



The IDC Monograph

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The Tort Immunity Act

When plaintiffs' attorneys are looking for deep pockets, they look to public entities, who they believe are flush with money from assessments, taxes, tickets, and tolls. To discourage targeting of local government entities and their employees, and to protect taxpayers' contributions to the public coffers, the legislature grants a number of immunities and defenses that shield local government entities and their employees from tort liability for acts and omissions arising out of the execution of public duties.

I. Overview

The immunities and defenses available to local government entities and their employees are enumerated in the Local Governmental and Governmental Employees Tort Immunity Act (the "Act").¹ The Act was enacted, in part because of the Illinois Supreme Court's rejection of the principles underlying the sovereign immunity doctrine² in *Molitor v. Kaneland Community Unit District No. 302*.³ It is, therefore, in derogation of the common law action against governmental entities and it limits the liability of such bodies.⁴ The Act does not impose duties but, instead, only confers immunities and defenses.⁵ The Act explicitly states that its purpose "is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses."⁶ The purpose of the Act is to prevent the diversion of public funds from their intended purpose to payment of damage claims.⁷

The Act accomplishes its purpose by immunizing local public entities and employees from negligence in executing their public duties. In some circumstances, however, the Act expressly eliminates immunity for "willful and wanton conduct," thereby exposing a public entity to liability for egregious conduct. The Act defines "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."⁸

There is no bright-line test for willful and wanton conduct. Rather, whether a public entity's acts constitute willful and wanton conduct depends on the facts of each particular case.⁹ Courts have consistently held, however, that willful and wanton conduct requires more than mere inadvertence or inattentiveness.¹⁰ Courts consider a totality of the evidence when determining whether conduct was willful and wanton.¹¹ It is the plaintiff's burden to prove willful and wanton conduct and it is a substantial one.

The Act is broad ranging and applies "to every kind of local governmental body."¹² Section 1-206 of the Act defines a local public entity entitled to the Act's immunities and defenses as follows:

"Local public entity" includes 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*. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.¹³

Even though this definition of "local public entity" seems rather specific, Illinois courts have "widely recognized various public entities as coming within the definition of local public entity, although those entities were not expressly identified in section 1-206."¹⁴ Therefore, defense counsel should consider carefully whether the Act applies to their clients, particularly in contexts that might not seem applicable at first glance.¹⁵ For purposes of interpreting this section, "public business" should be understood to possess its plain, ordinary, and commonly understood meaning—the paramount inquiry must be whether the entity is involved in the operation of government.¹⁶ Where an entity is created for the express purpose of performing public or governmental functions, the entity conducts "public business" and is tightly enmeshed with government such that the entity constitutes a form of a "local government body."¹⁷

Once it is determined that a body fits the definition of "local public entity," the Act's one-year statute of limitations often creates the first barrier against liability. Specifically, Section 8-101 of the Act provides:

Limitation.

(a) No civil action other than an action described in subsection (b) may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued.

(b) No action for damages for injury or death against any local public entity or public employee, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of those dates occurs first, but in no event shall such an action be brought more than 4 years after the date on

which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death.¹⁸

Further, the Act expressly prohibits the imposition of punitive damages against a local public entity despite the existence of another statute or common-law theory that might otherwise allow them. Section 2-102 of the Act states:

Notwithstanding any other provision of law, a local public entity is not liable to pay punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or a third party. In addition, no public official is liable to pay punitive or exemplary damages in any action arising out of an act or omission made by the public official while serving in an official executive, legislative, quasi-legislative or quasi-judicial capacity, brought directly or indirectly against him by the injured party or a third party.¹⁹

Similarly, immunity against punitive damages is provided to “public employees” who determine policy or exercise discretion on legislative matters under Section 2-213 of the Act, which states:

Notwithstanding any other provision of law, a public employee is not liable to pay punitive or exemplary damages in actions brought against the employee based on an injury allegedly arising out of an act or omission occurring within the scope of employment of such an employee serving in a position involving the determination of policy or the exercise of discretion when the injury is the result of an act or omission occurring in the performance of any legislative, quasi-legislative or quasi-judicial function, even though abused.²⁰

Therefore, while these municipal employees generally are immune from punitive damages when sued in their official capacity, they may be held liable for punitive damages when sued in their personal capacity.

Another important aspect of the Act is the indemnification provided to employees of public entities. Section 2-302 of the Act provides:

If any claim or action is instituted against an employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:

- (a) appear and defend against the claim or action;
- (b) indemnify the employee or former employee for his 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.²¹

Section 2-302, however, also provides, as a matter of public policy, “no local public entity may elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.”²²

II. Supervision Immunity

Section 3-108 of the Act bestows immunity upon local public entities and their employees for their supervision or failure to supervise activities on or for the use of public property.²³ Commonly referred to as “supervision immunity,” Section 3-108 provides:

(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 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.²⁴

Thus, supervision immunity applies to three basic scenarios:

- (1) Where supervision is actually undertaken, there is immunity from negligence but not from willful and wanton conduct;
- (2) Where the law requires supervision (a statute or code says supervision “shall” be provided), there is immunity from negligence but not from willful and wanton conduct for any failure to provide supervision; and
- (3) Where no supervision is provided and no law requires supervision, there is absolute and unconditional immunity for any failure to provide supervision.

For the purpose of the immunity, “public property” is not limited to property owned by the particular public entity defendant, but rather extends to any public property where supervision is provided. For instance, supervision of a school athletic team at a separate park-owned facility does not waive the immunity.²⁵ Public property, however, is specifically defined in the Act to include only property “owned or leased by a local public entity” and does not include “easements, encroachments and other property that are located on its property but that it does not own, possess or lease.”²⁶ In a unique wrinkle, and as the definition of “local public entity” does not include the State or “any office, officer, department, division, bureau, board, commission, university or similar agency of the State,”²⁷ courts have refrained from extending supervision immunity to public locations such as state parks.²⁸

The term “supervision,” however, has been construed broadly so that the immunity does not require any particular degree of quality²⁹ and includes direction, teaching, and to some degree active participation in an activity.³⁰ For instance,

the mere presence of a swim coach at a pool satisfies the definition of “supervision” under the act,³¹ as does a teacher who fails to identify a student participating in a chemistry experiment without state mandated eye protection.³² Moreover, school employees who exercised some precautions to protect students from injury, even if those precautions were insufficient, are not guilty of willful and wanton conduct.³³ Finally, the activity being supervised does not need to be within a park or scholastic setting, as supervision immunity has been applied to a variety of activities including regulatory supervision of a skydiving company,³⁴ oversight of a private corporation providing security,³⁵ or supervision of construction activities.³⁶

Unless the law specifically requires supervision, Section 3-108(b) provides blanket immunity from either negligence or willful and wanton claims for any failure to provide supervision, or when only “passive oversight” exists. Additionally, mere ineffectiveness does not establish that a defendant was utterly indifferent or consciously disregarded the safety of others.³⁷ Of particular interest, this immunity has been invoked frequently to immunize public entities from construction work-zone injuries in which the “supervision” provided by the public entity consisted only of loose oversight of the work or enforcement of contractual obligations.³⁸

III. Discretionary Immunity

Sections 2-109 and 2-201 of the Act confer immunity from liability to units of local government and their employees for the performance of discretionary functions.³⁹ This discretionary immunity is one of the most significant protections afforded to local public entities and their employees under the Act.⁴⁰ As such, an understanding of those parties discretionary immunity protects, and to what acts and omissions it applies, is essential to a robust defense of local public entities and their employees.

The burden is on the local public entities and their employees to prove they are entitled to immunity under Sections 2-109 and 2-201.⁴¹ The immunities set forth in these sections are applied by the courts on a case-by-case basis⁴² and are construed strictly against government defendants asserting them.⁴³

Section 2-109 provides that “[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.”⁴⁴ Thus, the Act does not confer discretionary immunity to a unit of local government directly.⁴⁵ Rather, it allows municipalities and other local public entities to shelter under the immunity granted to their employees by Section 2-201.⁴⁶

Section 2-201 immunizes local government employees from liability for both negligence and willful and wanton conduct.⁴⁷ The section states:

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.⁴⁸

Immunity under Section 2-201 is thus dependent upon both the type of position held by the subject employee and the acts carried out or omitted by the employee. Accordingly, courts use a two-part test to determine whether the employee may be granted discretionary immunity.⁴⁹ The first prong focuses on the employee’s position and the second prong on the employee’s alleged acts and omissions. In order to assert discretionary immunity successfully under Section 2-201, and by extension, Section 2-109, a government defendant must satisfy both prongs of the test.

a. First Prong: The Employee's Position

First, an employee may qualify for discretionary immunity “if he holds *either* a position involving the determination of policy *or* a position involving the exercise of discretion.”⁵⁰ Generally, the higher an employee’s position in the relevant chain of command, the more likely it is that the position involves the determination of policy or exercise of discretion.⁵¹ However, courts interpret this language liberally and will consider whether any government employee’s position involves the determination of policy or the exercise of discretion on a case-by-case basis. Thus, even general laborers charged to carry out seemingly mundane tasks, such as filling in potholes, can satisfy the first prong of Section 2-201 under the particular circumstances of a case, so long as some “personal judgment” is needed to execute the duties assigned to the position.⁵²

b. Second Prong: The Employee's Act or Omission

The crucial question under Section 2-201 is whether the claim concerns a “discretionary policy determination.”⁵³ For discretionary immunity to apply, the subject employee must have engaged in *both* the determination of policy *and* the exercise of discretion when performing the act or omission from which the plaintiff’s injury is alleged to have resulted.⁵⁴ In no case will a local public body or employee receive discretionary immunity from liability for the performance of a “ministerial” task.⁵⁵

c. Part (a): Whether the Act Involved a Policy Determination

Relatively few cases trace the contours of “determining policy” as used in Section 2-201. In essence, policy determinations involve decisions that require the subject employee to utilize his or her particular expertise to balance competing interests and to make a judgment call as to what procedure, solution, or course of action will best serve each of those interests.⁵⁶

While policy choices are commonly thought to be the province of executive-level employees, such as school district administrators,⁵⁷ courts have found that lower-level employees, such as teachers and coaches, also make many everyday decisions “determining policy” for the purposes of Section 2-201.⁵⁸ Indeed, a public employee of any level who considers available resources, time, efficiency, safety, or fiscal and work force constraints in the execution of his or her public duties can make a “policy determination” under Section 2-201.⁵⁹

d. Part (b): Whether the Act Involved the Exercise of Discretion

The decisive final step in the test requires the court to classify the act or omission giving rise to the complaint as either discretionary or ministerial in nature. Discretionary acts are those unique to a public office.⁶⁰ They are characterized by the exercise of personal deliberation and judgment in deciding how and in what manner the act should be performed or whether to perform the particular act in the first place.⁶¹ On the other hand, acts that an employee performs in a prescribed manner on a given set of facts, or in obedience to the mandate of legal authority, are ministerial in nature.⁶² Nevertheless, courts have found that this immunity applies to bar claims brought regarding the failure of school officials

to discipline bullies despite the existence of an anti-bullying policy, finding that those acts or omissions constituted discretionary acts and policy determinations.⁶³

The designation of acts as either discretionary or ministerial escapes precise formulation, however, and must be made by the court in light of the particular facts and circumstances of each case.⁶⁴ For example, although repairs generally are ministerial acts for which local governments may be liable if negligently performed,⁶⁵ courts have held that an eighth-grade shop teacher's decision to remove the safety shield from a saw was a discretionary act,⁶⁶ and that city workers' decisions about filling potholes, involved the exercise of discretion.⁶⁷ In sum, appellate courts are willing to uphold trial court findings of discretion (and immunity) based on the "*minutiae*" of how local government employees complete even menial, everyday tasks for their employers,⁶⁸ even when the results are admittedly harsh.⁶⁹

Illinois courts have generously interpreted the language in Section 2-201 in favor of finding discretionary immunity for local public entities and their employees. The burden to establish this immunity remains with government defendants, however.⁷⁰ Consequently, counsel should take care to flesh out and introduce into evidence the intricacies and incidental choices inherent in the everyday duties executed by both executive-level policy makers and lower-level personnel, including teachers, coaches, and general laborers, when asserting discretionary immunity under Sections 2-109 and 2-201.⁷¹

IV. Adoption and Failure to Enforce a Law

The Act recognizes that government employees are not perfect and need immunity when failing to enforce an ordinance or law. Similarly, it furnishes protection for claims arising from the issuance or denial of permits and the institution of administrative proceedings.

a. Failure to Adopt or Enforce a Law

Local government⁷² units are granted immunity for any injury caused by adoption or failing to adopt or enforce any law. This protection has also been extended to government employees.⁷³ This immunity further extends to such things as failure to inspect property,⁷⁴ enforcement of a housing code,⁷⁵ or enforcement of a property maintenance code.⁷⁶

This immunity is absolute and without any exception for willful and wanton misconduct.⁷⁷ The Illinois Supreme Court confirmed complete protection in *Village of Bloomington v. CDG Enterprises*.⁷⁸ There, a developer asserted that municipal officials secretly worked to deny the developer's petition for rezoning and annexation so that they could steer the project to their "cronies."⁷⁹ The Illinois Supreme Court specifically held that there were no exceptions for corrupt or malicious motives to the immunity afforded by Sections 2-103 and 2-105.⁸⁰

Additionally, these sections of the Tort Immunity Act apply to failure to enforce issues. Where the employee fails to enforce an enactment or law, there is immunity. However, these particular sections do not apply to situations where an employee attempts to enforce a law and does so in a negligent or incompetent manner.⁸¹ In situations where there are accusations of an employee incompetently enforcing the law, a different section of the Act—Section 2-202—is triggered and no protection for willful and wanton misconduct is in place.

b. Judicial or Administrative Proceedings

From time to time, irate residents will take umbrage with ordinance prosecutions and other administrative proceedings and will file suit against government employees. Often these claims are attendant to claims of political targeting or other mischief. However, according to section 2-208, a public employee enjoys immunity from claims arising from the institution or prosecution of an administrative or judicial proceeding as long as the employee did not act maliciously and without probable cause.⁸² This immunity does not immunize public employees from the common law claim of malicious prosecution.⁸³ Indeed, this provision will not immunize a public employee who acts maliciously, but malice alone does not infer an absence of probable cause.

The Third District case of *Knox County v. Midland Coal Co.*⁸⁴ provides an example. The county obtained a preliminary injunction to stop the strip mining of prime farmland to protect the county's property tax base.⁸⁵ The mining company successfully appealed the preliminary injunction, with the appellate court ruling that the county did not have jurisdiction to obtain the injunctive relief until after it had exhausted all of its administrative remedies. The mining company then filed suit to recover the damages it suffered because of the county's actions. The court held that the county had probable cause to seek the injunction and found in favor of the county.⁸⁶

c. Issuance, Denial, Suspension, or Revocation of a Permit

Suits are sometimes filed because applicants for local permits are denied. In the eyes of the applicants, the denial is without proper cause or blatantly unfair. Governmental entities⁸⁷ and public employees⁸⁸ have broad immunity from claims relating to the issuance, denial, suspension, or revocation of a permit, or the failure or refusal to do the same. This immunity is absolute. Even in situations where a government employee has corrupt or malicious motives in making such a decision, immunity applies.⁸⁹ Furthermore, this immunity does not distinguish between a ministerial act and an exercise of discretion, thus granting immunity to both types of acts.

*Doyle v. City of Marengo*⁹⁰ provides an example of this immunity. In *Doyle*, the plaintiffs purchased homes in a subdivision that had been previously designated a flood plain. The city issued occupancy permits for the homes, but failed to issue letters of map revision that would have removed the flood plain designation. As such, the plaintiffs were forced to purchase flood insurance. The plaintiffs sued the city, alleging that they suffered damages arising from the city's negligent issuance of the occupancy permits before issuing letters of map revision. The city successfully moved for dismissal based on Section 2-104 immunity, which was upheld on appeal, with the appellate court finding that there was no willful and wanton statutory exception. Interestingly, the court did suggest that an exception to this immunity might occur if there had been evidence of bad faith or malicious motives. Reading in such a "corrupt motives" exception into the statute, will be subject to further appellate scrutiny.⁹¹

Similarly, in *Mack Industries, Ltd. v. Village of Dolton*, Section 2-206 was found to provide immunity in a landlord's case against the village and village manager for injuries caused by the failure to issue permits and certificates.⁹² This case pertained to notices of disconnection regarding water supply. Dismissal was affirmed on appeal based on this immunity.

V. Condition of Property

Section 3-102⁹³ is largely a codification of the common law duty of a local public entity to maintain its property.⁹⁴ It does not provide a complete immunity to a local public entity for negligently maintaining its property,⁹⁵ but rather defines the scope of a local public entity's duty while simultaneously identifying the narrow circumstances under which the duty is inapplicable.⁹⁶

a. Duty of Local Public Entity

In a general sense, a local public entity owes the same duty that any landowner owes to persons using its land: the duty to exercise ordinary care to maintain its property in a reasonably safe condition.⁹⁷ However, a local public entity owes this duty only to "intended and permitted" users of the property who are using it in a manner that is reasonably foreseeable.⁹⁸ Importantly, a local public entity owes the duty of care only when the foreseeable use is *both* permitted *and* intended.⁹⁹ Thus, the Act will apply to immunize a local public entity for injury arising from the condition of its property when the injured party was not an intended and permitted user of the property.¹⁰⁰

In order to determine whether a particular use of government property was permitted and intended, the local public entity's intent is controlling and the courts will look to the property itself to determine the intended use.¹⁰¹ This was examined recently in *Pattullo-Banks v. City of Park*.¹⁰² In that situation, whether a pedestrian was an intended user of a street where she was hit by a car was irrelevant to the determination of whether the city breached its duty to maintain its property by unreasonably piling snow on the sidewalk so as to make it unpassable. Rather, whether the pedestrian was an intended and permitted user was to be determined based upon the property for which the city was alleged to have breached its duty rather than the place where the injury occurred.

Further, in making such a determination, the historical and customary use of the property is a relevant factor.¹⁰³ Other factors will also be examined. For instance, to determine a municipality's intent as to whether a pedestrian was a permitted and intended user of a street, it is necessary to look at pavement markings, signs and other physical manifestations of the intended use of the property.¹⁰⁴ Whether a local public entity owed a duty of care is a matter of law to be determined by the court.¹⁰⁵

b. Notice of Condition Required

Even where a duty is owed to an intended and permitted user of the government property, Section 3-102 states:

[A] local public entity . . . 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.¹⁰⁶

In order to establish actual notice, it is only necessary to establish that there was notice or knowledge of the dangerous condition itself, not the unsafe nature of the condition.¹⁰⁷ As stated in *Zameer v. City of Chicago*, "notice" demands proof that the defendant had timely notice of the specific defect that caused the injury, not merely the general conditions of the

area.¹⁰⁸ Actual notice is imputed to a local public entity when one of its employees has actual knowledge of the condition.¹⁰⁹

Section 3-102(b) of the Act provides two affirmative methods of proving that a local public entity did not have constructive notice.¹¹⁰ These methods are in the nature of affirmative defenses that will bar a plaintiff's right to recover if properly raised and proved by the local public entity.¹¹¹ In that regard, a local public entity does not have constructive notice 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.¹¹²

It has been held that a local public entity has constructive notice of a defective condition of its property where the defective condition has existed for such a length of time or, is so conspicuous or plainly visible that the local public entity and its agents should have known of the existence of the condition by exercising reasonable care and diligence.¹¹³ The question of whether a local public entity had constructive notice of a defective condition is usually for the trier of fact.¹¹⁴ However, it becomes a question of law when the evidence when viewed in the light most favorable to the plaintiff so overwhelmingly favors the defendant that no contrary verdict could ever stand.¹¹⁵

Factors to be considered in determining if a public entity had constructive notice of a defective condition of its property are the length of time the condition existed and the conspicuity of the condition.¹¹⁶ Speculation is not permissible. The recent case *Zameer v. City of Chicago* is particularly useful for the defense bar.¹¹⁷ In *Zameer*, the plaintiff tripped on a height differential in the sidewalk. Judge Flanagan properly rejected the plaintiff's suggestion that the notice element was satisfied merely by pointing out that there had been prior complaints regarding other sections of the sidewalk. In affirming summary judgment, the appellate court reiterated that the surrounding area is irrelevant and that the plaintiff must prove timely notice of the specific defect itself - a defect down the other end of the street holds no water.¹¹⁸

The burden of proof is an important issue to consider in regard to the determination of constructive notice. As one court observed, "[i]t is unclear whether notice of the unsafe condition is an element of the plaintiff's *prima facie* case or only becomes an issue if lack of notice is raised as an affirmative defense."¹¹⁹ The initial burden of demonstrating that the local public entity has constructive notice of the condition of its property is on the plaintiff, but a public entity seeking to base its immunity on one of the defined bases of lack of constructive notice will bear the burden of proving those facts.¹²⁰ It must be raised as an affirmative defense or it is considered to be waived.

VI. Negligent Inspection

As noted *supra*, a local government unit's duty to inspect its own property is delineated by Section 3-102. However, sometimes lawsuits are filed against public entities arising out of inspections of *private* property. For instance, where a certificate of occupancy is granted, or a fire inspector reviews a building, tort immunity might be triggered. Section 2-207 provide:

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.¹²¹

Unlike Section 3-102, inadequate inspections of non-governmental property have absolute immunity.¹²² This complete protection is granted despite willful and wanton misconduct associated with such inspections.¹²³

The Act allows for a broad definition of an "inspection" for the purposes of Section 2-207. In *Hess v. Flores*, plaintiff was injured by a fall from an apartment building staircase with a missing handrail.¹²⁴ The plaintiff sued the City of Chicago for willful and wanton conduct and attempted to circumnavigate Section 2-207 by suggesting that the city inspector's activities were outside the inspection process. The plaintiff argued that the city created an even more dangerous situation beyond the scope of a mere inspection by directing the building owner to do specific work regarding the handrail, ordering the building owner to stop work during a time when the staircase lacked handrails, and ordering the owner to place yellow caution tape on the stairway in place of the handrail. The court rejected this theory, instead holding that Section 2-207 applies not only to negligent inspections, but also to willful and wanton conduct associated with such inspections. Consequently, even when a local government inspector has engaged in willful and wanton misconduct that is beyond the norm of an "inspection," Section 2-207 provides protection.¹²⁵

VII. Defamation and Misrepresentation Immunity

One of the broadest immunities afforded local government entities under the Tort Immunity Act is immunity from defamatory statements made by a public employee. Section 2-107 of the Tort Immunity Act states as follows:

A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous or for 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.¹²⁶

Notably, this immunity is absolute and has no willful and wanton exclusion. Perhaps more importantly to the practitioner, Section 2-107 immunity is regularly granted at the pleading stage pursuant to a Section 2-619 motion to dismiss.¹²⁷

Defamation immunity has provided broad protection to local government entities in a variety of settings and circumstance. For instance, a school bus driver who was fired after a teacher assistant alleged poor work performance,¹²⁸ or a police officer who was fired after a former colleague on another force incorrectly stated he was suspended in his previous

job.¹²⁹ The immunity has also been provided for statements read into the record, and broadcast over the internet and television.¹³⁰ In a wholly separate context, federal courts have found defamation immunity when a village clerk sent a certified letter that a plaintiff “has failed to perform one or more of the provisions of the ordinance for the Subdivision and Platting of Land”.¹³¹

While the Tort Immunity Act’s protection for defamation is reserved for the local public entity, the common law further provides protection from defamation claims for the public employee. The key consideration is whether the employee is acting within the scope of his or her official capacity, as opposed to a personal capacity.¹³² For example, members of a school or school board making allegedly defamatory statements about a teacher to parents would be acting within the scope of their official capacity.¹³³ However, this can be a very narrow path to navigate as frequently these statements toe the line between the official and personal capacity of the speaker. For example, a female police officer who made complaints to both her superiors and fellow officers was provided immunity for statements made “further up the chain of command” but was not granted absolute immunity for those statements made to other officers on the force.¹³⁴

The Act also provides immunity for some misrepresentations or information provided pursuant to Section 2-210.¹³⁵ Unlike the statutory immunity for defamation, however, this immunity only applies to negligent misrepresentations, and not willful and wanton misrepresentations.¹³⁶ However, the much broader protection found in this section is with the provision of information by a public employee. Section 2-210 states as follows:

A public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation or 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.¹³⁷

The Appellate Court, First District has made it clear that the “or” in the text of this section is “disjunctive” meaning a wholly different alternative to the text’s first clause.¹³⁸ This is important, as there is no negligence modifier on the provision of information clause. Thus, a public employee acting within the scope of his or her employment is immune from any injury caused by the provision of information—no matter how that information is published.

Local government entities are well protected for actions against it for allegedly defamatory statements. Perhaps more importantly, the case law generally suggests that such actions should be dismissed at the pleading stage in both federal and state venues. Less clear is the immunity provided to individual public employees, particularly in their individual capacity. This is where a careful reading of provision of information immunity found in Section 210, as well as an understanding of the common law privileges associated with official acts are necessary.

VIII. Recreational Property Immunity

A cause of action sounding in negligence against a public entity or public employee for a failure to maintain equipment or any other action based upon the condition of the public-owned property, potentially implicates Section 3-106 of the Act. This provision holds:

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.¹³⁹

The initial question is whether the property is “recreational” property. Whether public property qualifies as “recreational property” under Section 3-106 is determined by its nature, intended use, and past use. The primary purpose of the public property, however, does not have to be recreational for it to qualify as “recreational property.” The public property may be used for a variety of purposes, not just recreational activities, and still benefit from the immunity provided under Section 3-106.¹⁴⁰ A less understood concept, but of equal importance is the nature of the property itself. Traditionally this provision of the Act was applied primarily to actions involving real property. This was error, and unnecessarily limited the scope of this immunity. A review of the relevant case law makes clear that Section 3-106 does not amend, rather it incorporates the definition of “public property” found in 745 ILCS 10/3-101, which states:

As used in this Article unless the context otherwise requires “property of a local public entity” and “public property” mean real or personal property owned or leased by a local public entity, but do not include easements, encroachments and other property that are located on its property but that it does not own, possess or lease. (emphasis added).

Recently, the Illinois Supreme Court rejected a narrow application of this provision by highlighting the holding in *Grundy v. Lincoln Park Zoo*¹⁴¹, as follows:

In *Grundy*, after examining this court’s opinions in *McCuen*, *Sylvester*, and *Rexroad v. City of Springfield*, 207 Ill.2d 33, 277 Ill.Dec. 674, 796 N.E.2d 1040 (2003), the panel stated:

‘These three decisions leave little doubt that the Supreme Court has understood, if not outright announced, that section 3–106 immunity extends to injuries caused by the condition of movable personal property, as in *McCuen*, or by movable items on real property, as in *Sylvester*....’

We agree with this assessment of our prior opinions, and accordingly find, to the extent that *Stein* contradicts this conclusion, it is overruled.”¹⁴²

Thus, once it is determined that the property at issue, be it real or personal property, was used for a recreational purpose, it is arguable that any action for negligence is barred.

IX. Hazardous Recreational Immunity

Section 3-109 of the Act immunized local public entities and employees as follows:

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 reasonably 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.¹⁴³

The statute itself offers two paths to identify what type of activity is a “hazardous recreational activity.” Subsection (b) of the statute defines it as any activity that creates a “substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator.” Whereas subsection (b)(1)-(3) lists a variety of recreational events which are by definition to be considered hazardous, including: skydiving, surfing, animal racing, downhill skiing, rock climbing, pistol or rifle shooting, and importantly “body contact sports.”¹⁴⁴ Generally, the list of activities in subsection (b) are only activities that the courts have qualified as “hazardous recreational activities.” For example, in *Grandalski ex rel. Grandalski v. Lyons Tp. High School Dist. 204*¹⁴⁵, the First District affirmed granting a motion to dismiss based upon various immunity statutes. In *Grandalski*, the plaintiff was injured when she fell on her head while performing a gymnastics maneuver during a physical education class in high school.

The plaintiff argued that the school district should be liable because the gymnastics activity was a hazardous recreational activity. In discussing whether plaintiff’s participation in the physical education class was a recreational activity, the court stated as follows:

Even if we were to conclude the activity here was “recreational,” it was not “hazardous recreational activity” under section 3-109 of the Tort Immunity Act. Section 3-109 provides, in pertinent part, as follows: “(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.” A basic gymnastics class is not the type of activity that falls under section 3-109.¹⁴⁶

To distinguish a “hazardous recreational activity” from a simply recreational activity the focus is whether the risk is a feature of the activity and not an unintended hazard made possible by participating in the activity. For example, a skydiver knows that he or she will fall from great height and impact the ground—this risk is the feature of the activity. Section 3-109 immunity is infrequently litigated, which is a good thing as once triggered it can control or limit other immunities.¹⁴⁷

X. Police Services

Under the Act, a public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.¹⁴⁸ Whether a public employee or entity’s acts constitute willful and wanton conduct depends on the facts of the particular case. Proof that the conduct is willful and wanton requires a demonstration that it shows an “utter indifference to” or “conscious disregard for” the safety of the person that they are engaged with at the time of the conduct or prior thereto.¹⁴⁹ There are, however, certain public employees who, generally, enjoy immunity from liability regardless of their state of mind when acting in certain circumstances.¹⁵⁰ These immunities are focused on various activities relating to police protection and detention and corrections functions. Section 2-202 does not provide an exception to the immunities provided in other sections of the Act, and will not govern where other, more specific, immunities apply.¹⁵¹

a. Enhanced Immunity: Police Protection Services

Under Section 4-102 of the Act,¹⁵² local public entities and public employees enjoy absolute immunity from liability for any failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for any failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals.¹⁵³ This immunity is not waived by a contract for private security service, but cannot be transferred to a non-public entity or employee.¹⁵⁴

This immunity, however, does not allow police officers to engage in any conduct while performing police services. Indeed, this provision does not bar claims premised on a public entity's or a public employee's willful and wanton misconduct in the actual execution and enforcement of the law.¹⁵⁵ The primary issue in most of these cases is whether the defendant provided police services.¹⁵⁶ Thereafter, issues involving the degree of control exerted by the police,¹⁵⁷ the context in which the police are acting,¹⁵⁸ or whether public security personnel may provide "police services," or any combination of those scenarios, will arise and complicate whether the immunity in this section will insulate the public employee, the public entity, or both, from claims for liability.

Immunity from liability for failure to establish a police department or otherwise provide police protection service also applies to local public entities such as boards of education.¹⁵⁹ In *Albert v. Bd. of Educ.*,¹⁶⁰ the court held that the board of education had no duty to provide police-type protection to students after school hours, off school grounds, and when there was no school-supervised activity taking place.

In certain circumstances where a public employee or entity is charged with a failure to provide police protection services, the absolute immunity found in Section 4-102 might not operate completely. From time to time, the express terms of one statute might conflict with the language of another. Under Illinois law, "when the plain language of one statute apparently conflicts with the plain language of another statute, we must resort to other means in determining the legislature's intent. Where two statutes conflict, [the court] will attempt to construe them together, *in pari materia*, where such an interpretation is reasonable."¹⁶¹

The Illinois Supreme Court has held that there is no conflict between the Illinois Vehicle Code¹⁶² and the Tort Immunity Act, reasoning that the Vehicle Code extends certain privileges to both public and private employees driving emergency vehicles while the Tort Immunity Act is more narrowly focused and applied only to public employees and their employers.¹⁶³ However, such a conflict exists between Section 4-102 of the Tort Immunity Act and Section 305 of the Illinois Domestic Violence Act of 1986.¹⁶⁴ Under Illinois law, the Domestic Violence Act limits the immunity a law enforcement officer enjoys in the context of a domestic violence case. The Domestic Violence Act provides immunity similar to that set forth in Section 2-202 of the Illinois Tort Immunity Act as opposed to the absolute immunity for the same public employees under Section 4-102 of the Tort Immunity Act.¹⁶⁵ The rationale expressed by the courts is that: (1) the express language of Section 305 of the Domestic Violence Act is more specific than the broad immunities of the Act; and (2) because the legislature enacted the Domestic Violence Act after the Act, the legislature intended the more recent Act to control.¹⁶⁶ Thus, one must be careful when analyzing whether there is any other legislation governing the specific police protection services involved in the case that could limit the absolute immunity normally afforded by Section 4-102.

b. Enhanced Immunity: Jail, Detention or Correctional Facility

Under Section 4-103 of the Act, local government entities and their employees are also immune from liability 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 Section 4-103 requires the periodic inspection of prisoners.¹⁶⁷

The Act is clear that there can be no liability for a public employee or entity who makes a knowing decision to forego establishing a jail, detention, or correctional facility. In those circumstances where a jail, detention, or correctional facility exists, then neither a public employee nor a public entity can be liable for failure to provide sufficient equipment, personnel, supervision, or facilities therein. There is no exception from the operation of the absolute immunity of this section even if a fact-finder determines that a public employee acted with willful and wanton intent.¹⁶⁸

XI. Fire and Emergency Services

Under the Act, local government entities are immune from the failure to establish a fire department, fire protection, rescue and other emergency services.¹⁶⁹ If established, local public entities and their employees are immune from the failure to suppress or contain a fire, and are immune from failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities.¹⁷⁰ Local government entities and their employees are also immune from liability for an injury caused by the negligent operation (but not the willful and wanton operation) of a motor vehicle, including fire trucks and rescue vehicles, when responding to an emergency call.¹⁷¹

The general policy behind the fire and emergency services sections of the Act is to “shield emergency responders from personal liability for decisions made and actions taken while responding to an emergency.”¹⁷² The theory is that “if the operator is haunted by the possibility of facing devastating personal liability for actions taken in the course of responding to an emergency, employees’ performance will be hampered.”¹⁷³

Responding to an Emergency

Although a covered employee is immune from claims of negligence in responding to an emergency,¹⁷⁴ the term “emergency” is not defined by the Act. Illinois courts, however, use the common definition of emergency, which is an “urgent need for assistance or relief” or as “a situation in which there is a high probability of death or serious injury to an individual or significant property loss and action by an Emergency Vehicle operator may reduce the seriousness of the situation.”¹⁷⁵ A public employee is protected by this immunity even if the employee is *en route* to the fire station or if the alarm turned out to be false when the injury occurs.¹⁷⁶

a. Willful and Wanton Conduct in Light of Fire and Emergency Services

As stated above, whether a public entity’s acts or omissions constitute willful and wanton conduct depends on the facts of the particular case.¹⁷⁷ To prove that conduct is willful and wanton, a plaintiff must demonstrate that the acts and omissions at issue show an “utter indifference” or “conscious disregard” for safety.¹⁷⁸

Unfortunately, however, there are no definitive actions an emergency vehicle operator can take to conclusively prevent a finding of willful and wanton disregard for safety.¹⁷⁹ Rather, Illinois law remains unsettled as to what actions taken by an emergency vehicle driver (for example, flashing the vehicle's lights, sounding its sirens, and slowing the vehicle at an intersection) tend to show a driver did not act with a willful and wanton disregard for safety, and is thus entitled to immunity. Illinois courts have held that the failure to activate emergency equipment does not alone constitute willful and wanton conduct, nor does driving at an excessive rate of speed.¹⁸⁰

XII. Medical Care for Prisoners

Pursuant to public policy, jailers owe a general duty of care to prisoners in Illinois.¹⁸¹ Jailers are required to “exercise ordinary and reasonable care for the preservation of their prisoner’s health and life under the circumstances of the particular case.”¹⁸² The courts’ interpretation of the Act is consistent with this general duty.¹⁸³ Section 4-105 of provides:

Neither a local public entity nor a public employee is liable for injury proximately caused by 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, acting within the scope of his employment, knows from his observation of conditions 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. Nothing in this section requires the periodic inspection of prisoners.¹⁸⁴

This section immunizes local public entities and employees from negligence actions. For example, in *Cooper v. Office of Sheriff of Will County*, Will County Sheriff’s deputies arrested decedent Patrick Cooper and transferred him to the general inmate population of the Will County Jail to await trial.¹⁸⁵ The deputies were aware that Cooper suffered from asthma that required medication and that Cooper had suffered an asthma attack in the past that required inhaler medication. On July 7, 2003, the decedent suffered a serious asthma attack that required immediate medical attention. Other inmates informed the deputy defendants that Cooper needed medical attention, but defendants failed to provide timely care, and Cooper died.¹⁸⁶ The Estate of Cooper then sued the deputies.

In ruling on the defendants’ motion to dismiss, the district court found that Section 4-105 immunized defendants from claims, alleging that defendants negligently failed to provide the decedent with timely medical treatment. The district court dismissed those claims that were based on negligence.¹⁸⁷ The district court found that Section 4-105 did not immunize the defendants from claims that were based on willful and wanton conduct.¹⁸⁸

To avoid the immunity in Section 4-105, plaintiffs must prove that jailers were willful and wanton when they failed to take reasonable action to summon medical care after observing that the prisoner is in need of immediate medical care. The willful and wanton standard is “remarkably similar” to the deliberate indifference standard used to analyze alleged violations of the Fourteenth and Eighth Amendment under 42 U.S.C. § 1983.¹⁸⁹ Under those circumstances, detainees have the right to receive reasonable medical treatment for a serious injury or medical need.¹⁹⁰ “Deliberate indifference is a high standard requiring [the detainee] to prove that the defendant [was] aware of the facts from which a substantial risk of serious harm could be inferred and that [the defendant] actually drew the inference.”¹⁹¹ This requires “evidence that the official was aware of the risk and consciously disregarded it nonetheless.”¹⁹² A correctional official cannot be found liable “unless the official knows of and disregards an excessive risk to inmate health or safety.”¹⁹³

Detainees “are not entitled to a specific type of treatment, or even the best care, only reasonable measures to prevent a substantial risk of serious harm.”¹⁹⁴ “Mere dissatisfaction or disagreement with a course of treatment is generally insufficient; [the courts] will defer to a medical professional’s treatment decision unless no minimally competent professional would have so responded under those circumstances.”¹⁹⁵ “Courts defer to a physician’s treatment decisions because there is not one proper way to practice medicine in a prison.”¹⁹⁶ Consequently, changing the type of treatment that an inmate receives does not amount to deliberate indifference simply because the inmate disagrees with it.¹⁹⁷

In the case of supervisory officials, deliberate indifference requires a showing of direct responsibility for improper conduct; the official must have caused or participated in the alleged constitutional deprivation.¹⁹⁸ Such responsibility means that the unconstitutional conduct occurred either at the direction of the supervisory official or with his knowledge and approval.¹⁹⁹ Thus, a plaintiff must present facts demonstrating the supervisor’s personal involvement in the allegedly unconstitutional activities.²⁰⁰

Federal courts also consider the “professional judgment rule.”²⁰¹ A decision made by a medical professional is “presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment.”²⁰² The corollary to the professional judgment standard is that non-medical correctional officials are entitled to defer to the judgment of medical professionals on questions of prisoner medical care.²⁰³ It is not deliberate indifference for a correctional official to defer to the medical judgment of the doctor or nurse providing medical treatment to a prisoner.²⁰⁴ When a prisoner is receiving care from a medical professional, jail personnel are justified in believing that the prisoner is receiving adequate treatment from a capable professional.²⁰⁵ No Illinois appellate courts have addressed the professional judgment rule in the context of Section 4-105. Presumably, public employees accused of being willful and wanton to a detainee’s medical needs could defend against such claims by establishing that they relied on the professional judgments of medical personnel.

Ultimately, detainees suing for insufficient medical care have an uphill battle. Section 4-105 immunizes the local public entity and the public employee against negligence claims. To have any chance at establishing a state law claim in Illinois, the detainee must prove that the public employee was aware of a medical need and willful and wanton in ignoring that medical need. Similarly, in federal court, the detainee must prove that the public employee was aware of a serious medical need and consciously disregarded that need. Medical needs that are addressed by a jail nurse or doctor further insulate the jailer through the professional judgment rule.

Conclusion

Local public entities lie at an intersection of two conflicting policy desires: the need for public services and the want to reduce the local tax burden. Unlike private persons or corporations, local public entities are often unable to reduce risk by refusing to engage in certain acts. The need for public goods and services, such as roads, sidewalks, police and fire protection, schools, and parks, do not diminish in poor economic times nor can they be continually maintained even in the best of times. The purpose of the Tort Immunity Act is to shield local public entities from the fallout of this conflict as they provide necessary services within the constraints placed upon them by the taxpayer. As such, the importance of the Tort Immunity Act to the executive and legislative branches of government should not be diminished. Any erosion in the effectiveness of the provisions of the Tort Immunity Act through the judicial process

is necessarily an erosion of the ability of the executive and legislative branches to govern. It is primarily through the Tort Immunity Act that the taxpayer is protected from the policy choices required by self-governance.

(Endnotes)

- ¹ Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, *et seq.*; *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 14.
- ² *Vesey v. Chi. Hous. Auth.*, 145 Ill. 2d 404, 412 (1991).
- ³ *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 18 Ill. 2d 11 (1959).
- ⁴ *Vesey*, 145 Ill. 2d at 412.
- ⁵ *Kirschbaum v. Vill. of Homer Glen*, 365 Ill. App. 3d 486, 492 (3d Dist. 2006).
- ⁶ 745 ILCS 10/1-101.1.
- ⁷ *Callaghan v. Vill. of Clarendon Hills*, 401 Ill. App. 3d 287, 291 (2d Dist. 2010).
- ⁸ 745 ILCS 10/1-210.
- ⁹ *Bielema v. River Bend Cmty. Sch. Dist. No. 2*, 2013 IL App (3d) 120808, ¶ 12; *Winfrey v. Chi. Park Dist.*, 274 Ill. App. 3d 939, 944 (1st Dist. 1995).
- ¹⁰ *Geimer v. Chi. Park Dist.*, 272 Ill. App. 3d 629, 637 (1st Dist. 1995).
- ¹¹ *Barr v. Cunningham*, 2017 IL 120751, ¶ 15.
- ¹² *Hubble v. Bi-State Dev. Agency of the Ill.-Mo. Metro. Dist.*, 238 Ill. 2d 262, 270 (2010) (finding that a management company for a low-income public housing development met the definition of a local public entity).
- ¹³ 745 ILCS 10/1-206 (emphasis added).
- ¹⁴ *Hubble*, 238 Ill. 2d at 270.
- ¹⁵ See, e.g., *Johnson v. Decatur Park Dist.*, 301 Ill. App. 3d 798 (4th Dist. 1998).
- ¹⁶ *Barnes v. Chi. Hous. Auth.*, 326 Ill. App. 3d 710, 726 (1st Dist. 2001).
- ¹⁷ *Hubble*, 238 Ill. 2d at 269–73.
- ¹⁸ 745 ILCS 10/8-101.
- ¹⁹ *Id.* § 2-102.

²⁰ *Id.* § 2-213.

²¹ *Id.* § 2-302.

²² *Id.*

²³ 745 ILCS 10/3-108.

²⁴ *Id.*

²⁵ *See Castenada v. Cmty. Sch. Dist. Unit No. 200*, 226 Ill. App. 3d 514, 517 (2d Dist. 1992).

²⁶ 745 ILCS 10/3-101.

²⁷ *Id.* § 1-206.

²⁸ *See Stiff v. E. Ill. Area of Special Educ.*, 251 Ill. App. 3d 859, 861–62 (4th Dist. 1993).

²⁹ *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 392 (1996).

³⁰ *Longfellow by Longfellow v. Corey*, 286 Ill. App. 3d 366, 370 (4th Dist. 1997).

³¹ *Dixon v. Chi. Bd. of Educ.*, 304 Ill. App. 3d 744, 749 (1st Dist. 1999).

³² *Hill v. Galesburg Cmty. Unit Sch. Dist. 205*, 346 Ill. App. 3d 515, 521 (3d Dist. 2004).

³³ *Barr*, 2017 IL 120751, ¶ 18.

³⁴ *Spangenberg v. Verner*, 321 Ill. App. 3d 429, 432 (5th Dist. 2001).

³⁵ *Barnes*, 326 Ill. App. 3d at 722-724.

³⁶ *Epstein v. Chi. Bd. of Educ.*, 178 Ill. 2d 370, 382 (1997).

³⁷ *Shwachman v. Northfield Tp. High Sch. Dist. 225*, 2016 IL App (1st) 143865-U, ¶ 41.

³⁸ *Moorehead v. Metro. Water Reclamation Dist. of Greater Chi.*, 322 Ill. App. 3d 635, 640 (1st Dist. 2001).

³⁹ 745 ILCS 10/2-109; 2-201.

⁴⁰ *Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15*, 198 Ill. 2d 475, 484 (2002).

⁴¹ *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 370 (2003).

⁴² *Snyder v. Curran Twp.*, 167 Ill. 2d 466, 474 (1995).

⁴³ *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 627 (1st Dist. 2010).

⁴⁴ 745 ILCS 10/2-109.

⁴⁵ *Id.* § 2-109.

⁴⁶ *Id.* § 2-201.

⁴⁷ *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶¶ 35–38.

⁴⁸ 745 ILCS 10/2-201.

⁴⁹ *Harinek v. 161 N. Clark St. Ltd. P'ship*, 181 Ill. 2d 335, 341 (1998).

⁵⁰ *Harinek*, 181 Ill. 2d at 341 (emphasis in original).

⁵¹ *See id.* at 342–43.

⁵² *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 395 (1st Dist. 2000) (“The degree to which a pothole should be prepared, and specifically how much loose asphalt and moisture will be removed, is a matter of a worker’s personal judgment, and encompassed within that judgment are policy considerations of time and resource allocation during a given workday.”). *Monson v. City of Danville*, 2017 IL App (4th) 160593-U, ¶ 34 (finding public works director used his discretion to determine which portions of a sidewalk were in need of repair or not).

⁵³ *Courson ex rel. Courson v. Danville Sch. Dist. No. 118*, 333 Ill. App. 3d 86, 88 (4th Dist. 2002) (citing *Arteman*, 198 Ill. 2d at 487).

⁵⁴ *Harinek*, 181 Ill. 2d at 341.

⁵⁵ *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (1st Dist. 2002); *In re Chi. Flood Litig.*, 176 Ill. 2d 179, 194 (1997).

⁵⁶ *Harinek*, 181 Ill. 2d at 342 (quoting *West v. Kirkham*, 147 Ill. 2d 1, 11 (1992)); *Wrobel*, 318 Ill. App. 3d at 394 (quoting *Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 313 Ill. App. 3d 702, 706 (5th Dist. 2000)).

⁵⁷ *Arteman*, 198 Ill. 2d at 487 (school district’s decision not to provide protective equipment for physical education class was a policy decision).

⁵⁸ *See Courson ex rel. Courson*, 333 Ill. App. 3d at 90 (finding that a shop teacher’s operation of a table saw without a safety guard constituted a “discretionary policy determination” because he had to balance safety interests against resources and skill of students to determine how best to do his job.).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 803 (5th Dist. 2008).

⁶² *Snyder*, 167 Ill. 2d at 474 (a township’s placement of a warning sign was a ministerial act because regulations and statutes controlled the sign’s placement).

⁶³ *Mulvey v. Carl Sandburg High Sch.*, 2016 IL App (1st) 151616, ¶ 47.

⁶⁴ *Trtanj*, 379 Ill. App. 3d at 804.

⁶⁵ *Morrissey*, 334 Ill. App. 3d at 256-257.

⁶⁶ *Courson ex rel. Courson*, 333 Ill. App. 3d at 91.

⁶⁷ *Wrobel*, 318 Ill. App. 3d at 395.

⁶⁸ *Gutstein*, 402 Ill. App. 3d at 626 (discussing *Wrobel*, 318 Ill. App. 3d at 395).

⁶⁹ *See Hascall*, 2013 IL App (4th) 121131, ¶ 38 (finding that Section 2-201 immunized a school district, superintendent, and principal from liability for injuries resulting from alleged willful and wanton failures to respond to student bullying in school despite the “seeming harshness of the result.”).

⁷⁰ *Van Meter*, 207 Ill. 2d at 370.

⁷¹ *See Gutstein*, 402 Ill. App. 3d at 629 (holding that the city failed to carry its burden to prove discretionary immunity where the city did not present evidence at trial that could allow the court to consider whether a city employee exercised discretion by choosing which materials to use when regrading depressions in an alley).

⁷² *See* 745 ILCS 10/2-103 (“A local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.”); *Weiler v. Village of Oak Lawn*, 86 F. Supp.3d 874 (N.D. Ill. 2015); *Donovan v. Community Unit School Dist. 303*, 2015 IL App. (2d) 140704 (immunity was not limited to discretionary acts and therefore parents’ action against district asserting violations of No Child Left Behind Act and School Code stemming from reorganization of two schools was barred).

⁷³ *See* 745 ILCS 10/2-205 (“A public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce any law.”); *Mahoney Grease Service, Inc. v. City of Joliet*, 85 Ill. App. 3d 578, 581 (3d Dist. 1980) (legislators cannot be held personally responsible based upon their vote in the exercise of discretion vested in them by virtue of their office).

⁷⁴ *Ware v. City of Chicago*, 375 Ill. App. 3d 574 (1st Dist. 2007).

⁷⁵ *Stigler v. City of Chicago*, 48 Ill. 2d 20 (1971).

⁷⁶ *Pouk v. Vill. of Romeoville*, 405 Ill. App. 3d 194 (3d Dist. 2010).

⁷⁷ 745 ILCS 10/2-103; *id.* § 2-205.

⁷⁸ *Vill. of Bloomingdale v. CDG Enters.*, 196 Ill. 2d 484 (2001).

⁷⁹ *Vill. of Bloomingdale*, 196 Ill. 2d at 487-488.

⁸⁰ *Id.* at 493-494.

⁸¹ Compare this immunity to that set forth in 745 ILCS 10/2-202 (“A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.”).

⁸² 745 ILCS 10/2-208.

⁸³ Compare 745 ILCS 10/2-208 (“A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, unless he acts maliciously and without probable cause.”) to the elements of common law malicious prosecution in *Ross v. Mauro Chevrolet*, 369 Ill. App. 3d 794, 801 (1st Dist. 2006).

⁸⁴ *Knox Cnty. v. Midland Coal Co.*, 265 Ill. App. 3d 782 (3d Dist. 1994).

⁸⁵ *Knox Cnty.*, 265 Ill. App. 3d at 783.

⁸⁶ *Id.*

⁸⁷ 745 ILCS 10/2-104 (“A local public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.”).

⁸⁸ *Id.* § 2-206 (“A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.”).

⁸⁹ *Vill. of Bloomingdale*, 196 Ill. 2d at 495-496.

⁹⁰ *Doyle v. City of Marengo*, 303 Ill. App. 3d 831 (2d Dist. 1999).

⁹¹ *Doyle*, 303 Ill. App. 3d at 831.

⁹² *Mack Indus., Ltd. v. Vill. of Dolton*, 2015 IL App (1st) 133620.

⁹³ 745 ILCS 10/3-102.

⁹⁴ *Foust v. Forest Preserve Dist. of Cook County*, 2016 IL App. (1st) 160873, ¶ 24; *Washington v. City of Chi.*, 188 Ill. 2d 235, 239 (1999); *Anderson v. Alberto-Culver USA, Inc.*, 317 Ill. App. 3d 1104,1112 (1st Dist. 2000).

⁹⁵ *Catberro v. Naperville Sch. Dist. No. 203*, 317 Ill. App. 3d 150 (2d Dist. 2000).

⁹⁶ *Boub v. Twp. of Wayne*, 183 Ill. 2d 520 (1998).

- ⁹⁷ *Bowman v. Chicago Park Dist.* 2014 IL App. (1st) 132122, ¶ 49 (an intended user is by definition a permitted user, however, a permitted user is not necessarily an intended user); *Callaghan*, 401 Ill. App. 3d 287, 291 (2d Dist. 2010).
- ⁹⁸ *Washington*, 188 Ill. 2d at 239; *Gutstein*, 402 Ill. App. 3d at 616.
- ⁹⁹ *Walker v. Chi. Hous. Auth.*, 2015 IL App. (1st) 133788, ¶ 73; *Diefendorf v. City of Peoria*, 308 Ill. App. 3d 465, 468 (3d Dist. 1999).
- ¹⁰⁰ *Berz v. City of Evanston*, 2013 IL App (1st) 123763, ¶ 10.
- ¹⁰¹ *DeMambro v. City of Springfield*, 2013 IL App (4th) 120957, ¶¶ 15–20 (discussing “intended and permitted” use of streets); *Dunet v. Simmons*, 2013 IL App (1st) 120603, ¶ 28.
- ¹⁰² *Patullo-Banks v. City of Park*, 2014 IL App (1st) 132856.
- ¹⁰³ *Brooks v. City of Peoria*, 305 Ill. App. 3d 806, 809 (3d Dist. 1999).
- ¹⁰⁴ *Dunet*, 2013 IL App (1st) 120603, ¶ 28.
- ¹⁰⁵ *Marshall by Marshall v. City of Centralia*, 143 Ill. 2d 1, 5 (1991).
- ¹⁰⁶ 745 ILCS 10/3-102.
- ¹⁰⁷ *Glass v. City of Chi.*, 323 Ill. App. 3d 158, 163 (1st Dist. 2001).
- ¹⁰⁸ *Zameer*, 2013 IL App (1st) 120198, ¶ 23.
- ¹⁰⁹ *Glass*, 323 Ill. App. 3d at 163.
- ¹¹⁰ 745 ILCS 10/3-102(b).
- ¹¹¹ *Bubb v. Springfield Sch. Dist.* 186, 167 Ill. 2d 372, 378 (1995).
- ¹¹² 745 ILCS 10/3-102(b)(1)–(2).
- ¹¹³ *Perfetti v. Marion Cnty.*, 2013 IL App (5th) 110489, ¶19.
- ¹¹⁴ *Palermo v. City of Chicago Heights*, 2 Ill. App. 3d 1004, 1008 (1st Dist. 1971); *see also Coultas v. City of Winchester*, 208 Ill. App. 3d 238, 240-241 (4th Dist. 1991).
- ¹¹⁵ *Krivokuca v City of Chi.*, 2017 IL App (1st) 152397, ¶ 51.
- ¹¹⁶ *Zameer*, 2013 IL App (1st) 120198, ¶ 15; *Mtengule v. City of Chicago*, 257 Ill. App. 3d 323, 329 (1st Dist. 1993).
- ¹¹⁷ *Zameer*, 2013 IL App (1st) 120198.
- ¹¹⁸ *Id.* at ¶ 23.

¹¹⁹ *Tracy v. Vill. of Lombard*, 116 Ill. App. 3d 563, 572 (2d Dist. 1983).

¹²⁰ *Vesey*, 145 Ill. 2d 404 (1991), 745 ILCS 10/3-102(b)(1)-(2); *Krivokuca*, 2017 IL App (1st) 152396, ¶ 51.

¹²¹ 745 ILCS 10/2-207.

¹²² *Hess v. Flores*, 408 Ill. App. 3d 631, 643 (1st Dist. 2011).

¹²³ *Ware*, 375 Ill. App. 3d at 582-583.

¹²⁴ *Hess*, 408 Ill. App. 3d 631.

¹²⁵ *Id.* at 647-49.

¹²⁶ 745 ILCS 10/2-107.

¹²⁷ *See, e.g., Goldberg v. Brooks*, 409 Ill. App. 3d 106 (1st Dist. 2011).

¹²⁸ *Goldberg*, 409 Ill.App.3d at 107.

¹²⁹ *King v. City of Chi.*, 324 Ill. App. 3d 856, 858, (1st Dist. 2001).

¹³⁰ *Friedman v. Moore*, 2014 IL App (2d) 130671-U, ¶ 5.

¹³¹ *Union Pac. R.R. Co. v. Vill. of S. Barrington*, 958 F. Supp. 1285, 1289 (N.D. Ill. 1997).

¹³² *Horwitz v. Bd. of Educ. of Avoca Sch. Dist. No. 37*, 260 F.3d 602, 617 (7th Cir. 2001).

¹³³ *Horwitz*, 260 F.3d at 617.

¹³⁴ *Anderson v. Beach*, 386 Ill. App. 3d 246, 250 (1st Dist. 2008) (but note a conditional privilege may apply).

¹³⁵ 745 ILCS 10/2-210.

¹³⁶ *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dirs.*, 2012 IL 112479, ¶ 43.

¹³⁷ 745 ILCS 10/2-210.

¹³⁸ *Goldberg*, 409 Ill. App. 3d at 111.

¹³⁹ 745 ILCS 10/3-106.

¹⁴⁰ *Bubb*, 167 Ill. 2d at 376-377.

¹⁴¹ *Grundy v. Lincoln Park Zoo*, 2011 IL App (1st) 102686.

¹⁴² *Moore v. Chi. Park Dist.*, 2012 IL 112788, ¶ 21.

¹⁴³ 745 ILCS 10/3-109(a).

¹⁴⁴ 745 ILCS 10/3-109(b)(1)-(3).

¹⁴⁵ *Grandalski ex rel. Grandalski v. Lyons Tp. High School Dist.* 204, 305 Ill. App. 3d 1, (1st Dist. 1999).

¹⁴⁶ *Grandalski*, 305 Ill.App.3d at 11-12.

¹⁴⁷ *See Murray v. Chi. Youth Ctr.*, 224 Ill. 2d 213 (2007).

¹⁴⁸ 745 ILCS 10/2-202.

¹⁴⁹ 745 ILCS 10/2-210.

¹⁵⁰ 745 ILCS 10/2-202.

¹⁵¹ *Hess*, 408 Ill. App. 3d at 644; *see also Ries v. City of Chi.*, 242 Ill. 2d 205, 220 (2011).

¹⁵² 745 ILCS 10/4-102.

¹⁵³ *Prough v. Madison Cnty.*, 2013 IL App (5th) 110146, ¶ 23.

¹⁵⁴ 745 ILCS 10/4-102.

¹⁵⁵ *A.R. ex. rel. M.R. v. Chi. Bd. of Educ.*, 311 Ill. App. 3d 29, 35 (1st Dist. 1999) (overruled on other grounds).

¹⁵⁶ *Doe ex rel. Ortega-Piron v. Chi. Bd. of Educ.*, 213 Ill. 2d 19 (2004); *see also Betts v. City of Chi.*, 2013 IL App (1st) 123653, ¶¶ 27–29 (overturning the trial court’s dismissal of a negligence claim against a police officer because the officer’s affidavit did not set forth sufficient facts to allow the court to conclude that he was executing or enforcing the law when he crashed into the plaintiff’s car).

¹⁵⁷ *Anthony v. City of Chi.*, 382 Ill. App. 3d 983 (1st Dist. 2008) (involving police at the scene of a nightclub when patrons were trampled in a stairwell).

¹⁵⁸ *DeSmet ex. rel. Estate of Hays v. Cnty. of Rock Island*, 219 Ill. 2d 497 (2006) (finding “police protective services” implicated where police are called upon to locate a missing person) (superseded by statute as stated in *Murray*, 224 Ill.2d 213).

¹⁵⁹ 745 ILCS 10/1-206.

¹⁶⁰ 2014 IL App (1st) 123544, ¶ 54-56.

¹⁶¹ *Moore*, 219 Ill. 2d at 479.

¹⁶² 625 ILCS 5/1-100 *et seq.*

¹⁶³ *Harris v. Thompson*, 2012 IL 112525, ¶ 25.

¹⁶⁴ 750 ILCS 60/305.

¹⁶⁵ *Moore*, 219 Ill. 2d at 488–90.

¹⁶⁶ *Id.* at 480.

¹⁶⁷ 745 ILCS 10/4-103.

¹⁶⁸ *Jefferson v. Sheahan*, 279 Ill. App. 3d 74 (1st Dist. 1996).

¹⁶⁹ 745 ILCS 10/5-101.

¹⁷⁰ *Id.* § 5-102.

¹⁷¹ *Id.* § 5-106.

¹⁷² *Hatteberg v. Cundiff*, 2012 IL App (4th) 110417, ¶ 16.

¹⁷³ *Hatteberg*, 2012 IL App (4th) 110417, ¶ 16.

¹⁷⁴ 745 ILCS 10/5-106.

¹⁷⁵ *Young v. Forgas*, 308 Ill.App.3d 553, 561 (4th Dist. 1999) (citing MERRIAM–WEBSTER’S COLLEGIATE DICTIONARY 377 (10th ed. 1998)).

¹⁷⁶ *E.g., Hatteberg*, 2012 IL App (4th) 110417, ¶ 16; *Young*, 308 Ill. App. 3d at 562.

¹⁷⁷ *Bielema*, 2013 IL App (3d) 102808, ¶ 12; *Winfrey*, 274 Ill. App. 3d at 944.

¹⁷⁸ *Koltes v. St. Charles Park Dist.*, 293 Ill. App. 3d 171, 178 (2d Dist. 1997); *Oravek v. Cmty. Sch. Dist. 146*, 264 Ill. App. 3d 895, 898 (1st Dist. 1994); *Bialek v. Moraine Vall. Cmty. Coll. Sch. Dist. 524*, 267 Ill. App. 3d 857, 865 (1st Dist. 1994).

¹⁷⁹ *See, e.g., Williams v. City of Evanston*, 378 Ill. App. 3d 590 (1st Dist. 2007); *Young*, 308 Ill. App. 3d at 553; *Hampton v. Cashmore*, 265 Ill. App. 3d 23 (2d Dist. 1994); *see also Carter v. Simpson*, 328 F.3d 948 (7th Cir. 2003).

¹⁸⁰ *Williams*, 378 Ill. App. 3d at 600.

¹⁸¹ *Dezort v. Vill. of Hinsdale*, 35 Ill. App. 3d 703, 708 (2d Dist. 1976).

¹⁸² *Dezort*, 35 Ill. App. 3d at 710.

¹⁸³ *See id.* (finding that 745 ILCS 10/4-105 requires no more than the general duty imposed on jailers to provide ordinary and reasonable care).

¹⁸⁴ 745 ILCS 10/4-105.

¹⁸⁵ *Cooper v. Office of Sheriff of Will County*, 333 F. Supp. 2d 728, 731 (N.D. Ill.2004).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 732.

¹⁸⁸ *Id.* at 732–33.

¹⁸⁹ *Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2007) (The constitutional standard of care applicable to pre-trial detainees is derived from the Fourteenth Amendment substantive due process, whereas the Eighth Amendment’s prohibition against cruel and unusual punishment governs the standard of care available to post-trial prisoners.).

¹⁹⁰ *Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976).

¹⁹¹ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

¹⁹² *Woods v. Morris*, No. 04-1440, 2007 WL 2792154, at *15 (C.D. Ill. Sept. 18, 2007) (quoting *Mathis v. Fairman*, 120 F.3d 88, 91 (7th Cir. 1997)).

¹⁹³ *Farmer*, 511 U.S. at 837; *Miller v. Neathery*, 52 F.3d 634, 638 (7th Cir. 1995).

¹⁹⁴ *Woods*, 2007 U.S. Dist. LEXIS 68846, at *22–23; *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997).

¹⁹⁵ *Mayan v. Weed*, 310 Fed. Appx. 38, 41 (7th Cir. 2009); *Collignon v. Milwaukee County*, 163 F.3d 982, 988 (7th Cir. 1998).

¹⁹⁶ *Ducey v. Siddiqui*, No. 08-CV-0692, 2009 WL 2488294, at *4 (S.D. Ill. Aug. 13, 2009).

¹⁹⁷ See *Ducey*, 2009 WL 2488294, at *4-5.

¹⁹⁸ *Moore v. State of Indiana*, 999 F.2d 1125, 1129 (7th Cir. 1993).

¹⁹⁹ *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995).

²⁰⁰ *Boyce v. Moore*, 314 F.3d 884, 888 (7th Cir. 2002).

²⁰¹ *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 987–88 (7th Cir. 1998).

²⁰² *Collignon*, 163 F.3d at 988 (quoting *Youngberg v. Romero*, 457 U.S. 307, 322–23 (1982)).

²⁰³ *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010).

²⁰⁴ *Rice ex rel Rice v. Corr. Med. Servs.*, 675 F.3d 650, 676 (7th Cir. 2012).

²⁰⁵ *Johnson v. Doughty*, 433 F.3d 1001, 1010–11 (7th Cir. 2006).



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