

THE LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT UPDATE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. OVERVIEW OF THE LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT

A. The Purpose of the Act

The purpose of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) is to "protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1(a). The Tort Immunity Act grants only immunities and defenses. This means that the Tort Immunity Act does not prevent plaintiffs from bringing claims and suits against local public entities, but does provide some immunities and defenses to those claims and suits. Immunity under the Act is an affirmative defense and is the defendant's burden to establish. Local public entities also enjoy the same defenses and/or immunities available to a private person, in addition to those provided in the Tort Immunity Act. 745 ILCS 10/1-101.1(b).

Unlike the average private person, business or corporation, the Tort Immunity Act also states that neither a local public entity nor an employee is liable to pay punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or a third party. 745 ILCS 10/2-102.

B. Who is covered under the Act?

"Local public entity" is defined in the Act as:

a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. "Local public entity" also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act as well as any not-for-profit corporation organized for the purpose of conducting public business.

745 ILCS 10/1-206. The Tort Immunity Act also provides employees of local public entities with immunities and defenses.

C. Statute of Limitations

The first major difference between the average personal injury case and a case brought against a local public entity and/or its employee is the time a plaintiff has to file a suit, also known as the statute of limitations. Normally a plaintiff involved in an incident such as a fall or a car accident has two years to file a lawsuit. However, under the Tort Immunity Act, if that same plaintiff has an accident allegedly caused by a local public entity or its employee, the plaintiff must bring a lawsuit against the local public entity and/or its employee within one year of the date of the accident. 745 ILCS 10/8-101(a). If the plaintiff files suit after one year, the local public entity and/or its employee can move to dismiss the case.

D. The provisions of the Tort Immunity Act

This handout and presentation will focus on new case law interpreting various sections of the Tort Immunity Act, but by no means is intended to be a complete discussion of every immunity or defense available in the Tort Immunity Act. You are encouraged to review the Act, as there are various provisions that may assist you in your tenure as a governmental official. The Tort Immunity Act can be found at

<http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ChapterID=58&ActID=2062>.

The updated case law below will discuss Article II, General Provisions Relating To Immunity, which consists of subparts titled Immunity of Local Public Entities, Immunity Of Public Employees and Indemnification Of Public Employees, as well as Article III, Immunity From Liability For Injury Occurring In The Use Of Public Property. The Tort Immunity Act consists of ten (10) articles; however, the vast majority of case law and recent case law concerns the above mentioned Article II and Article III.

II. RECENT CASE LAW

A. Discretionary Immunity

Discretionary acts of a local government and its employees are entitled to absolute immunity. *Johnson v. Mers*, 279 Ill. App. 3d 372 (2d Dist. 1996). Generally, discretionary acts are those acts that are unique to public office and require deliberation, decision, or judgment. *White v. Village of Homewood*, 285 Ill. App. 3d 496 (1st Dist. 1996). Ministerial acts are those acts that are generally performed in a prescribed manner under obedience to legal authority. *Snyder v. Curran Township*, 167 Ill. 2d 466 (1995).

The Tort Immunity Act states as follows: "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201.

Lorenc v. Forest Preserve District of Will County, 2016 IL App (3d) 150424 – The decedent was riding in a bicycling event in the Hickory Creek Forest Preserve. Plaintiff claimed that the Forest Preserve District was willfully and wantonly negligent when a volunteer for the event came onto the trail causing the decedent to hit his brakes, swerve and fall off his bike resulting in serious injuries that led to his death. The defendant argued that its volunteer waving his arms and stepping onto the trail involved a determination of policy or the exercise of discretion. Defendant argued that it was completely and absolutely immune based on the discretionary provision of the Tort Immunity Act. The third district held that the volunteers along the trail were able to exercise discretion in the performance of their duties in directing the bicyclists and informing them of upcoming issues and or new additions to the trail. The court further held that the Forest Preserve District exercised discretion when placing the volunteers at locations along the path to begin with. Therefore, the court ruled that the trial court did not err in granting defendant's motion to dismiss.

B. Inspection Immunity

The Tort Immunity Act also provides immunities for inspections. The pertinent provisions are as follows:

A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

745 ILCS 10/2-105.

A public employee is not liable for an injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than that of the local public entity employing him, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

745 ILCS 10/2-207).

Nourse v. City of Chicago, 2017 IL App (1st) 160664 – The plaintiff was an apprentice elevator serviceman and was working with his boss servicing elevators located at the River North Apartments in Chicago. The City of Chicago inspector was conducting an inspection of the elevators and directed plaintiff into the elevator shaft. At that same time, plaintiff's boss tested the pit switch and the elevator descended, striking the plaintiff. Plaintiff filed suit against the City of Chicago and the inspector alleging that the inspector was negligent and willfully and wantonly negligent in directing the plaintiff into the pit, failing to ensure it was safe for plaintiff to enter, failing to inform the supervisor that the plaintiff was in the shaft and failing to inform the plaintiff that the elevator could be activated. The court found that the plaintiff was attempting to impose liability on the defendants for alleged wrongful conduct during an

inspection. As such, because sections 2-105 and 2-207 specifically provide protections for inspections, it would be inconsistent to hold public entities and employees liable for their conduct in carrying out the inspections. Because the inspection was performed to determine whether the elevator posed a safety hazard, sections 2-105 and 2-207 applied and because the plaintiff could present no evidence to refute this conclusion, the defendant were immune from the negligent and willful and wanton negligence claims.

C. Supervisory Immunity

The Tort Immunity Act provides immunity to local public entities and employees from claims of negligence regarding supervision. The vast majority of cases involve supervision by teachers or administrators of students. However, other local public entities, like park districts, are also protected by this provision. The supervisory immunity section states as follows:

(a) Except as otherwise provided in this Act, 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.

(b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.

745 ILCS 10/3-108

Barr v. Cunningham, 2017 IL 120751 – Plaintiff filed suit for eye injuries he suffered in a P.E. class game of floor hockey. The plaintiff alleged that the teacher was willfully and wantonly negligent because she failed to require the students to use protective eye wear when it was readily available. The court held that the plaintiff failed to prove that the teacher was willfully and wantonly negligent as the evidence revealed that plastic sticks and soft squishy balls were used in place of wooden sticks and hockey pucks. In addition, the students were given rules for their safety and followed the rules. The Illinois Supreme Court held that this evidence showed that the teacher was not indifferent to the plaintiff's safety and was not willfully and wantonly negligent.

D. Premises Immunity

The Tort Immunity Act gives some additional protections with regard to premises claims. The relevant provision states as follows:

(a) Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

(b) A public entity does not have constructive notice of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either:

- (1) The existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property; or
- (2) The public entity maintained and operated such an inspection system with due care and did not discover the condition.

745 ILCS 10/3-102

Krivokuca v. City of Chicago, 2017 IL App (1st) 152397 – The plaintiff alleges that he was injured when a sinkhole opened in the roadway causing his entire vehicle to fall into the sinkhole. Plaintiff claimed that the City of Chicago failed to exercise ordinary care to maintain its property in a reasonably safe condition. The plaintiff also argued that the city was liable under a theory called *res ipsa loquitur*, which allows for the presumption of negligence if the item because the negligence was under the control of the defendant and that the accident would not have occurred absent negligence. The city argued that the Tort Immunity Act precludes a *res ipsa loquitur* claim as the Act requires that the defendant has actual or constructive notice of the alleged dangerous condition. The court held that the Tort Immunity Act requires more than circumstantial evidence and actually requires the plaintiff to prove that the defendant had actual or constructive notice of the condition. Therefore the Tort Immunity Act precluded the plaintiff from bringing a *res ipsa loquitur* claim. With regard to the negligence claim, the court pointed to the fact that the Tort Immunity Act requires the plaintiff to prove that the defendant had actual or constructive notice. The court held that there was no evidence that the city had actual or constructive notice of a dangerous condition that allegedly caused the sinkhole. As such, the court ruled that there was no genuine issue of material fact and upheld the granting of summary judgment to the defendants.

Burns v. City of Chicago, 2016 IL App (1st) 151925 – Plaintiff suffered a fall allegedly due to a raised ADA sensory tile located at a crosswalk. The plaintiff claimed that the City of Chicago was negligent in installing the sensory tiles, failing to inspect the area of the sidewalk, failing to repair the sidewalk and failing to warn the plaintiff of the dangerous nature of the sensory tile. The court first held that the tile that was raised between 3/4 and 1 1/2 inches above the sidewalk was *de minimis*. The court went on to hold that the city, while having a duty to maintain its property in a safe condition, does not have a duty to create public improvements. With regard to plaintiff's notice claim, the court held that constructive or actual notice would need to be proven and that based on the evidence, the plaintiff failed to meet this burden in providing facts showing that the city had constructive or actual notice of the raised tiles. Interestingly the evidence presented to the court were Google map photos which show that a year before the incident the tiles were not raised.

E. Recreational Property Immunity

Many local public entities such as school districts, park districts and municipalities have recreational property. Claims brought with regard to a condition of recreational property must allege and the plaintiffs must prove that the local public entity was willfully and wantonly negligent. The recreational property immunity provision states as follows:

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

745 ILCS 10/3-106.

Foust v. Forest Preservation District of Cook County, 2016 IL App (1st) 160873 – The decedent was hit by a tree limb that fell from an overhanging branch while he was riding his bicycle on a trail. The issues brought before the appellate court were whether a tree, whose base was located 7 feet from the side of the bicycle path, with a tree limb overhanging the path which breaks off and falls onto a cyclist, is a condition of the property intended or permitted to be used for recreational purposes and whether the tree constitutes a condition of the trail. The tree was located in Erickson Woods which was suitable for picnicking, hiking, in-line skating, cross-country skiing, fishing and the area was a "birding hotspot." The court used this evidence as well as the posted rules of the Forest Preservation District, which did not require hikers or birdwatchers to stay on the trails, to hold that the area in which the tree was located was a condition of the recreational property as this property was intended and permitted to be used for recreational purposes. Therefore, the plaintiff would be required to prove that the Forest Preservation District was willfully and wantonly negligent.

F. Access Road and Trail Immunity

Section 3-107 provides complete immunity to a local public entity for injuries caused by a condition of the access road and/or trail that meets the criteria contained in section 3-107.

Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (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.

745 ILCS 10/3-107.

In *Foust v. Forest Preservation District of Cook County*, 2016 IL App (1st) 160873, the defendant also argued that the tree and its limb were a condition of a riding trail which would provide complete immunity to the Forest Preservation District. The court held that the trail in which the plaintiff was riding his bike was a riding trail covered by section 3-107(b). The court held that if the tree limb had fallen across the path and the decedent had collided with it, the tree limb would have been considered a condition of the path and the defendant would be immune from liability. However, the court held that a tree limb overhanging the path that happened to fall and strike the bicyclist could not be considered a condition of the path for purposes of immunity under section 3-107(b).

Corbett v. County of Lake, 2016 IL App (2d) 160035, ¶ 28 – The plaintiff was seriously injured when riding her bike on the Old Skokie Bike Path in Lake County. The second district held that a trail need not be unpaved to qualify as a riding trail under the Tort Immunity Act and that the character of a path as a riding trail is not automatically defeated by the existence of any development in the surrounding area. However, the court also held that because the riding trail at issue was surrounded by narrow bands of greenway, industrial development, residential neighborhoods, parking lots, railroad tracks and major vehicular thoroughfares, the trail did not qualify as a riding trail under section 3-107(b). The decision has been appealed to the Illinois Supreme Court and the court has allowed the Petition to Appeal. The ruling by the Illinois Supreme Court should provide a consistent basis for the determination of whether the numerous governmental owned and operated trails in Illinois are immune under the Tort Immunity Act.



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Heather joined Heyl Royster in 2016. Before joining Heyl Royster, Heather worked at a mid-sized defense firm in the St. Louis Metro East area where she represented clients, including governmental entities, in the defense of personal injury and product liability claims throughout Illinois and Missouri. Heather also worked extensively in insurance coverage litigation. Heather has first and second-chair trial experience. She has obtained defense verdicts in several mandatory arbitrations, and argued and won summary judgment motions, in state court venues such as Madison County, IL, and in the United States Federal Court, Central District of Illinois. In the area of long-term care and nursing home liability, Heather has represented long-term care and nursing home facilities in the defense of medical malpractice cases including allegations of bed sores and wrongful death as well as pre-suit investigation and preparation. Heather has also written and argued appeals in the Fifth District of Illinois.

Heather is an adjunct professor at Southwestern Illinois College in the Paralegal Studies Program. She also founded the Madison County Women Lawyers group.

Professional Associations

- Madison County Bar Association
- Illinois State Bar Association
- The Missouri Bar Association
- Madison County Women Lawyers

Court Admissions

- State Courts of Illinois
- State Courts of Missouri
- United States District Court, Southern and Central Districts of Illinois

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