42, the district was ultimately afforded immunity because its employees did not willfully fail to supervise students playing "body shots." In *Brooks*, a student died after participating in a game, in the school bathroom, where students punched each other in the torso. The court explained that the complaint alleged no facts which "would permit the inference that the district's conduct was willful and wanton, as opposed to possibly merely negligent." Had the district's conduct been willful and wanton Section 3-108 immunity likely would not have applied.

E. Abused and Neglected Child Reporting Act

The Abused and Neglected Child Reporting Act ("Reporting Act"), requires a school district and its employees to report suspected child abuse to the Illinois Department of Children and Family Services. 325 ILCS 5/4. Suspected child abuse is defined as "reasonable cause to believe a child known to them in their professional or official capacity may be an abused or neglected child." This requirement applies to all school district personnel, including administrators and both certified and non-certified school employees. Even school board members who become aware of suspected child abuse during the course of an open or closed school board meeting must notify the superintendent or another equivalent school administrator to report the suspected abuse. Any person who willfully fails to report suspected abuse under the Reporting Act may be guilty of a Class A misdemeanor for a first violation, and a Class 4 felony for a second or subsequent violation. 325 ILCS 5/4.02.

Courts have found that the requirement to report suspected child abuse is not discretionary. In *Doe v. Dimovski*, *supra*, a student and a parent sued the school district that employed a teacher who had sexually abused the student. The plaintiffs claimed the school district had a duty to investigate the abuse and report it to the Illinois Department of Children and Family Services. The appellate court held the plaintiffs' claim could not be dismissed on the basis of the discretionary immunity set forth in Section 2-201 of the Tort Immunity Act. 745 ILCS 10/2-201. The court explained the Reporting Act did not allow the school district

discretion in deciding whether to report the suspected child abuse.[84] However, the Illinois Supreme Court in *Doe-3 v. McLean Cty. Unit Dist. No. 5*, *supra*, held that while a school district did not have an affirmative duty to warn another school district of sexual abuse allegations against a teacher, there was a duty to provide accurate information regarding that teacher's employment history.

[84] *Doe v. Dimovski*, *supra*; but see *Doe v. White*, 627 F. Supp. 2d 905 (C.D. Ill. 2009) and *Doe 20 v. Bd. of Educ. Cmty. Unit Sch. Dist. No. 5*, 680 F. Supp. 2d 957 (C.D. Ill. 2010), holding that Illinois' Abused and Neglected Child Reporting Act did not create a private cause of action for tort liability.

CHAPTER IV IN REVIEW

ILLINOIS SCHOOL CODE IMMUNITY

CLAIM EVALUATION CHECKLIST

- ❑ **A school district and its employees are entitled to immunity from at least two sources: the Tort Immunity Act and the *in loco parentis* doctrine found in the Illinois School Code. Make sure both sources are evaluated. (*See page 41*).**
- ❑ ***In loco parentis* immunity applies to educators, certified educational employees and other persons, whether or not certified, who provide related services to students. (*See page 41*).**
- ❑ **Was the plaintiff engaged in a school-related activity at the time of the alleged injury? (*See page 42*).**
- ❑ **Has the plaintiff sufficiently alleged willful and wanton misconduct on the part of the school employee? Remember, *in loco parentis* immunity only applies to negligent conduct and will not afford protection for willful and wanton acts. (*See page 42*).**
- ❑ **Does the equipment exception to *in loco parentis* immunity apply? (*See page 43*).**
- ❑ **Do the immunities available to school districts and their employees found in the Illinois Tort Immunity Act apply? (*See page 44*).**
- ❑ **Does supervision immunity found in Section 3-108 of the Tort Immunity Act apply? (*See page 12*).**
- ❑ **Does discretionary immunity found in Section 2-201 of the Tort Immunity Act apply? (*See page 13*).**
- ❑ **Was plaintiff injured on recreational property such as a playground or school gymnasium? If so, the immunity found in Section 3-106 of the Tort Immunity Act should apply. (*See page 31*).**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter IV.

- **Make sure school employees including teachers, teachers aides and coaches responsible for supervising activities have received appropriate training and that such training is well-documented.**
- **Supervisors of school activities should not be participants. Too active participation can negate the Tort Immunity Act protections.**
- **In the event of an injury, contact parents or guardians as soon as possible.**
- **If you are leaving school grounds, require all students to provide a parent or guardian-signed permission slip or waiver form for the off-grounds activity.**
- **If school improvements are made over the summer, make sure the improvements are complete and ready for student use by the time students return to school.**
- **Avoid allowing teachers to perform medical treatment on students.**
- **If school nurse is on the premises, contact her immediately. If no school nurse is available, call 911.**
- **Be sure coaches are properly trained and that activities are not allowed to begin until proper supervision is available.**
- **Pay close attention to all medical or doctor notes received from students, and abide by any physical restrictions placed on the students.**
- **Be sure all teachers follow safety rules and regulations in the classroom, including proper equipment for science and chemistry experiments.**
- **Be sure that all school district personnel, including administrators and both certified and non-certified school employees, are regularly trained about their requirements under the Abused and Neglected Child Reporting Act, and know that they must immediately report any suspected child abuse or neglect to the Illinois Department of Children and Family Services.**
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against public entity or its employees without consulting with an attorney.**
- **Ensure that private contractors which provide equipment or services associated with school activities are properly insured and provide well maintained equipment.**
- **Require and maintain student/parent injury waivers signed by the adult for school activities involving risk of injury.**
- **Conduct background checks, including on third-party contractors such as cab drivers for special needs children.**

CHAPTER VI. TORT IMMUNITY FOR POLICE SERVICES

The Tort Immunity Act contains a number of immunities which apply to governmental police services.

A. Police Protection Services

Section 4-102 of the Act, provides that there is no liability for a local public entity's failure to establish a police department or to provide police protection service. If police services are provided, no liability arises solely for failing to provide adequate police services or to prevent, detect or solve a crime or for failing to identify or apprehend a criminal.[85] This immunity is absolute and cannot be overcome by a showing of willful and wanton conduct. *DeSmet v. Cty. of Rock Island*, 219 Ill. 2d 497, 302 Ill. Dec. 466, 848 N.E.2d 1030, 1045 (2006). Thus, in *Green v. Chicago Bd. of Educ.*, 944 N.E.2d 459 (1st Dist. 2011), a school board was immune from liability for willfully and wantonly dismissing a student from school into an armed gang on school grounds without providing any police or protection services, resulting in the death of the student. See also *Albert v. Bd. of Educ. of City of Chicago*, 2014 IL App (1st) 123544, ¶ 59.

Illinois courts have considered whether a particular law enforcement activity falls within the definition of a "*police protection service*" under Section 4-102. Crowd control and traffic management at a Fourth of July celebration constituted a police service within the immunity available under Section 4-102.[86] Similarly, in *Long v. Soderquist*, 126 Ill. App. 3d 1059, 467 N.E.2d 1153 (2nd Dist. 1984), this immunity applied to a claim against a police officer for failing to light flares near an accident scene or to otherwise direct the drivers of the vehicles involved to move their cars from the roadway. In *McElmeel v. Vill. of Hoffman Estates*, 359 Ill. App. 3d 824, 835 N.E.2d 183 (1st Dist. 2005), the court applied Section 4-102 immunity to a police officers' actions in assisting a disabled motorist and stopping the southbound lane of traffic, resulting in a rear-end collision. In *Prough v. Madison Cty.*, 2013 IL App (5th) 110146, ¶ 26, the court held that Section 4-102 and Section 4-107 immunized the county, state, and sheriff's department for their alleged failure to provide adequate police protection by releasing an individual who was subject to a detention order and not preventing the commission of that individual's later crime.

The term "police protection service" also covers instances involving police assistance and rescue services. For example, in *Kavanaugh v. Midwest Club, Inc.*, 164 Ill. App. 3d 213, 517 N.E.2d 656 (2nd Dist. 1987), Section 4-102 provided immunity from plaintiff's claim the public entity was negligent in failing to dispatch personnel with proper rescue training and equipment after a motor vehicle had driven off a roadway into a nearby retention pond. Similarly, in *DeSmet v. County of Rock Island*, *supra*, this immunity applied to the failure to respond to an anonymous caller's report to a village clerk, who then notified the county dispatcher that a motorist's vehicle had left the road. The court explained that Section 4-102 is implicated where police are called upon to assist or locate motorists who have driven off the roadway. Additionally, in *Payne v.*

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[85] 745 ILCS 10/4-102.

[86] *Dockery v. Vill. of Steeleville*, 200 Ill. App. 3d 926, 558 N.E.2d 449 (5th Dist. 1990).

City of Chicago, 2014 IL App (1st) 123010, police officers were immune under Section 4-102 when they used a TASER on a man who was hallucinating while on crack cocaine because the officers were responding to a call for assistance. See also *Benton v. City of Granite City*, 2016 IL App (5th) 150241 (holding immunity applied for claims brought under Section 16 of the Animal Control Act, where the cause of action derives from the use of an animal providing police protection services).

However, in *Torres v. City of Chicago*, 352 Ill. App. 3d 533, 816 N.E.2d 816 (1st Dist. 2004), the court found Section 4-102 immunity did not apply to the failure to obtain medical aid to an injured person, where the police officers failed to request an ambulance for the victim until one and a half hours after arriving on the scene. The court explained the responsibility for obtaining medical aid involved no service characteristic of police functions.

The Illinois Supreme Court has also found that Section 4-102 does not provide immunity for the failure to prevent a crime against a victim of domestic violence. In *Moore v. Green*, 219 Ill. 2d 470, 848 N.E.2d 1015 (2006), the deceased called 911 after her husband violated a protective order and entered her house with a gun. The 911 dispatcher relayed this information to police officers, one of which acknowledged the receipt of the information. However, approximately five minutes before the victim was shot by her husband, the police officers drove by her house without investigating the matter further. The Supreme Court held the partial immunity under the Domestic Violence Act of 1986, rather than the absolute immunity under Section 4-102, was applicable. The court explained the Domestic Violence Act was intended to address the specific problem of domestic violence and, therefore, controls over the more general Section 4-102.

In addition, in *Lacey v. Vill. of Palatine*, 232 Ill. 2d 349, 367 (2009), Section 4-102 immunity barred the plaintiff's claim because the police officers were not "otherwise enforcing" the Domestic Violence Act so as to bring their conduct within the Act's limited immunity. The court recognized the Act does not impose a generalized, open-ended duty to protect victims of domestic violence. Rather, the Domestic Violence Act will only be implicated when the officer is providing emergency assistance or is in a position proximate to the victim that allows the officer to take reasonable steps to prevent further abuse, such as accompanying the victim to his or her place of residence or providing transportation to a hospital. *Id.*; see *Fenton v. City of Chicago*, 2013 IL App (1st) 111596, ¶ 39 (holding that the city was liable for the willful and wanton actions of two police officers where the officers failed to take reasonable steps to prevent further abuse after being summoned multiple times to a domestic disturbance).

Finally, as discussed in Chapter IV of this Handbook, the Illinois Supreme Court has also held that Section 4-102 did not apply to a school board's furnishing of a bus attendant for the transportation of special needs students to and from school.[87] The court explained that providing an attendant on a bus to supervise children does not constitute "police protection service."

B. Execution or Enforcement of the Law

Section 2-202 of the Tort Immunity Act insulates a public employee from liability so long as he is involved in the *execution or enforcement* of the law.[88] The determination of

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[87] *Doe, Ortega-Piron v. Chicago Bd. of Educ.*, *supra*.

[88] 745 ILCS 10/2-202. See *Payne v. City of Chicago*, *supra* at ¶ 34, for a discussion of the meaning of "execution or enforcement of the law" and "police protection services."

whether an officer is acting in the enforcement of the law must be made on a case by case basis,[89] but the general rule is that an officer must be actively involved in a "course of conduct designed to carry out or put into effect any law" as opposed to being engaged in "routine elements of his official duties."[90] See also *Stehlik v. Vill. of Orland Park*, 2012 IL App (1st) 091278, ¶ ¶ 30, 35 (police officer following a witness to the "showup" identification was immune from liability under Section 2-202 because the officer was engaged in the execution or enforcement of the law at the time of the collision and there was no evidence the officer acted willfully or wantonly). Thus, activities which are protected include investigating a traffic accident,[91] disbursing a disorderly crowd,[92] responding to a report of a crime in progress[93] and attempting to serve an arrest warrant.[94] Among the activities not protected are transporting a prisoner from one jail to another,[95] and accidents which occur during routine patrol.[96] In addition, where officers respond to a scene as backup, a question may exist as to whether they are providing traffic control or otherwise actually executing or enforcing the law or whether they are not in fact covered by immunity.[97]

Section 2-202 immunity is limited to claims based on ordinary negligence. If a plaintiff can establish the officer's conduct amounts to willful and wanton misconduct, no immunity is afforded.[98] See *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 117 ("after the affirmative defense of tort immunity was raised, the burden shifted to plaintiff to not only prove…battery, but also that the battery was willful and wanton"); *Wilson v. City of Chicago*, 758 F.3d 875, 880 (7th Cir. 2014). Section 2-202's exception for willful and wanton conduct does not override the absolute immunities found in more specific sections of the Act. For example, Section 4-106(b) immunized a police officer for willfully and wantonly allowing an arrestee to gain control of his vehicle and collide with another motorist because the arrestee became an "escaping prisoner." *Ries v. City of Chicago*, 242 Ill. 2d 205, 950 N.E.2d 631, 644 (2011). Similarly, Section 4-102 immunized a county from liability when it willfully and wantonly ignored a report of an automobile accident until the motorist's body was found three days later. *DeSmet v. County of Rock Island*, *supra*. But compare *Robles v. City of Chicago*, *supra* at ¶ 13 (applying Section 2-202 rather than Section 2-201 because Section 2-201 immunity is contingent on other provisions).

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[89] *Arnolt v. City of Highland Park*, 52 Ill. 2d 27, 282 N.E.2d 144 (1972); *Aikens v. Morris*, 145 Ill. 2d 273, 583 N.E. 2d 487 (1991).

[90] *Bruecks v. Cty. of Lake*, 276 Ill. App. 3d 567, 658 N.E.2d 538 (2nd Dist. 1995).

[91] *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 492 N.E.2d 1292 (1986).

[92] *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 888 N.E.2d 721 (1st Dist. 2008).

[93] *Morris v. City of Chicago*, 130 Ill. App. 3d 740, 474 N.E.2d 1274 (1st Dist. 1985).

[94] *Glover v. City of Chicago*, 106 Ill. App. 3d 1066, 436 N.E.2d 623 (1st Dist. 1982).

[95] *Aikens v. Morris*, *supra*.

[96] *Simpson v. City of Chicago*, 233 Ill. App. 3d 791, 599 N.E.2d 1043 (1st Dist. 1992).

[97] *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 881 N.E.2d 430 (1st Dist. 2007).

[98] *Bruecks v. Cty. of Lake*, *supra*.

C. Claims Arising Out of Jails or Lockups

The most significant types of torts alleged to have occurred in a municipal jail or police lockup involve suicides, assaults by another inmate, and inadequate medical treatment. Sections 4-103 and 4-105 of the Act, provide immunity for these kinds of claims.

Section 4-103 provides:

> Neither a local public entity nor a public employee is liable for failure to provide a jail, detention or correctional facility, or if such facility is provided, for failure to provide sufficient equipment, personnel, supervision or facilities therein. Nothing in this Section requires the periodic inspection of prisoners.

In *Fraley v. City of Elgin*, 251 Ill. App. 3d 72, 621 N.E.2d 276 (2nd Dist. 1993), Section 4-103 provided immunity in a jail suicide case where the alleged negligent and willful and wanton misconduct included the failures to remove the prisoner's personal effects at the time of detention and to regularly check on the prisoner. And, in *Bolinger v. Schneider*, 64 Ill. App. 3d 758, 381 N.E.2d 849 (3rd Dist. 1978), the court considered a claim by an inmate who was sexually assaulted by other inmates in a county lockup. The claim was based on an alleged failure to properly supervise the jail and monitor the plaintiff's cell. The court found that Section 4-103 provided immunity to the sheriff.[99] Because of these immunities, cases involving alleged misconduct in a jail or lockup tend to be brought under the provisions of the Federal Civil Rights Act. For a discussion of that Act, see Section VII.

Another common claim is that the public entity failed to provide medical treatment to an inmate or arrestee. However, Section 4-105 of the Act significantly limits an arrestee's ability to make such a claim. Section 4-105 provides:

> Neither a local public entity nor a public employee is liable for. . .the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but this Section shall not apply where the employee. . .knows. . .that the prisoner is in need of immediate medical care and, through willful and wanton conduct, fails to take reasonable action to summon medical care.[100]

As a result, before liability will attach under 4-105, the plaintiff must establish that the defendant actually observed a condition which required immediate medical care. This limitation recognizes that it may be impractical to take prisoners to a hospital or obtain medical care each time a minor injury occurs, and that even with a major injury, an act of simple negligence will not impose liability. The Courts are also aware that sometimes arrestees or prisoners will fake injuries or the need for medical services.

D. Abolishment of the Public Duty Rule and the Special Duty Exception.

In January 2016, the Illinois Supreme Court abolished the long-standing common-law "public duty rule." *Coleman v. E. Joliet Fire Prot. Dist.*, 2016 IL 117952. Prior to this decision,

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[99] See also *Jefferson v. Sheahan*, 279 Ill. App. 3d 74, 664 N.E.2d 212 (1st Dist. 1996) (rejecting judicial imposition of willful and wanton conduct exception not intended by the legislature); Section 4-103 may also interact with the discretionary immunity found in Section 2-201. See *Black v. Dart*, 2015 IL App (1st) 140402, ¶ 17 (discussing how a sheriff's decisions regarding the proper allocation of time and other resources require a sheriff to "make a judgment call").

[100] 745 ILCS 10/4-105.

the general rule in Illinois was that a local public entity owed no duty to provide police, fire protection, or rescue services.[101] This was known as the "public duty rule." This rule acknowledged that municipalities owed a duty to provide these services to the general public, but not to any individual. In addition to this general rule, there was a judicially created exception, where a local public entity had assumed a "*special duty*" to a person, therefore, elevating the individual's "status to something more than a member of the general public."[102] As a result of court's inconsistently applying the public duty rule and its exceptions, the application of the rule being incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct, and the determination that the legislature's enactment of statutory immunities rendered the public duty rule obsolete, the Illinois Supreme Court concluded that the public duty rule and its exception were unnecessary. *Coleman v. E. Joliet Fire Prot. Dist.*, *supra* at ¶ 54. Consequently, the Tort Immunity Act is now the sole immunization for government actors, but the immunity only applies to certain actions and does not remove the actor's duty. As the *Coleman* court stated, it is now up to the legislature to amend the Tort Immunity Act, if it wishes, to include a public duty immunity.

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[101] *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1st Dist. 1983); *Jackson v. Chicago Firefighters Union Local No. 2*, 160 Ill. App. 3d 975, 513 N.E.2d 1002 (1st Dist. 1987).

[102] *Long v. Soderquist*, *supra*.

CHAPTER V IN REVIEW

TORT IMMUNITY FOR POLICE SERVICES

CLAIM EVALUATION CHECKLIST

- ❑ **Does the governmental defendant's conduct fall within the definition of a "police protection service?" If so, Section 4-102 of the Tort Immunity Act should apply. (*See page 50*).**
- ❑ **Does the plaintiff's claim arise out of the execution or enforcement of the law? If so, Section 2-202 of the Tort Immunity Act should apply unless plaintiff can demonstrate willful and wanton conduct on the part of the governmental defendant. (*See page 52*).**
- ❑ **Did the plaintiff's injury occur in a municipal jail or police lockup such as a jail suicide or assault by another inmate? If so, the immunity found in Section 4-103 should apply. (*See page 53*).**
- ❑ **If the plaintiff alleges a failure to provide medical treatment by police personnel, there is immunity under Section 4-105 of the Tort Immunity Act unless the plaintiff demonstrates the governmental defendant actually observed a condition which requires immediate medical care and failed to take appropriate action. (*See page 53*).**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter V.

- **Record keeping is critical, so train employees on how to keep good records.**
- **Require reports to be accurate and timely. Stress the importance of preparing more thorough reports immediately after an incident that is unusual or potential for a lawsuit.**
- **Document facts showing execution or enforcement of the law. For example, if an accident happens during a routine traffic stop, note the circumstances of the stop.**
- **If video monitors are on 24-hours, make sure someone is there watching them. Be sure the monitors are regularly observed.**
- **Consider replacing video monitors with recording equipment.**
- **Set aside any video or audio tape where there is anything unusual or potential for a lawsuit. Do not wait for a lawsuit to preserve the tape and consider preserving the tapes for a longer retention period.**
- **Consider video cameras in squad cars and train regarding usage.**
- **Consider wearing body cameras on uniforms and train regarding usage.**
- **Use updated computer equipment in squad cars.**
- **Reinforce training on legal requirements for arrests and use of force policies.**
- **Require regular weapons and on-going use of force training.**
- **Regularly inspect and maintain conducted energy devices.**
- **Regularly review policies associated with use of police taser devices in light of changing manufacturer guidelines and publications.**
- **Emphasize officer safety in call responses.**
- **Provide regular performance reviews for all levels.**
- **Officers should assume their actions may be videotaped or recorded by citizens.**
- **Regularly test on knowledge of department policies and procedures.**
- **Emphasize use of radio communication.**
- **Require regular driving certification.**
- **Enforce department policies on vehicle pursuits.**
- **Enforce orders of protection in domestic violence/dispute calls.**
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against public entity or its employees without consulting with an attorney.**

- **Document the observable condition of prisoners.**

CHAPTER VII. TORT IMMUNITY FOR FIRE AND EMERGENCY MEDICAL SERVICES

This Chapter addresses the immunities and defenses available to local public entities and public employees that provide fire and emergency medical services. These immunities are found in Article V of the Tort Immunity Act.

A. Fire and Emergency Medical Services

The Tort Immunity Act provides certain immunities to fire protection districts, municipal fire departments and their employees from tort liability for injuries to the public arising from fire and emergency medical services.[103] The Tort Immunity Act does not apply to private ambulance services or independent contractors. See *Harris v. Thompson*, 2012 IL 112525, ("the Tort Immunity Act does not apply to private employees").

B. Section 5-101 Immunity for Failure to Establish a Fire Department or to Provide Fire Protection

Section 5-101 grants a governmental entity immunity for failure to establish a fire department or otherwise to provide fire protection, rescue or other emergency service. 745 ILCS 10/5-101. The Act defines "rescue services" to include, but is not limited to, the operation of an ambulance as defined in the Emergency Medical Services (EMS) Systems Act. 210 ILCS 50/1 et seq.

Section 5-101 codifies the common-law rule that a governmental entity owes the public no general duty of fire protection and that it therefore cannot be held liable for failing to provide fire services.[104] Under Illinois law, if a local public entity chooses, for whatever reason, not to provide fire protection services, it cannot be held liable for that choice. In *Jackson v. Chicago Firefighters Union Local No. 2*, *supra*, Section 5-101 was held to provide an absolute immunity for the failure to provide fire protection services.

C. Section 5-102 Immunity for Failure to Suppress or Contain a Fire or Provide Sufficient Personnel or Equipment

Once a governmental entity undertakes to provide fire protection services, Section 5-102 provides immunity from claims of negligence in failing to suppress or contain a fire or from failing to provide or maintain sufficient personnel, equipment or fire protection facilities.[105] For example, in *Pierce v. Vill. of Divernon*, *supra*, a homeowner's claim that Village failed to provide sufficient water or water pressure to allow suppression of fire in their home was barred by Section 10/5-101 of the Act. In *Harinek v. 161 N. Clark St., supra*, the Illinois Supreme Court

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[103] 745 ILCS 10/1-206 and 10/1-207.

[104] *Pierce v. Vill. of Divernon*, 17 F.3d 1074 (7th Cir. 1994). See also, *Remet Corp. v. City of Chicago*, 509 F.3d 816 (7th Cir. 2007).

[105] 745 ILCS 10/5-102.

held that a fire drill supervised by the City's fire marshal did not fall within the definition of "fire protection services" under Section 10/5-102. (See also, *Srail v. Vill. of Lisle*, 588 F.3d 940 (7th Cir. 2009), holding that the Constitution creates no right to fire protection).

D. Section 5-103(a) Immunity for Injury Arising from Condition of Firefighting Equipment

Under Section 5-103(a) of the Act, a public entity and its employees acting in the scope of their employment are immune from liability for an injury resulting from the condition of fire protection or firefighting equipment or facilities. This provision does not apply to an injury resulting from the condition of a motor vehicle while it is traveling on public ways. 745 ILCS 10/5-103(a).

In *Indep. Trust Corp. v. City of Chicago*, 295 Ill. App. 3d 811, 693 N.E.2d 459 (1st Dist. 1998), a fire hydrant lead pipe, which carried water from water main to hydrant, was not "firefighting equipment or facilities" within the meaning of Section 5-103(a) and, therefore, fire department was not shielded from liability for flooding arising from cracks in the pipe.

E. Section 5-103(b) Immunity for Negligent Fire Fighting Services

Under Section 5-103(b) of the Act, a public entity and its employees are immune from liability caused by a negligent act or omission while engaged in fighting a fire. 745 ILCS 10/5-103(b). This immunity does not apply if the injury is caused by willful and wanton conduct.

For example, Section 5-103(b) immunity applied when a bystander was injured after being hit in the face with a fire hose nozzle.[106] Similarly, this immunity applied to structural damage of a building after firefighters left the scene mistakenly believing the fire was out.[107] Finally, Section 5-103(b) immunity applied to the alleged negligent failure of police officers to rescue victims from a fire.[108]

F. Section 5-106 Immunity for Emergency Services

Section 5-106 provides a public entity and its employees with immunity from liability for an injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call. 745 ILCS 10/5-106. The general policy underlying the immunity found in Section 5-106 is that ambulance operators should be shielded from personal liability for decisions made and actions taken while responding to emergencies, since their performance would be hampered if operators were haunted by the possibility of facing devastating personal liability for actions taken in the course of responding to an emergency.[109]

For example, a response to a reported death call is considered an emergency under Section 5-106. *Carter v. Simpson*, 328 F.3d 948 (7th Cir. 2003). A volunteer firefighter driving his personal vehicle to the fire station to respond to a call concerning an automobile collision was

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[106] *Stubblefield v. City of Chicago*, 48 Ill. 2d 267, 269 N.E.2d 504 (1971).

[107] *Adams v. City of Peoria*, 77 Ill. App. 3d 683, 396 N.E.2d 572 (3rd Dist. 1979).

[108] *Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 807 N.E.2d 606 (1st Dist. 2004).

[109] *Buell v. Oakland Fire Protection District*, 237 Ill. App. 3d 940, 605 N.E.2d 618 (4th Dist. 1992).

also immunized by Section 5-106. *Hatteberg v. Cundiff*, 966 N.E.2d 995, 359 Ill. Dec. 307 (4th Dist. 2012).

Section 5-106 excepts willful and wanton conduct from its protection. Section 5-106 immunity, however, does not protect a public entity against a claim for comparative negligence when the public entity brings a lawsuit to recover damages for its own injury.[110] In *Gallagher Bassett Services v. Miggins*, the court explained this section does not apply in such a situation because a defendant asserting the claim of comparative negligence is not pursuing damages against the public entity but is only seeking to reduce or limit his own liability.

Section 5-106 immunity is not trumped by Section 5/11-205(e) of the Motor Vehicle Code which requires the driver of an authorized emergency vehicle to operate the vehicle with "due regard for the safety of all persons."[111] In *Harris v. Thompson*, *supra* at ¶ ¶ 24-25, the court explained that the Vehicle Code and the Tort Immunity Act each stand in their "own sphere" and that "the statutes each address different actors under different circumstances" and therefore do not conflict.

The immunity found in Section 5-106 for negligent operation of a motor vehicle while responding to an emergency call does not apply to a claim that a fire protection district was negligent for failing to discover defective brakes on fire truck. *C.D.L., Inc. v. East Dundee Fire Prot. Dist*., 252 Ill. App. 3d 835, 624 N.E.2d 5 (2nd Dist. 1993), *appeal denied*, 155 Ill. 2d 562, 633 N.E.2d 3 (1994).

G. Willful and Wanton Conduct Exception to Sections 5-103(b) and 5-106

Sections 5-103(b) and 5-106 both contain an exception for willful and wanton conduct. The Act defines the term "willful and wanton conduct" as a course of action which shows an "actual or deliberate intention to cause harm" or which, if not intentional, "shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210. Inadvertence, incompetence, or unskillfulness does not constitute willful and wanton conduct. *Floyd v. Rockford Park Dist.*, 355 Ill. App. 3d 695, 823 N.E.2d 1004 (2nd Dist. 2005).

In *Hampton v. Cashmore*, 265 Ill. App. 3d 23, 637 N.E.2d 776 (2nd Dist. 1994), ambulance operator's alleged failure to slow down upon reaching intersection or maintain a proper lookout, even if negligent, is not "willful and wanton conduct" where operator swerved in attempt to avoid collision and was not shown to have acted with utter indifference or conscious disregard for other's safety. However, in *Young v. Forgas*, 308 Ill. App. 3d 553, 720 N.E.2d 360 (4th Dist. 1999), the court disagreed with the holding in *Cashmore* and found a jury question existed on whether the ambulance operator, who was responding to emergency call, consciously made a decision to proceed against the red light into a crowded intersection without any regard for the safety of other drivers. See *Harris v. Thompson*, *supra* (holding an ambulance driver immune from civil liability where the emergency lights, but not the siren, were activated).

Some examples of willful and wanton conduct include:

- Excess speed for circumstances;
- Failure to use lights and sirens;

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[110] *Gallagher Bassett Services v. Miggins*, 346 Ill. App. 3d 1022, 806 N.E.2d 1215 (2nd Dist. 2004).

[111] *Carter v. DuPage Cty. Sheriff*, 304 Ill. App. 3d 443, 710 N.E.2d 1263 (2nd Dist. 1999); *Harris v. Thompson*, *supra*.

- Approaching intersection without reducing speed;
- Entering intersection before intersecting traffic yields right-of-way;
- Tailgating vehicles that do not move over; and
- Abrupt lane changes.

Similarly, in *Kirwan v. Lincolnshire-Riverwoods Fire Prot. Dist.*, 349 Ill. App. 3d 150, 156-57 (2nd Dist. 2004), the court reversed the dismissal of a willful and wanton claim where paramedics were alleged to have delayed seven to eight minutes before administering two necessary medications and never administered a third, despite knowledge that the decedent was having difficulty breathing and that her throat was closing due to an allergic reaction.

H. Section 5-104 Immunity for Damage to Roads and Bridges Caused by Fire Fighting Equipment

Under Section 5-104 of the Act, no trustee, officer or employee of a fire protection district or fire department having a mutual aid agreement with such district, nor any such fire protection district or department, shall be liable for damage caused to bridges and roads owned by the state or local government, when such damage is caused by firefighting equipment crossing bridges and roads for which load limits are lower than the weight of such equipment, when responding to an alarm or returning from an emergency call. 745 ILCS 10/5-104.

I. Motor Vehicle Code Requirements

Under Section 11-205 of the Motor Vehicle Code, the driver of an authorized emergency vehicle, when responding to an emergency call[112] may disobey a red light or stop sign, but only after slowing down as may be required and necessary for safe operation;[113] exceed maximum speed limits so long as he does not endanger life or property;[114] disregard regulations governing direction of movement or turning in specified directions.[115] Under these circumstances, however, emergency vehicles other than police vehicles must always use an audible signal when in motion or visual signals as set forth in Section 12-215 of the Motor Vehicle Code.[116]

Volunteer fire fighters responding to a call are required to use a blue oscillating or flashing light[117], and local fire fighting vehicles are authorized to use red or white oscillating, rotating or flashing lights.[118]

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[112] 625 ILCS 5/11-205(b).

[113] 625 ILCS 5/11-205(c)(2).

[114] 625 ILCS 5/11-205(c)(3).

[115] 625 ILCS 5/11-205(c)(4).

[116] 625 ILCS 5/11-205(d).

[117] 625 ILCS 5/12-215(c).

[118] 625 ILCS 5/12-215(d).

Section 11-205(e) of the Motor Vehicle Code states that the foregoing provisions "do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others." 625 ILCS 5/11-205(e). Illinois courts have made clear that Section 11-205(e) does not override the protections afforded to ambulance operators found in the Tort Immunity Act discussed above. *Carter v. DuPage Cty. Sheriff*, *supra*; *Harris v. Thompson*, *supra*.

J. Emergency Medical Services (EMS) Systems Act

The Illinois EMS Act establishes a scheme for coordinating all activities within the state concerning pre-hospital emergency services. 210 ILCS 50/1 *et seq*. An EMS system is an organization of providers of emergency medical care that includes fire departments and fire protection districts. Section 3.150(a) of the EMS Act provides for immunity from civil liability for acts or omissions committed by any certified, licensed or authorized person, agency or governmental body who in good faith provides emergency or non-emergency medical services in the normal course of conducting their duties, or in an emergency, unless such acts or omissions constitute willful and wanton misconduct. 210 ILCS 50/3.150(a). For instance, in *Bowden v. Cary Fire Prot. Dist.*, 304 Ill. App. 3d 274, 710 N.E.2d 548 (2nd Dist. 1999), the EMS Act afforded immunity to emergency medical technicians who provided treatment to asthma patient within the scope of their training, regardless of whether they performed such services negligently.

The EMS Act also extends immunity from civil liability to any person or governmental organization that administers, sponsors, authorizes, supports, finances, educates or supervises the functions of emergency medical services personnel for acts or omissions within the scope of the Act in connection with such services unless the act or omission was the result of willful and wanton misconduct. 210 ILCS 50/3.150(b).

In order to establish willful and wanton misconduct, a plaintiff must allege facts reflecting a conscious disregard or an utter indifference to the safety and well-being of the patient. In *Brock v. Anderson Rd. Ass'n*, 287 Ill. App. 3d 16, 677 N.E.2d 985 (2nd Dist. 1997), a claim that paramedics did not know how to fully use their equipment and failed to transport plaintiff to a hospital fast enough did not constitute willful and wanton negligence. Similarly, in *Tornabene v. Paramedic Servs. of Illinois, Inc.*, 314 Ill. App. 3d 494, 731 N.E. 2d 965 (1st Dist. 2000), the court found no liability without a showing that paramedics knowingly ignored orders or withheld treatment they knew was appropriate under the circumstances. And, in *Affatato v. Jewel Companies, Inc*., 259 Ill. App. 3d 787, 632 N.E.2d 137 (1st Dist. 1994), conduct of paramedics who became lost en route and took 20 minutes to arrive at the decedent's residence was not willful and wanton.

Significantly, in *Am. Nat'l Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274 (2000), the Illinois Supreme Court held that paramedics' alleged failure to make any attempt to open an unlocked door in order to treat a patient in severe respiratory distress stated a claim of willful and wanton misconduct sufficient to defeat the protections of the EMS Act. And, in *Yuretich v. Sole*, 259 Ill. App. 3d 311, 631 N.E.2d 767 (4th Dist. 1994), a family's claim that emergency medical technicians stopped treating victim and ceased attempts to extricate victim from car while he was still alive satisfied the willful and wanton conduct exception. Certain EMS activities with increased exposure to willful and wanton claims include:

- Delays in implementation of emergency care;
- Failure to act in accordance with standard operating procedures (SOPs) and

protocols;

- Failure to act in accordance with training; and
- Acting beyond level of training.

Finally, in *Abruzzo v. City of Park Ridge*, *supra*, the Illinois Supreme Court held that the limited immunity under the EMS Act prevailed over Section 6-105 and Section 6-106 immunity found in the Tort Immunity Act.

K. 911 Act Immunity

The "911 Emergency Phone System Act" is considered an emergency service, rather than a police protection service.[119] The 911 Act affords certain protections from civil liability for 911 emergency services. 50 ILCS 750/15.1.

Section 15.1 of the 911 Act provides immunity against claims of negligence to any public agency, emergency telephone system board, or unit of local government assuming the duties of an emergency telephone system board, as well as their officers, agents, and employees. The immunity applies to claims involving the development, adoption, operation, or implementation of any emergency phone system required under the Act.

The 911 Act also extends immunity to persons who provide instructions or who follow instructions over an emergency telephone system from civil liability for damages unless issuing or following these instructions constitutes willful or wanton misconduct. For example, the misrouting of an emergency phone call to the wrong public service agency which led to an 11-minute response time by emergency personnel did not demonstrate willful and wanton conduct for liability to attach under the 911 Act. *Chiczewski v. Emergency Tel. Sys. Bd. of DuPage Cty.*, 295 Ill. App. 3d 605, 692 N.E.2d 691 (2nd Dist. 1997).

In *Donovan v. Vill. of Ohio*, 397 Ill. App. 3d 844 (3rd Dist. 2010), the village was not liable in wrongful death case when 911 repeater system failed to transmit call for emergency assistance absent evidence of willful and wanton conduct.

L. Abolishment of the Public Duty Rule and the Special Duty Exception

The Illinois Supreme Court abolished the longstanding common-law "public duty rule" as well as its "special duty exception." See *Coleman v. E. Joliet Fire Prot. Dist.*, *supra*, discussed in Chapter V, Section D of this Handbook.

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[119] *Barth By Barth v. Bd. Of Educ. Of Chicago*, 141 Ill. App. 3d 266, 279, 490 N.E.2d 77 (1st Dist. 1986).

CHAPTER VI IN REVIEW

TORT IMMUNITY FOR FIRE AND EMERGENCY MEDICAL SERVICES

CLAIM EVALUATION CHECKLIST

- ❑ **Does plaintiff's claim allege a failure to provide fire protection, rescue, or other emergency services? If so, Section 5-101 immunity should apply. (*See page 58*).**
- ❑ **If plaintiff alleges negligence in failing to suppress a fire or failing to provide or maintain sufficient personnel, equipment or fire protection facilities, Section 5-102 of the Tort Immunity Act should apply. (*See pages 58-59*).**
- ❑ **If plaintiff's injury was caused by condition of firefighting equipment, Section 5-103(a) provides immunity unless injury results from failure of equipment while traveling on the public ways. (*See page 59*).**
- ❑ **If plaintiff alleges negligence on the part of fire fighters or other rescue personnel, Section 5-103(b) provides immunity unless plaintiff can establish the injury was caused by willful and wanton conduct. (*See page 59*).**
- ❑ **If plaintiff's injury was caused by the alleged negligent operation of an emergency vehicle, there is immunity for claims of negligence under Section 5-106 of the Tort Immunity Act. (*See pages 59-60*).**
- ❑ **If plaintiff can establish willful and wanton conduct on the part of the governmental defendants, then Section 5-106 immunity will not apply. (*See page 60*).**
- ❑ **If plaintiff's injury was caused by a collision with a fire truck, ambulance or other emergency vehicle, check to see if vehicle operator complied with requirements of Motor Vehicle Code. If not, willful and wanton exception to immunity may apply. (*See page 61*).**
- ❑ **If plaintiff's injury arises from emergency medical services, the Illinois EMS Act provides immunity to emergency personnel and the entity that employs them unless the alleged conduct is willful and wanton. (*See page 62*).**
- ❑ **If plaintiff's injury arises from 911 emergency services, the 911 Act affords immunity to any public entity or employee who provides this service, including persons who provide instructions or who follow instructions over an emergency telephone system unless the alleged conduct is willful and wanton. (*See page 63*).**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter VI.

- **Make sure firefighters use all protective equipment.**
- **Update training on life support equipment regularly.**
- **Keep up driving test certifications and train on rules of the road applicable to emergency personnel.**
- **Stress the importance of using emergency sirens and lights when responding to a call and making visual checks of all intersections before proceeding through them.**
- **Practice firefighting techniques on a regular basis.**
- **Test respiratory equipment on a regular basis.**
- **Regularly inspect ladders, hose, and couplings and repair or replace as necessary.**
- **Maintain a current inventory of available equipment.**
- **Establish and update a database of photographs and blueprints of multi-story buildings in the fire district.**
- **Promote ordinances requiring address numbers to be clearly visible from the street.**
- **Keep accurate numbers of structures with lock boxes and their location on the structure.**
- **Maintain an adequate equipment replacement fund.**
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against a public entity or its employees without consulting with an attorney.**
- **Regularly update local dispatch service training and dispatcher certification.**

CHAPTER VIII. FEDERAL CIVIL RIGHTS LIABILITY

A. Section 1983

This section provides a general overview of federal civil rights laws and the immunities and defenses available to public entities and their employees. 42 U.S.C. 1983 is the primary basis by which a plaintiff can assert a civil rights claim. Section 1983 is not a source of federal constitutional rights, but rather provides a conduit for asserting those rights found in the federal Constitution and other federal statutes.

Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The most common civil rights claims brought under Section 1983 are for alleged violations of the following constitutional amendments:

- First Amendment rights of freedom of religion, speech and press;
- Fourth Amendment protections against unreasonable searches and seizures;
- Fifth Amendment protections against self-incrimination and the right to just compensation for the taking of property;
- Eighth Amendment protections against cruel and unusual punishment, and
- Fourteenth Amendment protections against deprivations of life, liberty or property without due process.

B. Who May Assert a Civil Rights Claim

Section 1983 provides that "any citizen" of the United States or "other person" within the jurisdiction thereof may bring a civil rights claim. The courts have interpreted "other person" to include aliens, corporations and labor unions. *Graham v. Richardson*, 403 U.S. 365 (1971); *Chancy v. Suburban Bus Div. of Reg'l Transp. Auth.*, 52 F.3d 623, 677 (7th Cir. 1995). However, constitutional rights are personal in nature and may not be vicariously asserted. For example, passengers, who have neither a property nor possessory interest in an automobile searched by police, nor any interest in the property seized, cannot allege a violation of their civil rights.[120] Federal courts have concluded that a municipality is not a "person" within the meaning of Section 1983 and is not permitted to bring suit under the statute. *Rockford Bd. of Educ. Sch. Dist. No. 205 v. Illinois State Bd. of Educ.*, 150 F.3d 686, 688 (7th Cir. 1998).

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[120] *Rakas v. Illinois*, 439 U.S. 128, 149 (1978).

C. Who Can Be a Defendant

Section 1983 provides that liability can attach to "every person, who under color of any statute, ordinance, regulation, custom or usage of any State or Territory" deprives an individual of his or her constitutional rights. 42 U.S.C. 1983. The term "person" under Section 1983 also includes governmental employees. For example, a school superintendent, a chief of police or a Village President can be a defendant in a federal civil rights case, and may be personally named even if their governmental body is not made a defendant.

The United States Supreme Court in *Monell v. New York Dep't of Soc. Servs.*, 436 U.S. 658 (1978), held that governmental entities are "persons" who may be sued under Section 1983. However, the governmental entity is not a proper party to such a suit unless the entity itself is directly responsible for the violation of a person's civil rights. Under *Monell*, before liability can be imposed on a public entity, a plaintiff must establish that a governmental ordinance, policy or custom caused the alleged constitutional violation. The most obvious example is where an unconstitutional municipal ordinance causes a deprivation of an individual's constitutional rights.

A not-so-obvious example is where a widespread custom or practice of a public entity causes a constitutional deprivation. For instance, in *Jones v. City of Chicago*, 856 F.2d 985, 996 (7th Cir. 1988), the court found that the Chicago Police Department's custom of keeping street files on criminal defendants was department-wide and long-standing that it had been consciously approved at the highest policy-making level for decisions involving the police department. As such, the custom was found to be a continuing practice of the City of Chicago sufficient to establish Section 1983 liability. A single incident of unconstitutional conduct is not sufficient to establish a *Monell* policy or practice claim. Many cases can be disposed of readily where a plaintiff fails to demonstrate any facts other than those relating to his or her own claim.[121] In addition, sporadic or occasional unconstitutional acts by government employees are not sufficient to establish *Monell* liability. *Latuszkin v. City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001). Such immunity does not restrict a suit against the governmental employees or officers who committed their own acts in violation of Section 1983.

In addition, a plaintiff can establish direct governmental liability by showing that the public actor who committed the alleged constitutional violation was an official with "final policy-making authority"[122] or that such an official approved a lower-level employee's conduct.[123] State law determines which officials are considered "policy makers" for purposes of direct liability under Section 1983. *Vela v. Vill. of Sauk Village*, 218 F.3d 661 (7th Cir. 2000). The analysis focuses on whether the public official whose conduct is challenged had the final authority to establish governmental policy regarding the particular issue involved. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). For example, in the City of Chicago, the City Council, not the police superintendent, is the final policy maker on employment decisions regarding the City's police officers.[124]

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[121] *Strauss v. City of Chicago*, 760 F.2d 765, 768 (7th Cir. 1985).

[122] *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989).

[123] *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

[124] *Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992).

D. Elements of a Civil Rights Claim

To establish a federal civil rights claim, a plaintiff must prove a person, while acting "*under color of state law*" deprived the plaintiff of his or her constitutional rights, and that the challenged conduct caused the alleged constitutional violation.[125] The "color of law" element is established where a public employee acts pursuant to his or her office or in his or her official capacity. *Burrell v. City of Mattoon*, 378 F.3d 642 (7th Cir. 2004). The conduct must also be related to the performance of the employee's job duties. For example, a police officer's conduct while on duty and related to his or her police duties would satisfy this requirement. However, if the public official's actions are done in furtherance of their "personal or private pursuits," they are likely to fall outside of the color of law requirement even if performed during work hours or while on duty. For example, in *Estate of Sims v. Cty. of Bureau*, 506 F.3d 509 (7th Cir. 2007), a county sheriff's visit to a reporter, who was investigating the sheriff for official misconduct, were actions in furtherance of his personal interests, even if he performed them on duty and as such did not fall under color of law.

Acts which can cause liability are not limited to police actions. For example, a public entity can be liable under the Civil Rights Act when its building inspector helped a landlord illegally evict a tenant. The landlord and the inspector operated "under color of law" to deprive the tenant of a due process hearing.[126] And, a school board's decision to terminate a teacher's employment[127] and a city council's alleged failure to hire plaintiff[128] satisfied the "color of law" requirement for a Section 1983 claim.

E. Liability for Failure to Act

In some instances, a constitutional claim under Section 1983 may arise because a local government failed to act to remedy an unconstitutional wrong rather than due to the deliberate enforcement of an unconstitutional policy. The Supreme Court has held, for example, a local government may be liable for the failure to take action if the failure evidences a deliberate indifference to the constitutional rights of its citizens. *City of Canton v. Harris*, 489 U.S. 378 (1989).

"Deliberate indifference" is a stricter standard required to be proven in federal civil rights claims. Only when the failure to act reflects a deliberate or conscious choice by the local government can the failure to act be considered a governmental "policy." Thus, a failure to act which amounts only to negligence will not impose civil rights liability. A failure to act can constitute deliberate indifference only if governmental policy makers were aware of the need to act or if the need to act was obvious. For example, police use of deadly force is an obvious area in which City's failure to train its police officers amounted to "deliberate indifference" to citizen's civil rights. Under this theory of liability, a plaintiff must demonstrate that the public

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[125] *O'Donnell v. Vill. of Downers Grove*, 656 F. Supp. 562 (N.D. Ill. 1987)

[126] *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994); But see *Gardner v. Evans*, 811 F.3d 843 (6th Cir. 2016) (the court held that "*Flatford* did not clearly establish that a notice of eviction must include an explicit reference to the availability of any post-deprivation appeals process and the manner in such an appeal may be pursued.")

[127] *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194 (7th Cir. 1996).

[128] *Zemke v. Chicago*, 100 F.3d 511 (7th Cir. 1996).

entity was "on notice of a pattern of constitutional violations resulting from inadequate training of its employees," and that the failure to provide necessary training was "tantamount to a deliberate or conscious decision on the part of the defendants to allow the violations to continue." *Hirsch v. Burke*, 40 F.3d 900, 904 (7th Cir. 1994).

F. Qualified Immunity

The doctrine of qualified immunity protects government officials performing discretionary functions from liability for civil rights damages as long as their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[129] Qualified immunity is not only a defense to liability, but also protects public officials from having to withstand the burdens of trial. Government officials are personally protected by qualified immunity. The immunity does not extend to the governmental body.

The Supreme Court held that a private attorney retained by a municipality to investigate a personnel matter was afforded qualified immunity in a suit under 42 U.S.C. 1983 alleging a constitutional violation committed in the course of the investigation. *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012). It did not establish a clear test for determining when private individuals who work with the government are entitled to immunity, but it did give several policy reasons why some individuals who are "engaged in the public's business," have "specialized knowledge or expertise," and "work in close coordination with public employees" who could be vulnerable to "the distractions that can accompany even routine lawsuits" should enjoy protection from liability. But see *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 633 (2016) (advertiser hired by the Navy did not share in the government's unqualified immunity from liability and litigation). Qualified immunity did not extend to guards employed by a privately run prison facility, *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L.Ed.2d 540 (1997), nor to private individuals who used a state replevin law to compel the local sheriff to seize disputed property from a former business partner. *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

In determining whether qualified immunity applies to a defendant's conduct, courts use a two-step analysis. First, the court must decide whether the plaintiff has alleged a constitutional violation. This initial question should not be overlooked. If there is no federal constitutional claim alleged, that is the end of the inquiry and the claim should be dismissed. For example, in *Siegert v. Gilley*, 500 U.S. 226 (1991), the court found the public official's writing of an unfavorable reference letter did not rise to the level of a federal constitutional claim and the suit was dismissed on that basis. A mere failure to properly follow a state law mandate does not in itself result in a Civil Rights Act violation. *Stevens v. Umsted*, 131 F.3d 697, 707 (7th Cir. 1997).

If the first question is satisfied, the courts then ask whether the defendant's conduct constitutes a violation of clearly-established laws. This is an objective test which requires a determination of the protected right. Put another way, the standard is whether a reasonable person could have believed his actions were unlawful. Under this test, public officials are charged with knowledge of the law governing their conduct. The qualified immunity standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335 (1986). But, if the plaintiff's rights were not clearly established at the time of the alleged violation, the public official is entitled to qualified immunity. For example, in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, *City of Los*

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[129] *Anderson v. Creighton*, 483 U.S. 635 (1987).

Angeles v. Chew, 513 U.S. 1148 (1995), the court found that a police officer was entitled to qualified immunity because there was no existing case authority which suggested the use of a police dog to apprehend a criminal suspect was unlawful. Similarly, in *Beaman v. Souk*, a police officer had qualified immunity as the Court concluded that a reasonable officer could have the belief that a polygraph would not be material evidence and thus did not have an obligation to disclose it. *Beaman v. Souk*, 7 F.Supp.3d 805, 831 (C.D. Ill. 2014). And, in *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684 (7th Cir. 2001), the court found the Fourth Amendment standard for "doorway arrests" was not sufficiently clear to overcome qualified immunity defense. However, the Supreme Court has observed that public officials can still be on notice that their conduct violates clearly established law even in "novel factual circumstances" where the constitutional violation is obvious. *Hope v. Pelzer*, 536 U.S. 730, 731 (2002); see also *Baird v. Bd. of Educ. for Warren Cmty. Unit Sch. Dist. No. 205*, 389 F.3d 685, 696-97 (7th Cir. 2004) (holding that individual board members were not entitled to qualified immunity on plaintiff's due process claim because the hearing procedures were "severely deficient" under existing law).

Qualified immunity is an *affirmative defense* which must be pled by the public official. The failure of the official to raise the qualified immunity defense may result in a waiver of the protection.[130] Qualified immunity is one of the few defenses that allow for an immediate or interlocutory appeal from summary judgment because one of its purposes is to relieve public officials from the burden and expense of litigation. *Ortiz v. Jordan*, 131 S. Ct. 884 (2011); *Mitchell v. Forsyth*, 472 U.S. 511, 526-527 (1985).

G. Statute of Limitations

A civil rights plaintiff has two years from the date his cause of action accrues to file a federal civil rights claim. *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986). A civil rights action generally accrues when the plaintiff "knows or should have known" that his or her rights were violated.[131] The statute, however, is tolled in cases involving minors[132] or persons under a legal disability,[133] or where the injured party has died before the end of the limitations period. 735 ILCS 5/13-209(a)(1).

H. Compensatory Damages

Section 1983 is intended to provide compensation for constitutional injuries. Therefore, "compensatory damages" can be awarded to injured persons who demonstrate actual physical or emotional injuries caused by the constitutional violation. *Carey v. Piphus*, 435 U.S. 247 (1978). In Section 1983 actions, compensatory damages could include past and future medical expenses, pain and suffering, emotional distress and lost income.[134]

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130 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

131 *Hileman v. Maze*, 367 F.3d 694, 697 (7th Cir. 2004).

132 *Stanczyk v. Keefe*, 384 F.2d 707 (7th Cir. 1967).

133 *Reichert v. Ford Motor Co*., 768 F. Supp. 262 (S.D. Ill. 1991) (limitations period tolled until plaintiff's legal disability, *i.e*., mentally incompetent by reason of his injuries, was removed).

134 7th Circuit Pattern Jury Instruction 7.23.

An award of compensatory damages for a violation of the civil rights laws is intended to compensate the plaintiff for actual injury, by placing the injured party in the position he or she would have been had the violation not occurred. If the plaintiff has suffered no actual loss as a result of the unconstitutional conduct, the plaintiff is entitled to no more than nominal damages. *Carey v. Piphus*, *supra*. Recovery must be grounded in determinations of actual loss. *Hay v. City of Irving, Texas*, 893 F.2d 796 (5th Cir. 1990). However, a plaintiff may not recover compensatory damages if the existence of a compensable injury is too speculative. *Horina v. City of Granite City*, 538 F.3d 624 (7th Cir. 2008).

Damages for intangible injuries such as emotional distress must be proven with competent evidence. For instance, mental and emotional distress cannot be proven by a simple statement by plaintiff that he was depressed and humiliated. *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert denied*, 455 U.S. 1021 (1982). Testimony from a doctor or priest regarding plaintiff's emotional distress has been found to constitute sufficient evidence. *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989). Compensatory damages are not determined by the severity of the defendant's conduct, but rather by the effect of that conduct on the plaintiff. See *G. G. v. Grindle*, 665 F.3d 795 (7th Cir. 2011). Juries may award large damages for relatively innocuous conduct to "eggshell skull" plaintiffs who are particularly vulnerable to injury. *Cobige v. City of Chicago, Ill*., 651 F.3d 780, 782 (7th Cir. 2011).

I. Punitive Damages

Punitive damages in Section 1983 actions are intended to punish a defendant beyond the level of the plaintiff's actual damages. The purpose of punitive damages is to punish an individual governmental defendant for willful or malicious conduct and to deter others from similar conduct. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986). Public entities are not liable for punitive damages in civil rights cases. *City of Newport v. Fact Concerts, Inc*., *supra*. However, public officials individually do not enjoy immunity from claims for punitive damages. *Kentucky v. Graham*, 473 U.S. 159 (1985). Local officials can be sued in their personal capacity and assessed punitive damages for their individual, bad faith conduct under Section 1983. The federal circuit which encompasses Illinois has held a plaintiff need not introduce evidence of a defendant's income to recover punitive damages. *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996). A plaintiff is entitled to prove that a particular defendant is wealthy and that a large punitive award is justified. However, contrary evidence can be introduced by the defendant in an appropriate case to reduce such an award.

J. Attorneys' Fees

42 U.S.C. 1988 authorizes courts to award of reasonable attorney's fees to a prevailing plaintiff. This fee statute is to induce competent counsel to undertake meritorious civil rights cases by assuring them that if they are successful in vindicating federally protected rights they will be paid in the same manner as is traditional with attorneys compensated by fee-paying clients. Fees paid are those normally charged by attorneys handling such cases. It is not uncommon for fee awards to exceed a plaintiff's recovery in Section 1983 actions. Attorneys' fees under Section 1988 can only be recovered in actions brought under federal civil rights laws. In general, the federal courts are receptive to large fee awards to plaintiffs' attorneys in civil rights cases even in cases with low verdict amounts. As such, the potential exposure to substantial attorney's fees to prevailing plaintiffs should not be underestimated.

A governmental body or employee who prevails in a civil rights action can recover fees against a plaintiff or the plaintiff's attorney in a case which the court finds to have been frivolous

or improperly filed. See *Roger Whitmore's Auto. Servs., Inc. v. Lake Cty., Illinois*, 424 F.3d 659, 675 (7th Cir. 2005) (holding a prevailing defendant is only entitled to recover fees where plaintiff's action was "frivolous, unreasonable or groundless" or where "it has no reasonable basis, whether in fact or in law"). Attorneys' fees in state court actions involving only state claims are not recoverable.

To qualify as a "prevailing party," a plaintiff must succeed on a significant issue in the case which achieves some of the benefit the party sought in bringing the action.[135] Mere moral satisfaction, without more, does not bestow prevailing party status on a plaintiff. *Cady v. Chicago*, 43 F.3d 326 (7th Cir. 1994). Section 1988 does not create fee liability where liability on the merits does not exist. For example, if a defendant is immune from liability, either because of legal immunity or on the merits, attorneys' fees under Section 1988 cannot be recovered.[136] Finally, a party who recovers nominal damages ordinarily should not be awarded any fees. *Farrar v. Hobby*, 506 U.S. 103 (1992); *Frizzell v. Szabo*, 647 F.3d 698 (7th Cir. 2011).

In some instances, Section 1988 only allows for a partial recovery of attorneys' fees. When a plaintiff prevails on a civil rights claim, a Section1988 fee award "should not reimburse the plaintiff for work performed on [other] claims that bore no relation to the grant of relief." *Fox v. Vice*, 131 S. Ct. 2205, 2214 (2011). In light of the difficulties inherent in separating work done in furtherance of one claim from work done in furtherance of a factually related claim, district courts may exercise discretion in determining the final amount of attorneys' fees they will award. *Hensley v. Eckerhart*, 461 U.S. 424, 436-437 (1983). When a plaintiff brings a combination of frivolous and nonfrivolous claims, the defendant may only recover those fees which he or she would not have paid but for the frivolous claim. *Fox v. Vice*, *supra* at 2216. Once again, "the trial court must determine whether the fees requested would not have accrued but for the frivolous claim" through the exercise of its discretion.

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[135] *Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist*., 489 U.S. 782 (1989).

[136] *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989)

CHAPTER VII IN REVIEW

FEDERAL CIVIL RIGHTS LIABILITY

CLAIM EVALUATION CHECKLIST

- ❑ **Has the plaintiff alleged a federal constitutional right? (*See page 69*).**
- ❑ **Was the plaintiff's federal lawsuit filed within two years from the date of the alleged injury? (*See page 74*).**
- ❑ **Was the two year statute of limitation tolled because the claim involves a minor or person under a legal disability? (*See page 74*).**
- ❑ **Is the constitutional right asserted personal to the plaintiff? Constitutional violations may not be vicariously asserted. (*See page 69*).**
- ❑ **Is the governmental defendant a "person" under 42 U.S.C. 1983? (*See page70*).**
- ❑ **Is plaintiff alleging a *Monell* direct liability claim against the governmental entity? A governmental entity is not a proper party to a federal civil rights lawsuit unless the entity itself is directly responsible for the violation of a person's civil rights. (*See page 70)*.**
- ❑ **Has the plaintiff established that the governmental defendant was acting under "color of law"? (*See page 71*).**
- ❑ **Is the plaintiff alleging a failure to act against a governmental entity? If so, plaintiff must demonstrate the failure to take such action amounts to a deliberate indifference to the constitutional rights of the plaintiff. (*See page 71*).**
- ❑ **Is qualified immunity available as a defense to the governmental employee? If so, then qualified immunity must be raised as an affirmative defense. (*See page 72*).**
- ❑ **Is there a federal constitutional claim alleged? If yes, did the governmental defendant's conduct constitute a violation of clearly established law? (*See page 72*).**
- ❑ **Has plaintiff demonstrated that he or she suffered a compensable injury? (*See page 74*).**
- ❑ **If plaintiff is seeking intangible injuries such as emotional distress, is there competent evidence to establish these damages? (*See page74*).**
- ❑ **Is plaintiff seeking punitive damages from a public employee or official individually? If so, such damages are recoverable. *(See page 75*).**
- ❑ **Should evidence of defendant's net worth be used at trial to diminish amount of punitive damages awarded? (*See page 75*).**

- ❑ **Is plaintiff a "prevailing party" and thus entitled to attorney's fees under 42 U.S.C. 1988? (*See page 75*).**
- ❑ **Was plaintiff awarded only nominal damages at trial? If so, plaintiff may not be entitled to recover attorney's fees. (*See page 75*).**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter VII.

- **Inform, train and educate officers in proper practice and procedures involving an exercise of constitutionally protected rights.**
- **Implement and follow citizen complaint procedures.**
- **Fully investigate citizen complaints.**
- **Make sure citizen complaints and investigation are well documented.**
- **Reinforce training on legal requirements for arrests, search and seizure and use of force policies.**
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against public entity or its employees without consulting with an attorney.**
- **Fully document and support employee disciplinary actions and comply with due process requirements for suspensions and terminations.**
- **Have a good understanding of requirements for accommodation of disabilities under the Americans with Disabilities Act before responding to any employee's request for accommodation and document all efforts to assist such a request.**

CHAPTER IX. MEDICAL, HOSPITAL AND PUBLIC HEALTH ACTIVITIES

Article VI of the Illinois Tort Immunity Act contains certain immunities which apply to the operation of medical, hospital and public health activities. These immunities apply to public entities and public employees as defined in Sections 1-206 and 1-207 of the Act. They apply to public hospitals, infirmaries, clinics, dispensaries and mental institutions. The immunities apply to the conduct of employees who are employed directly by the public body, but do not apply to independent physicians or medical practice groups that work in a public facility under contract.

In addition to the immunities discussed in this section, discretionary and supervisory immunities under Sections 3-108(a) and 2-201 of the Act will apply to appointed boards in their regulation of health facilities.

A. Prevention or Control of Communicable Disease

Section 6-104(a) of the Act provides immunity to public entities and their employees for injuries resulting from public health decisions relating to the prevention of diseases or controlling the communication of diseases within the community if such decisions involve the exercise of discretion vested in the public entity or a public employee. 745 ILCS 10/6-104(a). Section 6-104(b) further provides "neither a local public entity nor a public employee is liable for an injury caused by an act or omission in the carrying out with due care a decision described in subdivision (a). 745 ILCS 10/6-104(b). There are no reported cases which discuss the application of this immunity. The only appellate court to consider the statute in the last decade has expressly declined to rule on it. *Taylor v. Bi-County Health Dep't*, 353 Ill. Dec. 857, 956 N.E.2d 985, 998 (5th Dist. 2011). The Attorney General has issued the opinion that a county can be liable for negligent administration of flu vaccine. 1976 Op. Atty. Gen. No. S. 1171. The plain language of the statute confers immunity for discretionary decisions by public entities and their employees which relate to the prevention or control of communicable diseases. Section 6-104(b) appears to limit this immunity to the non-negligent acts or omissions during the administration of such discretionary decisions which cause injury.

B. Physical or Mental Examination of Persons

Many municipalities and counties have established public hospitals under statutory grants of authority. Article VI of the Act provides significant protections from medical malpractice claims which are not afforded to private hospitals or clinics. Section 6-105 of the Act provides immunity for "injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others." 745 ILCS 10/6-105. This means that even if a person appears at a public health facility for medical care but fails to receive an exam or tests which might reveal a condition or assist in a proper diagnosis, the immunity would apply to a medical malpractice claim. This immunity also applies to willful and wanton conduct. *Grandalski v. Lyons Twp. High Sch. Dist. 204, supra*. In *Grandalski,* the school district was immune for alleged negligence of teacher and school nurse in providing medical care for student. One Illinois court has held that immunity under 6-105 did not apply to school counselor's failure to inform mother of student's suicide intentions, but would have applied if plaintiff alleged failure to

examine or diagnose student. *Grant v. Bd. of Tr. of Valley View Sch. Dist. No. 365-U,* 286 Ill. App. 3d 642, 676 N.E.2d 705 (3rd Dist. 1997), appeal denied 173 Ill. 2d 524, 684 N.E.2d 1335.

C. Diagnosis, Treatment of Mental or Physical Illness or Addiction

Section 6-106(a) of the Act provides absolute immunity for injury caused by diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addiction. See *Michigan Ave. Nat'l Bank v. Cty. of Cook*, 191 Ill. 2d 493 (2000). (Section 6-106(a) immunity applied to physician's failure to diagnose breast cancer.) This section also provides absolute immunity for failing to prescribe treatment for a mental or physical illness or addiction. *Id*. See *McQueen v. Shelby Cty.,* 730 F. Supp. 1449 (C.D. Ill.1990), where the court held if a mental health organization was considered to be a "local public entity" under the Act, it and its employees would be shielded from liability under this immunity for failing to diagnose a jail inmate's mental problems which led to the suicide of inmate. See also *Mabry v. Cty. of Cook*, 315 Ill. App. 3d 42 (1st Dist. 2000) (immunity applied to claim based on defendant's failure to diagnose a pulmonary embolism and the failure to conduct a physical examination that would have discovered the condition).

However, Section 6-106(c) provides that public employees *who have undertaken to prescribe treatment for mental, physical or addiction* are liable for an injury proximately caused by the employee's negligence or wrongful acts. 745 ILCS 10/6-106(c). Thus, if a public employee makes a diagnosis and negligently prescribes inadequate treatment, the immunity does not apply. *Mills v. Cty. of Cook*, 338 Ill. App. 3d 219, 788 N.E.2d 169 (1st Dist. 2003).

These principles were also analyzed and affirmed in *Wilkerson v. Cty. of Cook*, 379 Ill. App. 3d 838, 884 N.E.2d 808 (1st Dist. 2008). In *Wilkerson*, pursuant to Sections 6-105 and 6-106(a) of the Tort Immunity Act, the First District Appellate Court upheld the lower court's grant of summary judgment to the county hospital and two of its employees in a case involving the alleged failure to properly examine and diagnose a patient who eventually died as the result of cervical cancer. See also *Johnson v. Bishof*, 2015 IL App (1st) 131122, ¶ 58 (finding hospital and doctors immune from liability under section 6–106(a) because they failed to diagnose plaintiff's spinal cord injury rather than providing inadequate treatment).

Section 6-106(d) further provides that public entities and their employees are liable for an injury proximately caused by an employee's negligence or wrongful conduct "in administering any treatment prescribed for mental or physical illness or addiction." 745 ILCS 10/6-106(d). *See, Lloyd v. Cty. of DuPage,* 303 Ill. App. 3d 544, 707 N.E.2d 1252 (2nd Dist. 1999), appeal denied 184 Ill. 2d 559, 714 N.E.2d 528 (County-operated nursing home liable for injuries to resident proximately caused by nursing home employee's negligent or wrongful acts or omissions in administering prescribed treatments.)

In *Hemminger v. Nehring*, 399 Ill. App. 3d 1118 (3rd Dist. 2010), a medical clinic and its employees were immune under Section 6-105 and Section 6-106 for death of patient due to alleged failure to properly interpret results of pap smear and to perform biopsy for cervical cancer.

D. Confinement of Person for Mental Illness or Addiction

Section 6-107 provides immunity for decisions relating to the confinement, terms of confinement and release of persons with mental illnesses. Section 6-107(a) specifically provides that there is no liability for decisions relating to: 1) whether to confine a person for mental illness or addiction; 2) the terms and conditions of confinement for mental illness or addiction in a

medical facility operated or maintained by a local public entity; and 3) whether to parole or release a person from confinement for mental illness or addiction in a medical facility operated or maintained by a local public entity. 745 ILCS 10/6-107(a). The term "medical facility" includes a hospital, infirmary, clinic, dispensary, mental institution or similar facility. 745 ILCS 10/6-101. This immunity, however, does not apply to tort liability for false arrest or false imprisonment. 745 ILCS 10/6-107(b).

E. Injury Caused to or by Escaping or Escaped Mental Patient

Section 6-108 of the Act provides immunity to public entities and public employees for an injury caused by or to an escaping or escaped mental patient. 745 ILCS 10/6-108. Since there is no willful and wanton exception provided, this immunity is absolute.

F. Failure to Admit Person to Medical Facility

Section 6-109 of the Act provides immunity for an injury resulting from the failure to admit a person to a medical facility operated or maintained by a local public entity. 745 ILCS 10/6-109. This immunity covers only government-run medical facilities and does not apply to private facilities. This section does not contain a willful and wanton exception to liability.

G. Statute of Limitations

The statute of limitations for actions arising from "patient care" is two (2) years after the date on which the claimant knew, or through the use of reasonable diligence should have known of the existence of the injury or death for which damages are claimed, but in no event shall such action be brought more than four (4) years after the act, omission or occurrence which caused the injury or death. 745 ILCS 10/8-101(b). Courts interpret this section in conformity with 13-212 of the Code of Civil Procedure (735 ILCS 5/13-212), which contains substantially the same language. *Kaufmann v. Schroeder*, 241 Ill. 2d 194, 946 N.E.2d 345, 348 (2011). The injuries subject to the Section 8-101(b) limitations period must be causally connected to a patient's medical care and treatment. See *Brucker v. Mercola*, 227 Ill. 2d 502, 523, 319 Ill. Dec. 543, 886 N.E.2d 306 (2007). This means the injury must originate in actual medical care or treatment and may not be merely incidental to such care or treatment. See *Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 14-15, 319 Ill. Dec. 319, 885 N.E.2d 999 (2007). Thus, the Supreme Court has found that a woman's claim that a doctor unnecessarily sedated her and committed deviant sexual acts was subject to the one-year limitation in Section 8-101(a) rather than the two-year "patient care" limitation. *Kaufmann v. Schroeder*, *supra* at 349-350.

CHAPTER VIII IN REVIEW

MEDICAL, HOSPITAL AND PUBLIC HEALTH ACTIVITIES

CLAIM EVALUATION CHECKLIST

- ❑ **Is the claim filed within two (2) to four (4) years of the alleged negligent conduct of a medical provider? If not, the claim may not be timely and therefore subject to dismissal under the Tort Immunity Act. (*See page 82*).**
- ❑ **Does the claim or lawsuit name the government entity as a defendant, or does it only mention the assumed name of the medical facility? A claim may be dismissed for failing to name the proper defendant, particularly when the wrong party has been named near the expiration of the applicable statute of limitations. (*See page 82*).**
- ❑ **Does the complaint allege a failure to test for or diagnose a medical condition? If so, Section 6-106(a) provides immunity to the government medical facility. (*See page 81*).**
- ❑ **Does the complaint allege that negligent medical treatment has taken place? In that instance, the immunity under Section 6-106(a) is abrogated by Section 6-106(c), which allows government liability for negligent prescription of treatment or provision of treatment. (*See page 81*).**
- ❑ **Does a claim related to injury caused by administration of a vaccine through a public program allege that the vaccine injection was negligently performed? In that case, Section 6-104(b) probably removes the immunity for negligent conduct which is provided by Section 6-104(a), for the discretionary decision to implement the program. (*See page 80*).**

LOSS PREVENTION IDEAS

The following are some suggested ways in which governmental entities can utilize the immunities discussed in Chapter VIII:

- **Record keeping is critical, so train employees on how to keep good records.**
- **Educate and train employees on prevention and control of communicable diseases.**
- **Educate and train employees on the proper handling of physical and mental examinations.**
- **Educate and train employees on issues relating to the diagnosis and treatment of persons with mental or physical illness or addiction.**
- **Educate and train employees on how to recognize symptoms associated with mental or physical illness or addiction.**
- **Carefully screen educational and training experience of medical facility personnel.**
- **Perform regular performance reviews of medical facility personnel.**
- **For those government entities which have established public hospitals which operate independently and under assumed names, ensure that the hospital administration requires its medical malpractice insurance carrier to name the government body as an additional insured under the policy.**
- **Do not release documents requested by subpoena or under the Freedom of Information Act on potential cases against public entity or its employees without consulting with an attorney.**