

Governmental Immunities



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MCIT
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FOREWORD AND ACKNOWLEDGEMENTS

This handbook is intended for use by personnel of LMCIT, MCIT, MATIT, LMC, AMC and cities, counties, and townships in the furtherance of the defense of cities, counties, and towns. It is not to be copied without the permission of Quinlivan & Hughes, P.A. The materials in this handbook were written and prepared by Kenneth H. Bayliss. Mr. Bayliss, a former Assistant Attorney General in the office of the Minnesota Attorney General, joined what is now Quinlivan & Hughes P.A. in 1995. Most of his tenure with the Minnesota Attorney General's Office was spent in the Tort Claims Division, where he defended the State, its agencies, and its employees from civil lawsuits. He has continued to devote much of his private practice to the defense of governmental entities and since joining Quinlivan & Hughes P.A. has represented counties, township, school districts, the State, and joint powers entities in a wide range of legal disputes.

DISCLAIMER AND IMPORTANT MESSAGE

The materials in this handbook have been prepared by Kenneth H. Bayliss, a shareholder at Quinlivan & Hughes P.A. These materials are abridged from a variety of sources and are intended to report on general concepts related to governmental immunities. Attorneys should conduct their own independent legal research. This handbook is intended to serve as a guide and point of departure for analysis of claims involving governmental immunities. It is not a substitute for independent legal research. It is very important that county attorneys not view the receipt of this handbook as an invitation to defend claims without providing notice of claim to LMC, MCIT, or MATIT. When a member receives a covered claim it should immediately notify the designated trust contact and inform it of the claim. This handbook may be of use to city, county, and township attorneys who wish to understand the various immunities that protect the cities, counties, and townships. It may even be of use in the defense of covered claims, but in no event should it be viewed as an invitation to forego existing claim and suit notification policies and procedures.

GOVERNMENTAL IMMUNITIES

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This summary serves as a practical guide to the state of the law. Each of the significant statutory and common-law immunities will be separately discussed.

STATUTORY IMMUNITIES

A. DISCRETIONARY IMMUNITY.

“Discretionary Immunity”: A Note on Its Various Names

One of the complications in discussing immunities is that the nomenclature for the immunities changes from decade to decade. What was for decades “discretionary immunity” was for a period of years referred to by the courts as simply “statutory immunity” or “statutory discretionary immunity.” In 1996 the Minnesota Supreme Court attempted to clarify confusion in area of governmental immunities by stating that thereafter “discretionary immunity” would be referred to as “statutory immunity”:

Unfortunately, the immunity field is brimming with such terms and inconsistent usage has led to more than a little confusion. Therefore, . . . we will henceforth refer to the immunity deriving from Minn. Stat. § 3.736, subd. 3 as “statutory immunity.”

Janklow v. Minnesota Bd. of Examiners of Nursing Home Administrators, 352 N.W.2d 711, 716 (Minn. 1996).

The court's renaming of what was formerly “discretionary immunity” was short-lived and probably not too helpful. While it is true that under the old scheme confusion existed between discretionary and official immunity, this is primarily due to the fact that the test for official immunity uses the word “discretion.” This of course leads some to confuse the discretionary immunity and official immunity. But the court's selection of the word “statutory” as its new descriptor was unfortunate given that the Municipal Tort Claims Act contains numerous statutory immunities, of which the old “discretionary” immunity was but one.

More recently Minnesota Courts have abandoned the simple “statutory immunity” label in favor of “statutory discretionary immunity,” when discussing what was formerly simply “discretionary immunity.” See, e.g., Unzen v. City of Duluth, 683 N.W.2d 875 (Minn. Ct. App. 2004); Zaske ex rel. Brasch v. Lee, 651 N.W.2d 527 (Minn. Ct. App. 2002). And in recent cases it appears that the courts are inclined to revert back to the

original, simplest, and probably best moniker, “discretionary immunity.” These materials will refer to “discretionary immunity.”

The Basics of Discretionary Immunity

Discretionary immunity is the best known and probably the most important of the various governmental immunities. It can also be the most difficult to apply. See Nusbaum v. Blue Earth County, 422 N.W.2d 713, 719 (Minn. 1988) (“Courts have consistently encountered difficulty in applying the discretionary function exception.”) It is occasionally referred to, erroneously, as “governmental immunity,” as if it were the only form of immunity the government possesses.

Put simply, discretionary immunity is the doctrine that precludes governmental liability where the conduct being challenged is a policy-making function. It is found in the Municipal Tort Claims Act at Minn. Stat. § 466.03, subd. 6, and in the State Tort Claims Act at Minn. Stat. § 3.736, subd. 3(b). It applies to “any loss caused by the performance or failure to perform discretionary duty, whether or not the discretion is abused.” Minn. Stat. § 3.736 subd 3(b).

In determining whether a case involves a governmental function immune under the discretionary immunity doctrine, the Minnesota Supreme Court has distinguished between “planning” and “operational” decisions. “Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy.” Holmquist v. State, 425 N.W.2d 230, 234 (1988). In contrast, “operational” decisions include “scientific or technical” decisions that do not involve a “balancing of policy considerations.” Nusbaum v. Blue Earth County, 422 N.W.2d 713, 720-21 (1988). It has also been said that “operational” decisions “involve decisions relating to the ordinary day-to-day operations of the government.” Holmquist, 425 N.W.2d at 232.

Allegations of Negligence Do Not Thwart Discretionary Immunity

Allegations of negligence are irrelevant in considering the question of discretionary immunity. The statutes absolve government entities from liability for discretionary acts “whether or not the discretion is abused.” Minn. Stat. § 3.736 subd. 3(b); Minn. Stat. § 466.03, subd. 6. This is because “judicial review of major executive policies for ‘negligence’ or ‘wrongfulness’ could disrupt the balance of separation of powers of the three branches of government.” Nusbaum, 422 N.W.2d at 718. As the court noted in Holmquist:

the question is not whether the State's conduct resulted in a condition posing an unreasonable risk of harm; it is whether the conduct consisted

of planning or policy making decisions (protected) or operational level decisions (unprotected).

425 N.W.2d at 232.

Economic Considerations and the Allocation of Limited Financial Resources

In determining whether discretionary immunity will bar a claim, one must decide whether the conduct that the plaintiff complains of was the product of policy decisions made by the governmental entity. Discretionary immunity is most commonly applied when the challenged act is a product of limited financial resources. For instance, in Hennes v. Patterson, 443 N.W.2d 198 (Minn. Ct. App. 1989), the State was held to be immune for its decision to plow snow off the traveled portion of a roadway and up against a guardrail, thereby creating a ramp over which a vehicle launched off a bridge. Important to the finding that discretionary immunity barred the claim was that one of the reasons for the failure to remove the ramp of snow until several days after the snowfall was the limited availability of snow removal equipment. Id. at 203. Determination of how to utilize its limited allocation of snow removal equipment was held to be immune. Id. Similarly, in McEwen v. Burlington N. Ry. Co., 494 N.W.2d 313 (Minn. Ct. App. 1993), the court held that the failure to paint pavement markings on a freshly resurfaced roadway was an immune decision. Id. at 317. In McEwen, the decision not to repaint was the product of a MNDOT district policy of delaying repainting to avoid the need for a second repainting. Thus, the decision was based on financial considerations and was protected. Id. Decisions regarding the installation of traffic signals based on a prioritization system are also discretionary because they have economic implications. Wornson v. Chrysler Corp., 436 N.W.2d 472, 474-75 (Minn. Ct. App. 1989).

Even when strict economic considerations are not involved, other policy considerations may support a finding of discretionary immunity. For instance, decisions regarding the placement of inmates or patients, and decisions regarding how much liberty to afford them, are normally protected policy decisions immune from suit under the doctrine of discretionary immunity. In Pappenhausen v. Schoen, 268 N.W.2d 565, 567 (Minn. 1978), the State was held immune from suit for a decision to grant a medical parole of a mentally ill rapist from a prison to an open state hospital, where he escaped and raped a woman. The court noted that the level of confinement or freedom accorded mental patients was "an indisputably discretionary activity, involving as it does the application of skilled judgment to a wide variety of human conditions." Id. at 572. A similar result obtained in Cairl v. State, 323 N.W.2d 20 (Minn. 1982), where the Court held the State immune for a decision to release a dangerous youth from a state institution on holiday leave where the youth then set a fire causing injuries. See also Koelln v. Nexus Residential Treatment Facility, 494 N.W.2d 914 (Minn. Ct. App. 1993) (holding county

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and State immune from liability for placement of psychopathic personality in residential treatment setting). In Johnson v. State, 553 N.W.2d 40 (1996), the court held that discretionary immunity barred claims related to the release of an inmate who was supposed to report to a halfway house.

When a governmental decision recognizes the potential for harm and consciously decides to permit that harm to exist because it believes its decision is necessary to serve a greater good, that governmental decision will not normally be disturbed. Thus, in Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992), the Minnesota Supreme Court held that a school district's decision not to assign personnel to ensure that children board the right bus was a protected decision. The court noted:

The school district's formulation of a bus transportation policy involved many factors, including safety, cost, and the educational goal of instilling a sense of personal responsibility to the students.

Id. at 44. As Pletan, Cairl, and other cases demonstrate, it is always important to be able to point to a policy consideration that was taken into account by the governmental entity in order to establish discretionary immunity.

The Minnesota Supreme Court has held that the decision not to have a law enforcement ride the buses implicated fiscal concerns so as to warrant the application of discretionary immunity. Watson v. Metropolitan Transit Comm'n, 553 N.W.2d 406 (Minn. 1996). In Watson gang members threw a bus passenger out a bus window. The court held that the level of police presence at any particular location is a classic planning decision protected by discretionary immunity.

The Importance of the Record

The importance of tying the governmental action to policy considerations when one attempts to establish discretionary immunity is demonstrated by comparing Hennes v. Patterson, 443 N.W.2d 198 (Minn. Ct. App. 1989) and Gorecki v. County of Hennepin, 443 N.W.2d 236 (Minn. Ct. App. 1989). These cases involved nearly identical accidents and were handed down at approximately the same time by the Court of Appeals. In each case, a vehicle left a bridge and fell to the ground below after climbing a ramp of snow that a snowplow had left along a bridge guardrail. As discussed above, discretionary immunity was found to apply in Hennes, because the record established that the snow had not been removed because of economic considerations relating to MNDOT's allocation of equipment. Hennes, 443 N.W.2d at 203. In Gorecki, by contrast, the reason that the snow had remained against the bridge rail without being removed was not sufficiently explained. Further, the explanation that was given was not tied to any significant policy considerations—such as budgeting—and discretionary immunity did

not bar the claim. The lesson to be learned by comparing Hennes and Gorecki is that one must carefully explain to the court what policies exist and how these policies relate to the challenged conduct. This can be the difference between success and failure in bringing a discretionary immunity motion.

The importance of a substantial record supporting summary judgment was highlighted by the Minnesota Supreme Court case of Conlin v. City of Saint Paul, 605 N.W.2d 396 (Minn. 2000). In Conlin Plaintiff turned a corner on to a street that had been recently sealed and sanded and fell off his motorcycle. The affidavit of an engineer explained that warning signs were only left up for one day after the sealing and sanding of the roads. The engineer's affidavit stated the reasons for keeping up warning devices for only one day as follows:

the minimal public safety concerns associated with this project; traffic considerations that barricades or cones blocking large areas for up to a ten day period would create congestion and flow problems; social considerations that residents on sealed roads would be inconvenienced by barricades and financial considerations that Street Maintenance's limited funds would be required to hire and pay additional crews for posting and removal of signs or barricades.

The decision of the court may very well have been different if any amount for the cost of keeping the signs in place had been given and if the “whether or not the discretion is abused” language in the statute had been emphasized. Prior to Conlin other courts had hinted at the creation of a “minimal expenditure of funds” exception to discretionary immunity. Christensen v. Mower County, 587 N.W.2d 305 (Minn. Ct. App. 1999) (failure to place warning signs warning of placement of loose limestone chip on roadway not protected because involved “minimal expenditure of funds.”); Nguyen v. Nguyen, 565 N.W.2d 721, 724 (Minn. Ct. App. 1997) (relatively inexpensive measures may not rise to the level of protect planning decisions). Summary judgment motions based on discretionary immunity should carefully consider the “minimal expenditure of funds” argument.

The courts' occasional suspicion of discretionary immunity claims can be seen in Hancock v. Ind. School Dist. #281, No. C0-02-018 (Minn. Ct. App. Dec. 3, 2003) (unpublished). There a school district's policy decision to replace non-safety glass only as it became broken was not entitled to discretionary immunity. The court stated that the school district could not present sufficient evidence that the policy actually existed. The decision also appeared to be operational rather than planning. There was strong evidence of the existence of the policy and it seems quite surprising that the court did not take the school district's affidavits as sufficient evidence of a policy.

Another example of the court's cynical response to proffered policies was seen in Olmanson v. LeSeuer County, 673 N.W.2d 506 (Minn. Ct. App. 2004), aff'd 693 N.W.2d 876 (Minn. 2005). There the decision not to erect off-road culvert crossing signs for the protection of snowmobilers not protected by discretionary immunity. The court found there was insufficient evidence relating to how the policy was created.

Accordingly, we hold for immunity purposes it is essential that the county provide detailed evidence of how and when the county made a particular policy decision, including providing evidence of specific facts that the county considered in making its determination. We agree with respondent that the county need not necessarily adopt a written policy, but there must be evidence that there was a deliberative process that led to establishment of the policy in question.

Olmanson, 673 N.W.2d at 515.

Though it is a case involving official immunity, also instructive is the unreported case of Christensen v. Rainy River Community College, No. CX-02-658 (Sept. 21, 2004) (unpublished). There the decision not to repair a sidewalk was protected by official immunity where there were numerous requests for funding to repair sidewalks that were turned down by a parent government agency. This type of strong record would surely get one over the hurdle set forth by cases such as Conlin.

The importance of documenting the creation of a policy was clearly demonstrated in Schroeder v. St. Louis County, 708 N.W.2d 497 (Minn. 2006). There an accident occurred as a road grader was working the road while traveling against traffic. It had been recognized that working against traffic might pose a hazard, but the county had decided that for economic reasons and for competing safety reasons it was preferable to do the particular work involved while traveling against traffic. The county was able to produce written evidence of a meeting, showing that the issue had been discussed and decided. This entitled the county to immunity.

"Mere" Professional Judgment

Although almost every governmental act can involve the exercise of some discretion, not every act involving some discretion is entitled to discretionary immunity. Nusbaum, 422 N.W.2d at 719. For instance, decisions involving mere professional engineering judgment have been held not protected by discretionary immunity. Schaefer v. State, 444 N.W.2d 876 (Minn. Ct. App. 1989). Courts have noted that decisions based upon safety alone may not be protected. Abo El Ela v. State, 468 N.W.2d 580, 582 (Minn. Ct. App. 1991). In addition to not applying in instances of mere professional judgment, courts have held that discretionary immunity does not apply in instances that involve the mere implementation of policy. Nusbaum v. Blue Earth County, 422 N.W.2d 713 (Minn. 1988).

Thus, in Nusbaum, the policy decision to adopt the Manual on Uniform Traffic Control Devices was a decision protected by discretionary immunity, but the manner of implementation of the policies contained in the manual was accorded no such protection. It should be noted that the Supreme Court has observed that there is

not always a sharp distinction between 'making' and 'implementing' policy, and whether consequences of policy making might also be immune will require inquiry into 'whether the consequential conduct itself involves the balancing of public policy considerations in the formulation of policy.'

Olson v. Ramsey County, 509 N.W.2d 368, 371 (Minn. 1993) (quoting Pletan v. Gaines, 494 N.W.2d 38, 44 (Minn. 1992)). Those considering a dispositive motion on grounds that involve the professional decisions that do not directly implicate public policy are likely to find official immunity has more application than discretionary immunity.

Policy Need Not Be Written

There is no requirement that a policy actually be a written policy for the governmental entity to be entitled to summary judgment. Bloss v. University of Minnesota Bd. of Regents, 590 N.W.2d 661, 666-67 (Minn. Ct. App.1999); Schroeder v. St. Louis County, No. A04-97 (Minn. Ct. App. Oct. 12, 2004) (unpublished), aff'd 708 N.W.2d 497 (Minn. 2006).

Implementation of Policy

Despite the Nusbaum court's suggestion that the implementation of decisions is not protected, several decisions have found that the implementation of policy can itself be protected by discretionary immunity. Sometimes the implementation of a policy itself is entitled to immunity. Whether consequences of a planning decision are immune from liability depends on whether the consequential conduct itself involves the balancing of public policy considerations in the formulation of the policy. Pletan v. Gaines, 494 N.W.2d 38, 44 (Minn. 1992). "Sometimes the implementation of a policy itself requires policymaking." Holmquist, 425 N.W.2d at 234 (citation omitted). See also Bloss v. University of Minnesota Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999) (holding decisions related to level of protection offered to students on foreign study program were entitled to discretionary immunity).

Failure to Adopt a Policy

The mere failure to adopt a policy designed to prevent a particular harm does not involve a policy decision protected by discretionary immunity. S.W. and J.W. v. Spring Lake Park Sch. Dist. No. 16, 580 N.W.2d 19 (Minn. 1998). This case overrules Killen v. Independent School District 706, 547 N.W.2d 113 (Minn. Ct. App. 1996).

Particular Types of Cases

Road and Traffic Device Cases

Warning signs: Warning of hazards by placing signs is not inherently either discretionary or operational; classification depends on the factors considered in making the decision. Steinke v. City of Andover, 525 N.W.2d 173, 175 (Minn. 1994) (choosing whether to warn public of hazards is not inherently discretionary or operational); Holmquist v. State, 425 N.W.2d 230, 234 (Minn. 1988) (placing signs may or may not be discretionary); Christensen v. Mower County, 587 N.W.2d 305 (Minn. Ct. App. 1999) (failure to place warning signs warning of placement of loose limestone chip on roadway not protected because involved “minimal expenditure of funds.”) Although decisions not to engage in road shoulder maintenance were protected by discretionary immunity, decision not to put up warning sign where there was prior notice of a dangerous condition was not protected. Berg v. Hubbard County, 578 N.W.2d 12 (Minn. Ct. App. 1998).

In Steinke, the Minnesota Supreme Court held that the failure to place a warning sign in a particular location was the result of a planning level decision. Steinke v. City of Andover, 525 N.W.2d 173, (Minn. 1994). Anoka County had decided to place signs warning of deep ditches only along county roads and recognized rights of way, not at unrecognized rights of way or upon unimproved property. Id. at 176. On discretionary immunity grounds, the court barred the suit brought by a snowmobiler who sued the County for negligent failure to warn.

The length of the all-red clearance for a traffic signal is a policy decision protected by discretionary immunity. Zank v. Larson, 552 N.W.2d 719 (Minn. 1996).

Road Maintenance: In Gutbrod v. County of Hennepin, 529 N.W.2d 720, (Minn. Ct. App. 1995), a county's decision to repair potholes according to a set schedule was held to be immune. The court in Gutbrod stated the issue as follows: “To determine whether a particular act is protected, it is necessary to distinguish planning level decisions from those at the operational level . . . Planning level decisions are protected, and involve questions of public policy and the balancing of competing policy objectives. . . . Unprotected, operational level decisions relate ‘to the ordinary day-to-day operations of

the government' and involve the exercise of scientific or professional judgment." Id. at 723. The Court in Gutbrod went on to analyze the plaintiff's claim that the county negligently failed to detect and repair a rut in the roadway. The plaintiff lost control of a motorcycle when a wheel hit the rut. Plaintiff said the county should have repaired the rut before the accident. The court held that officials made the decisions concerning the rut at the planning level because of the balancing of factors, including available funds, work schedules and known risks. The court stated: "The county's decision to adhere to the established repair schedule, however, was made by [the county engineer] after he considered the risks and costs of changing that schedule. As such, its decision is protected." Id. at 723. More recently, discretionary immunity was extended to the decision not to have inspection routes, but to instead rely on county law enforcement and maintenance personnel to report downed signs. Zaske ex rel. Bratsch v. Lee, 651 N.W.2d 527 (Minn. Ct. App. 2002).

Discretionary immunity can apply in cases of traffic signs that are obscured by brush. In Riedel v. Goodwin, 574 N.W.2d 753 (Minn. Ct. App. 1998) the government entity's decision to clear vegetation from high volume roadways before low volume roadways was protected by discretionary immunity. In another case, the township's decision not to mow brush adjacent to intersections was a protected planning decision. Schultz v. Frank, No. C1-00-285 (Minn. Ct. App. Aug. 1, 2000) (unpublished).

The courts have faced several cases involving the application of discretionary immunity to snowplowing. Probably the most important such case is In re: Alexandria Accident of Feb. 8, 1994, 561 N.W.2d 543 (Minn. Ct. App. 1997). There the court held that decisions not to upgrade the lighting system on snowplows, decisions regarding the scheduling of snowplowing, and decisions related to the training of snowplow operators were all subject to discretionary immunity. Discretionary immunity also protected decisions related to weather information. Action taken by a snowplow operator pursuant to a state policy may be protected. Where the state is immune it is immune from claims for contribution from co-defendants. Similarly, the priority of snow removal was protected planning decision. Norlander v. Norman's Bar, 1999 WL 118628 (Minn. Ct. App. 1999). Again in Hromatko v. City of Worthington 998 WL 252412 (Minn. Ct. App. May 19, 1998) (unpublished) the court held that the city was immune for hazards associated with snow piles that limited sight distances at intersections because removal of snow piles involved planning decisions. However, where the snowplow driver is not actively engaged in plowing at the time of the accident, it is more difficult to claim discretionary immunity. In Norman v. Thorson, No. C9-99-1578 (Minn. Ct. App. April 25, 2000) (unpublished), the snowplow driver was returning from a coffee break, but not plowing. The court refused to extend immunity, finding Alexandria Accident did not apply.

VanDeWalker v. County of Steele, 1998 WL 373266 (Minn. Ct. App. July 7, 1998) (unpublished,) held that a decision to leave up warning signs for limited period of time was not protected by discretionary immunity where there was no evidence as to the

manner that policy was considered.

A conclusory affidavit stating that economic factors were considered with respect to the placement of snow, but providing no detail, was insufficient to show entitlement to discretionary immunity. Fear v. Ind. School Dist. 911, 634 N.W.2d 204 (Minn. Ct. App. 2001) review denied, (Minn. Dec. 11, 2001).

Immunity may also be lost where known defects are not repaired. Berg v. Hubbard County, 578 N.W.2d 12 (Minn. Ct. App. 1998). Immunity applied to the county's summertime failure to repair ruts based on maintenance schedule, but immunity was lost where the county failed to repair or warn after a previous accident occurred just before the subject accident and the county road maintenance personnel inspected the site, but did not warn or repair. Official immunity was also held not to apply, but the analysis is not particularly persuasive since the court seems to be looking for a policy decision when analyzing official immunity—something that it normally reserves for discretionary immunity cases.

Minder v. Anoka County, 677 N.W.2d 479 (Minn. Ct. App. 2004). In a case involving injury to a motorcycle rider who hit pothole, the county was immune for decisions related to prioritization of approval of road repairs. The county's entitlement to immunity was not overcome by suggestion that pothole should have been filled pursuant to county's practice of spot repairs where there was no evidence that the particular pothole at issue had been brought to the attention of the county prior to the accident.

Guardrails: Where a decision to install bridge approach guardrails was the product of a mixture of professional judgment and policy decisions, such a decision was a planning decision entitled to discretionary immunity. Fisher v. County of Rock, 596 N.W.2d 646 (Minn. 1999). Another decision finding bridge guardrails protected as planning decision because of the expense involved: Emmons v. Olmsted County, No. C6-96-2138 (Minn. Ct. App. May 20, 1997). *But see*, Barrett v. Itasca County, 1998 WL 865621 (Minn. Ct. App. Dec. 15, 1998) (unpublished) (holding failure to erect guardrail is the type of operational decision not protected by discretionary immunity, citing Abbett; record appeared to have no evidence of prioritization of projects); *see also* Angell v. Hennepin County Reg'l Rail Auth., 578 N.W.2d 343, 346 (Minn. 1998) (failure to erect barricade to protect bicyclist not entitled to discretionary immunity where decision appeared to involve mere professional judgment).

Construction Decisions: A decision not to build a pedestrian walk across a busy roadway was a planning decision that was protected by discretionary immunity. Fawzy v. Flack, No. C4-00-846 (Minn. Ct. App. Nov. 21, 2000) (unpublished).

Gerber v. Neveaux, 578 N.W.2d 399 (Minn. Ct. App. 1998) (decision to rely on state highway construction standards and state inspections was protected by discretionary

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immunity).

Flooding, Drainage and Water Cases

Chabot v. City of Sauk Rapids, 422 N.W.2d 708, 711 (Minn. 1988) held that a city's decision not to upgrade an inadequate holding pond because of economic considerations is policy-making protected by discretionary immunity. Another case held that a city's decision not to upgrade sewer system components to meet 200-year flood, rather than 10-year flood, was protected planning decision. Wennerlyn v. City of Minneapolis, No. C3-99-362 (Minn. Ct. App. Aug. 31, 1999) (unpublished). Planning decisions related to storm sewer system were also held protected in Christopherson v. City of Albert Lea, 623 N.W.2d 272 (Minn. Ct. App. 2001). Where the design and construction of a county road is policy-based, discretionary immunity applies. Fischer v. County of Blue Earth, No. C6-00-413 (Minn. Ct. App. Oct. 23, 2000) (unpublished).

Permit Issuance

Improper issuance of building permits is not a basis for liability, since such action is protected by discretionary immunity. Anderson v. City of Minneapolis, 178 N.W.2d 215, 217 (Minn. 1970). The proposition that the government entity's granting of building permits is discretionary and protected by discretionary immunity has been repeatedly affirmed. See, e.g., Snyder v. City of Minneapolis, 441 N.W.2d 781, 787 (Minn. 1989) (affirming Anderson's holding that issuance of building permit is generally discretionary conduct); Vrieze v. New Century Homes, Inc., 542 N.W.2d 62, 66-67 (Minn. App. 1996) (holding that granting building permits is discretionary and subsequent approval of modification to buildings permits is discretionary conduct); Sheedy v. Mower County, No. C0-96-2328 (Minn. Ct. App. July 8, 1997) (unpublished); Reinardy v. City of Red Wing, No. C0-99-1548 (Minn. Ct. App. Mar. 21, 2000) (unpublished); Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002) (also rejecting section 1983 claim).

A decision to issue a permit for the construction of a private sewage treatment structure is immune under the doctrine of discretionary immunity. McNamara v. McLean, 531 N.W.2d 911 (Minn. Ct. App. 1995).

Hiring, Retraining and Retention

The level of training of employees is a policy decision protected by discretionary immunity.

Maras v. City of Brainerd, 502 N.W.2d 69 (Minn. Ct. App. 1993) (police officer); Watson v. Metropolitan Transit Comm'n, 553 N.W.2d 406 (Minn. 1996) (bus driver); Chaney v. MCTO, No. C9-95-2477 (Minn. Ct. App. Jan. 14, 1997) (unpublished) (bus driver);

Peterson v. Ind. School Dist. 704, No. C0-99-285 (Minn. Ct. App. July 29, 1999) (unpublished) (cheerleader coordinator).

Hiring training and retraining of employees is a protected planning decision entitled to discretionary immunity. Fear v. Ind. School Dist. 911, 634 N.W.2d 204 (Minn. Ct. App. 2001) review denied, (Minn. Dec. 11, 2001).

Whistleblower

Discretionary immunity cannot apply to a claim under the whistleblower act. Janklow v. Minn. Bd. Of Examiners for Nursing Home Adm'rs., 552 N.W.2d 711 (Minn. 1996).

Human Rights Act

Discretionary immunity is unavailable to a claim under the Minnesota Human Rights Act, Davis v. Hennepin County, 559 N.W.2d 117 (Minn. 1997).

Law Enforcement Decisions

Decision to arrest pursuant to a statute immunizing officers for arrests in domestic disputes was protected by discretionary immunity. Lom v. Itasca County, 2002 WL 264658 (Minn. Ct. App. Feb 26, 2002) (unpublished).

Other Types of Decisions

Even where ordinance compelled homeowners to trim trees and shrubs within sight triangle at intersections, the decision to prioritize tree trimming and clearing of shrubs from sight triangles at most frequented intersections was protected by discretionary immunity. Soltis-McNeal v. Erickson, No. C2-99-854 (Minn. Ct. App. Dec. 14, 1999) (unpublished). But mere mistake in professional judgment, such as failure to detect rot in a tree during a tree inspection does not rise to the level of a protected planning decision. Elfstrand v. City of Brooklyn Center, No. C1-98-1029 (Minn. Ct. App. Dec. 22, 1998) (unpublished).

Where to locate a baseball field is a policy decision entitled to discretionary immunity. Hills v. City of White Bear Lake, 1999 WL 451763 (Minn. Ct. App. July 6, 1999)

There is no discretionary immunity where a county creates a nuisance. Sletten v. Ramsey County, 2002 WL 109272 (Minn. Ct. App. Jan 29, 2002) (unpublished) and Sletten v. Ramsey County, 1999 WL 595368 (Minn. Ct. App. Aug. 10, 1999) (unpublished).

Discretionary Immunity Summary

Discretionary immunity is perhaps best thought of as policy-making immunity. It is probably the most amorphous and difficult to understand of the various governmental immunities. This is particularly true because seemingly similar incidents can give rise to different results. Even when negligence is clear cut, one must be careful to determine whether there are any established government policies that account for the conduct giving rise to the loss. Although a discretionary immunity defense may not become apparent until the litigation has progressed for some time, one should consider discretionary immunity's applicability from the time that the claim is first made and reconsider its applicability as the claim progresses and more facts become known.

B. SNOW AND ICE IMMUNITY

Snow and ice are the inevitable products of Minnesota's wintry climate. The legislature recognized that it would be potentially disastrous for governmental entities to take on the liability for each and every accident that occurred on a snow-covered or ice-covered roadway. Governmental entities are not liable for losses caused by:

Snow or ice conditions on any highway or public sidewalk that does not abut a publicly owned building or publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of the municipality.

Minn. Stat. § 466.03, subd. 4(a); see also Minn. Stat. § 3.736, subd. 3(d). Thus, where slippery road or sidewalk conditions are the product of natural causes, snow and ice immunity protects governmental entities from liability. This immunity was applied in In re Jones, 419 N.W.2d 839 (Minn. Ct. App. 1988), in which the plaintiff sued St. Louis County for failing to salt a county road on which the decedent was fatally injured. The court found that the failure to salt or otherwise remedy a naturally occurring slippery condition could not constitute an affirmative act so as to give rise to liability:

In this case, the slippery road conditions were caused by traffic on the road which packed down natural snowfall. While the county may have been able to avert the condition by using salt, the county cannot be said to have affirmatively caused the slipperiness. The statute requires the condition to have been caused by an act, not an omission of the county.

Id. at 841. The court also rejected the claim that a failure to maintain a road could constitute an affirmative act, noting that such a ruling "would essentially nullify [the] statutory language." Id. Similarly, in Berg v. City of St. Paul, 414 N.W.2d 204 (Minn. Ct. App. 1987), the court held that the City of St. Paul could not be liable for slippery road

conditions when such conditions were caused by natural weather conditions rather than affirmative negligent acts. Berg, 414 N.W.2d at 207-08.

The type of affirmative act necessary to avoid the application of snow and ice immunity was demonstrated in Robinson v. Hollatz, 374 N.W.2d 300 (Minn. Ct. App. 1985). The Robinson court held that liability could attach where plaintiff alleged snow had negligently been piled in a roadway median so as to obscure his vision. Robinson, 374 N.W.2d at 303. The court found that the piling of snow in the median was an affirmative act precluding immunity. The court acknowledged that:

The statute grants immunity to a county or municipality for injuries resulting from the usual and natural accumulation of snow and ice on the streets.

Id.

Absent evidence that the government affirmatively created the snow or ice condition, losses related to snow and ice are entitled to immunity. Norlander v. Norman's Bar, 1999 WL 118628 (Minn. Ct. App. 1999) (unpublished). Failure to clear a catch basin did not constitute an affirmative act within the meaning of the exception to snow and ice immunity. Kyllonen v. City of Park Rapids, 1998 WL 764087 (Minn. Ct. App. 1998) (unpublished).

A clever argument was advanced in Koen v. Tschida, 493 N.W.2d 126 (Minn. Ct. App. 1992). The plaintiff argued that the accident was a product not of the snow or ice condition on the roadway, but instead the county's failure to trim trees adjacent to the roadway, post warning signs, and reduce the speed limit at the site of the accident. Plaintiff argued that trimming the trees would have helped avoid the icy condition on the roadway in the first place, because it would have exposed the roadway to more sunlight. Koen, 493 N.W.2d at 128. Further, the plaintiff alleged that because the county knew that this area was subject to icy conditions it should have reduced the speed limit and posted signs warning of the potential icy conditions. Id. The court rejected all these arguments, noting that none of these acts could be said to constitute "affirmative negligence." Id.

The statute also provides a rule that governs liability adjacent to buildings when a municipality owns or leases a building or parking lot in another jurisdiction:

Notwithstanding paragraph (a), a municipality that owns or leases a building or parking lot in another municipality is not immune from a claim based on snow or ice conditions on a public sidewalk abutting the building or parking lot, but the other municipality is immune,

except when the condition is affirmatively caused by its own negligent acts.

This provision establishes the rule when one municipality owns or leases property outside its jurisdiction.

C. OUTDOOR RECREATION IMMUNITY AND PARK AND RECREATION IMMUNITY

Another of the most important immunities is the immunity that applies to park and recreation facilities. With respect to municipalities, this is known as parks and recreation immunity. See Minn. Stat. § 466.03, subd. 6e. With respect to the State, this immunity is known as outdoor recreation immunity. Minn. Stat. § 3.736, subd. 3(h).

Under the terms of the Municipal Tort Claims Act, municipalities are immune from

[A]ny claim based on the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreational property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Minn. Stat. § 466.03, subd. 6e. Thus, as with the similar provisions of State's outdoor recreation immunity, a municipality is liable under the terms of the immunity when the landowner's conduct falls below the duty owed to a trespasser under the common-law standard. The common law trespasser standard thus becomes the focus of any claim based on outdoor recreation or parks and recreation immunity.

The standard that will normally be applicable to recreation immunity claims is found in Restatement (Second) of Torts § 335. Under this provision, a landowner, here the governmental entity, will be liable to a trespasser, here the claimant, when the following conditions are met:

- 1) the possessor of land knows or from facts within the possessor's knowledge should know that trespassers constantly intrude upon a limited area of land;
- 2) the condition is one which the possessor created or maintains;
- 3) the condition is, to the possessor's knowledge, likely to cause death or serious

bodily harm to trespassers;

- 4) the condition is of such a nature that the possessor has reason to believe that such trespassers will not discover it; and
- 5) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

See Johnson v. Washington County, 518 N.W.2d 594 (Minn. 1994); Sirek v. State, Dept. of Natural Resources, 496 N.W.2d 807, 809 (Minn. 1993).

The common-law trespasser standard is frequently applied in cases that do not involve governmental liability. See, e.g., Sirek, 496 N.W.2d at 810-12 (citing cases that did not involve governmental immunity in context of outdoor recreation immunity). Thus, case law applying to a landowner's obligation to trespassers may bear on issues of immunity even though immunity is not discussed in those opinions. Conversely, outdoor recreation immunity and parks and recreation immunity cases are a rich source of case law when interpreting any landowner's duty to a trespasser.

Two Minnesota Supreme Court cases, Johnson v. Washington County, 518 N.W.2d 594 (Minn. 1994), and Sirek v. State, Dept. of Natural Resources, 496 N.W.2d 807 (Minn. 1993), set the standards applicable to outdoor recreation and park and recreation immunities. Johnson involved a wrongful death action that arose from the drowning of a seven-year-old while participating in an extended daycare program at a park. A Washington County jury found the county that operated the park where the drowning occurred liable for damages. Johnson, 518 N.W.2d at 598. Although it appears that no motions asserting park and recreation immunity were made by the county until after the trial had taken place, the trial court granted the county's post-trial motion for judgment notwithstanding the verdict based on assertion of the park and recreation immunity. The Supreme Court, after review by the Court of Appeals, affirmed the trial court's decision. Id. The court specifically held that artificial conditions that duplicate natural terrain do not constitute an artificial condition so as to give rise to liability the restatement standard:

The Court of Appeals further held that even if the Reserve Pool were an artificial condition, the county is entitled to immunity because the pool contained no hidden dangers. Id.

We agree. As this court recognized in Davies v. Land O'Lakes Racing Association, 244 Minn. 248, 255, 69 N.W.2d 642, 647 (1955), even under § 339, "a possessor of land will not ordinarily be held liable for injuries

occurring in ordinary, natural, or artificial bodies of water that are free from traps or concealments." (Emphasis added). The Reserve Pool, as constructed, has a gradually-sloped bottom with no drop-offs and contains no unusual currents. Moreover, as we noted in Davies, "[i]t is generally conceded that the ordinary body of water, even though it be artificial, while it does involve the risk of death or serious harm, does not constitute an unreasonable risk thereof because even a child to some extent appreciates the risks that are connected with it."

Id. at 599-600.

The Supreme Court rejected the contention that the presence of lifeguards created a duty beyond that which would otherwise exist, and cited approvingly the Court of Appeals case of Zacharias v. Minnesota Dept. of Natural Resources, 506 N.W.2d 313 (Minn. Ct. App. 1993). Zacharias had also involved a drowning. There the court held that an artificially created swimming pond contained within a state park was subject to the outdoor recreation immunity and that the presence of lifeguards did not give rise to a duty greater than the restatement standard. Id. at 318.

The other important Supreme Court decision, Sirek, involved a tragic accident in which a six-year-old, who was with her family on a visit to Interstate State Park, rushed to cross a highway dividing the park. Sirek, 496 N.W.2d at 809. The Sireks had reached an end of the trail and were waiting for traffic to clear when their child suddenly attempted to dash across the highway and was struck by a passing van. Id. Foremost among the issues in Sirek was whether the adult trespasser standard contained in Restatement (Second) of Torts § 335 or the child trespasser standard contained in Restatement (Second) of Torts § 339 applied. Until Sirek no one had argued that the more liberal standard contained in § 339 should apply in cases in which children were injured. See, e.g., Henry v. State, 406 N.W.2d 608 (Minn. Ct. App. 1987) (applying § 335 even though accident involved the death of a child as a result of a falling tree limb in a state park). The plaintiff in Sirek argued that Restatement § 335 should only be applied in those cases involving injury to the adult. The Supreme Court rejected this contention, holding that Restatement § 335 applies in all outdoor recreation immunity or parks and recreation immunity cases in which children are under the supervision of adults. Sirek, 496 N.W.2d at 812. See also Johnson v. Washington County, 518 N.W.2d 594, 599 (Minn. 1994) (applying Restatement § 335 when a child is under the supervision of adult lifeguards). After disposing of the question of which Restatement standard applied, the Sirek court then held that the Sireks had actually discovered the existence of the highway and that there were no traps or hidden dangers that would give rise to liability. Sirek, 496 N.W.2d at 814.

An interesting decision from the Court of Appeals, Martinez v. Minnesota Zoological

Gardens, 526 N.W.2d 416 (Minn. Ct. App. 1995), examined application of the Restatement standard to a situation where a child was injured by heavy railings that tipped over and injured him while he was a visitor at the Minnesota Zoological Gardens. The case was decided under the State's "Zoo Immunity" because the Minnesota Zoo is not a part of the outdoor recreation system. See Minn. Stat. § 3.736, subd. 3(o). The standard, however, to be applied by the court in such cases is identical to that invoked in outdoor recreation immunity and parks and recreation immunity cases. Significantly, the Martinez court noted that: "the plaintiff bears the burden of establishing that each of the elements of § 335 has been met in order to defeat a claim of immunity." Martinez, 526 N.W.2d 418.

Thus, the Martinez court expressly recognized that the Restatement standard contains several independent prerequisites to liability rather than a "totality of the circumstances" type test. Further, Martinez noted, citing Sirek, that a landowner is

entitled to assume trespassers will realize that no preparation has been made for the reception and will, therefore, be on the alert to observe the conditions which exist upon the land.

Id. at 418. The Martinez court held that because a brief inspection of the railings would have revealed the condition and the possibility that they would tip over, the railings, as a matter of law, did not constitute a concealed condition so as to give rise to liability under the Restatement standard. Id. at 419.

While courts have generally held that the adult trespasser standard applies to these immunity claims, the courts have held differently with respect to one injury to a child that happened on school grounds. Fear v. Ind. School Dist. 911, 634 N.W.2d 204 (Minn. Ct. App. 2001) review denied, (Minn. Dec. 11, 2001). A contrary result was arrived at in Stiele ex rel. Gladieux v. City of Crystal, 646 N.W.2d 251 (Minn. Ct. App. 2002). A boy, aged 11, cut his leg on a metal signpost when jumping off a fence near some tennis courts. The court first reviewed the question of whether the case should be analyzed under Restatement section 335 or 339, concluding that 335 was the proper standard pursuant to Sirek and Johnson v. County of Washington. The court then concluded that the hazard was not hidden and was simply not of a type likely to cause death or great bodily harm. Where a 14-year-old skier hit a barrel that was plainly visible, the adult trespasser standard applied and park and recreation immunity barred the claim. Schaffer v. Spirit Mountain Recreation Area Authority, 541 N.W.2d 357 (Minn. Ct. App. 1995).

One interesting case examined the threshold inquiry of when someone is the "user" of a park or the outdoor recreation system. In Carlson v. State, Dept. of Natural Resources, No. C6-01-1099 (Minn. Ct. App. Jan. 15, 2002) (unpublished) the court held that a snowmobiler was a "user" of the outdoor recreation system when he ran into dock temporarily stored in the outlet of the Pelican River. Thus, even where the mechanism of

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injury may not be related to a recreational activity, and even though an injury may actually occur inside, users of property that is designated as recreational property may not be able to bring suit. In Hinnenkamp v. City of Columbia Heights, No. C7-01-1354 (Minn. Ct. App. Feb. 12, 2002) (unpublished), the court held that where a city-owned mixer fell off a cart, spilling scalding liquid on a caterer, the injury occurred at a facility intended to provide recreational services and the immunity therefore applied. The court also determined that a large, heavy mixer on a wheeled cart presented no hidden dangers.

Kastner v. Star Trails Ass'n, 658 N.W.2d 890 (Minn. Ct. App. 2003) established that a snowmobile trail user organization that contracts with a municipality and is responsible for maintaining a snowmobile trail is entitled to recreational immunity.

Habeck v. Ouverson, 669 N.W.2d 907 (Minn. Ct. App. 2003) established that municipal recreational immunity applies to accidents occurring at county fairs. In this case, a young girl was run over by tractor that transported people at a county fair. Since children were ordinarily present at the fair, however, the court held that the more lenient child trespasser standard applied.

One unusual case has held that a rollerblader who claimed not to see a hazard on a path established hidden defect so that recreational immunity did not apply. Lishinski v. City of Duluth, 634 N.W.2d 456 (Minn. Ct. App. 2001), review denied (Minn. Jan. 15, 2002). This is contrary to many recreational immunity cases, given that the restatement places a high threshold when determining whether or not a defect is hidden. Careful review of the cases cited in the Restatement and the cases cited in Lishinski suggests that “hidden” does not mean that the injured party simply did not see the defect.

Another Duluth case also refused to apply recreational immunity in a case where one might expect it to be applied. Unzen v. City of Duluth, 683 N.W.2d 875 (Minn. Ct. App. 2004). Outdoor recreation immunity did not apply where a golfer tripped on defective stair nosing at municipal golf course. The court imposed liability even though strong case could be made that the stairs or any defect were not a hidden or concealed condition within the meaning of the restatement standards, and even though it would seem unlikely that such a condition would be likely to cause death or great bodily harm. The Minnesota Supreme Court denied review of this case, as it had in the Lishinski case.

A city’s decision to permit bog races was protected by recreational immunity. Merchlewitz v. Midwest 4 Wheel Drive Ass'n, Inc, 587 N.W.2d 652 (Minn. Ct. App. 1999).

In Levine v. City of Maple Grove, No. C2-94-270 (Minn. Ct. App. Aug. 5, 1994) (unpublished) a city was sued for liability related to a post adjacent to a city bike trail. The City argued that it was entitled to summary judgment as a matter of law because the

post was not likely to cause serious bodily harm or death to a trespasser, it had no knowledge that the post was likely to cause such harm or death, and the post was in obvious condition that trespassers are likely to discover. The appellate court agreed.

Outdoor recreation immunity is a powerful tool in the defense of claims arising out of park and recreation areas. Attorneys and claim representatives analyzing the liability of a government entity with respect to such claims should always consider whether this immunity applies. It is important not to view this simply as "park" immunity. The municipal parks and recreation immunity also applies to claims based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces. Minn. Stat. § 466.03, subd. 6e. The State Tort Claims Act, Minn. Stat. § 3.736, subd. 3(h), applies not just to state parks but to any of the "outdoor recreation system" as defined in Minn. Stat. § 86A.04. Wayside rest areas are included in the outdoor recreation system, as are state historic sites and monuments. (A listing of state historic sites is found in Minn. Stat. § 138.53.) Thus, it has been held in at least one district court case that an individual who tripped on the indoor steps of the State Capitol while on a tour was a user of the outdoor recreation system and consequently subject to the standard of liability contained in the Restatement. Erickson v. State, No. CX-89-2992 (Ramsey Cty. Dist. Ct. Dec. 6, 1991). If counties or other municipalities which own historic sites are sued by those touring the sites, immunity may well be available because of the breadth of the definition of "outdoor recreation" immunity when combined with the special "catch-all" immunity, Minn. Stat. § 466.03, subd. 15, which grants municipalities immunity where the state would be immune.

D. LICENSING AND PERMITTING IMMUNITY

Governmental entities entangle themselves in the lives of citizens by requiring and issuing innumerable licenses, permits, and authorizations. Since most licensing statutes contain some criteria, which, after a lapse by a licensee, would allow a plaintiff to challenge the wisdom of the original licensure, the potential liability of governmental entities in the absence of a licensing immunity provision would be staggering. Both the Municipal Tort Claims Act and the State Tort Claims Act contain licensing and permitting immunity. Minn. Stat. § 466.03, subd. 10; Minn. Stat. § 3.736, subd. 3(j). Licensing and permitting immunity bars claims based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the governmental authority. Application of this immunity is illustrated in Andrade v. Ellefson, 391 N.W.2d 836 (Minn. 1986). In Andrade, two infants were injured in a family daycare operated by defendant Ellefson. The infants' injuries were consistent with either a fall or violent shaking at the daycare. Plaintiff sued Anoka County, alleging that the children's injuries were caused by negligent licensing, inspection, and supervision of the daycare home by the county. Id. at 837. It was further alleged that Anoka County ignored repeated complaints of overcrowding in the home, and possibly ignored complaints of physical abuse as well. Id. at 839. Despite these complaints, the daycare center's license

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was renewed several times. The Minnesota Supreme Court held that the Plaintiffs' claims against Anoka County were barred by the licensing immunity contained in Minn. Stat. § 3.736, subd. 3(j). Id. 840. Andrade stands for the proposition that actions based on negligent licensure will not be permitted.

Licensing and permitting immunity was also applied in Gertken v. State, 493 N.W.2d 290 (Minn. Ct. App. 1992). In Gertken the plaintiff alleged, in a case involving two wrongful death claims, that a state licensing inspector provided negligent advice concerning the safety of her home's ventilation system. After an inspection by a state deputy fire marshal, carbon monoxide accumulation in the home resulted in the death of two members of plaintiff's family and injuries to others. Plaintiff alleged that during an inspection of the home required by daycare licensing standards, the deputy fire marshal had given advice concerning ventilation of the fireplace. Id. at 292. Plaintiff contended that this advice was not directly related to standards needed for a license, and consequently was outside the scope of immunity. The Court of Appeals disagreed and held that the immunity provision applied even if the advice was outside the normal scope of an inspection. Id. The court observed:

The immunity statute includes the State's representations within the scope of the subject matter involved in the issuance of a license. It would be anomalous to construe the statute to apply to only representations implied by state licensure and not to express statements or silence in response to comments on subjects within the scope of the licensing inspection. We approach this case exactly as did the trial court, asking simply whether the representations were 'directly related' to the scope of the subject matter considered in licensing.

Id.

The court expressly declined to address the issue of whether express representations made during the course of a licensing inspection would give rise to liability. Id. at 292.

Andrade and Gertken demonstrate that licensing and permitting immunity apply not only in those situations where a license or permit has been issued but also to inspections conducted pursuant to that licensing and permitting authority. The applicability of licensing and permitting immunity should be considered whenever a claim arises out of investigation or inspections conducted pursuant to licensing or permitting statutes.

E. OTHER "CATCH-ALL" IMMUNITY

As a result of a 1986 amendment to the Municipal Tort Claims Act, municipalities are immune from any claim for which the state would be immune if the action had been brought against the State. Minn. Stat. § 466.03, subd. 15.

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This immunity assures that the scope of immunities available to municipalities will never be narrower than that available to the State. The converse, however, is not true: there is no "catch-all" immunity provision that provides that the State has all immunities that are available to municipalities. At the time of the enactment of "catch-all" immunity, the legislature also specifically included most of the state immunities in the text of the Municipal Tort Claims Act. As a result, it is only in an unusual case that one would need to apply this immunity. It would, however, expressly provide immunity for losses caused by wild animals in their natural state, as provided in Minn. Stat. § 3.736, subd. 3(e). Further, it would assure that future amendments to the State Tort Claims Act would have the effect of providing equal protection to municipalities.

In Levine v. City of Maple Grove, No. C2-94-270 (Minn. Ct. App. Aug. 5, 1994) (unpublished) the court held a city by operation of Minn. Stat. § 466.03, subd. 15, enjoyed the same immunity as the state enjoys under Minn. Stat. § 3.736 (1992). Because state immunity under § 3.736 extends to trails or paths with artificial surfaces, the city likewise has such immunity.

One area in which the "catch-all" immunity provision may be of some practical assistance to defending claims on behalf of government agencies would be in those instances where a plaintiff is attempting to impose respondeat superior or vicarious liability on a municipality. This is because the definition of "scope of employment" found within the State Tort Claims Act is much narrower than the common law definition of "scope of employment." The common law test, as found in Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306 (Minn. 1983), imposes vicarious liability even where it is clear that the employee is no longer serving the interest of his employer. Marston, 329 N.W.2d 306 (Minn. 1983). This rigid and expansive definition of "scope of employment" contrasts sharply with the narrower standard in the tort claims act:

Scope of office or employment means that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authorities.

Minn. Stat. § 3.732, subd. 1(3). It is clear that the definition of "scope of employment" found in the State Tort Claims Act is different than that in Marston. By operation of the "catch all" provision of the Municipal Tort Claims Act, the definition of "scope of employment" found in the State Tort Claims Act is applicable to municipal claims.

F. OTHER STATUTORY IMMUNITIES

Both tort claims acts contain numerous narrowly drawn immunity provisions that limit governmental entities' responsibility for many specific types of activities. These

additional immunities have infrequently been the topic of appellate decisions, but still are occasionally useful in the defense of claims.

1. Due Care in the Execution of a Statute.

Both tort claims acts provide immunity for losses caused by acts or omissions of employees "exercising due care in the execution of a valid or invalid statute or regulation." Minn. Stat. § 3.736, subd. 3(b). See also Minn. Stat. § 466.03, subd. 5. This immunity is infrequently applied, primarily because it would appear to require a showing of "due care" before being applicable. See Boop v. City of Lino Lakes, 502 N.W.2d 409 (Minn. Ct. App. 1993). The proper use of this immunity was seen in Johnson v. Dirkswager, 315 N.W.2d 215 (Minn. 1982), where this immunity provided some protection for a state employee who was required to disclose information pursuant to the Data Practices Act. Johnson v. Dirkswager, 315 N.W.2d at 223. See also Freier v. Independent Sch. Dist. No. 197, 356 N.W.2d 724 (Minn. Ct. App. 1984) (finding an absolute privilege to disclose information pursuant to the Data Practices Act).

The discretionary immunity provisions providing for immunity where employees exercise due care in the execution of a valid or invalid statute or rule are infrequently applied. This immunity is best reserved for those occasions on which statutes require a governmental employee to perform certain acts and the subsequent challenge is not to the manner in which the employee perform the acts but to the requirement that the employee perform the acts.

2. Tax Collection Immunity

Both tort claims acts bar claims "in connection with the assessment and collection of taxes." Minn. Stat. § 3.736, subd. 3(c); Minn. Stat. § 466.03, subd. 3. This immunity bars suits arising from the assessment and collection of taxes.

3. DWI Impoundment Immunity

Both tort claim acts bar claims where recovery is prohibited by Minn. Stat. § 169.121, subd. 9. Minn. Stat. § 169.121, subd. 9 grants immunity to the state and political subdivisions and their employees for liability arising out of the driving, operation, and physical control of a motor vehicle that has been impounded by a peace officer. The immunity applies where the police officer acts in good faith and exercises due care. While it would thus seem that the statute provides only limited protection, since it applies only where good faith and due care can be shown, it should be noted that liability frequently arises out of the acts of those other than the peace officer who conducts the impoundment. This immunity

provision may thus primarily benefit the state and municipalities from claims for losses that occur at impound lots.

4. Unimproved Real Property Immunity

This immunity provision provides immunity to governmental entities for claims "based upon the condition of unimproved real property" which they own. Minn. Stat. § 3.736, subd. 3(g); Minn. Stat. § 466.03, subd. 6b. While the Municipal Tort Claims Act does not define "unimproved real property," the State Tort Claims Act defines it as "land that the state has not improved, including, fixtures and attachments to land that the state has not either fixed nor improved." Minn. Stat. § 3.736, subd. 3(g). These provisions are obviously intended for the defense of claims that arise out of land which governmental entities have title to but on which they conduct no activities. It might also find application where the governmental entity has possession of property shortly after a purchase but has not yet erected any structures thereon or conducted any activities on that land. It would seem that this provision might be useful in the defense of claims related to snowmobile or ATV trails that are maintained by entities other than the governmental entity that actually owns the land.

5. Losses Other Than Injury to or Loss of Property or Personal Injury or Death

Both tort claims acts provide immunity for losses "other than injury to or loss of property or personal injury or death." Minn. Stat. § 3.736, subd. 3(f); Minn. Stat. § 466.03, subd. 8.

This is a cryptic provision that has never been interpreted in Minnesota jurisprudence. This immunity was one of the initial 12 immunities enacted pursuant to the State Tort Claims Act. The review of the legislative history, however, does not disclose the source of this immunity or its intended purpose.

It might be argued that this provision was intended to bar claims other than direct claims by injured parties. A good example of such a claim would be a subrogation claim. There the claim that is actually being brought is not one for injury to or loss of property or personal injury or death, but instead a claim being asserted by a party who faced a personal injury or property damage claim. Further historical research and/or clever lawyering are likely the only method of giving some meaning to this unusual statutory provision.

6. Public Assistance or Welfare Immunity

Minn. Stat. § 466.03, subd. 9 and Minn. Stat. § 3.736, subd. 3(i) both preclude liability for "a loss of benefits or compensation due under a program of public assistance or public welfare, except where... compensation for loss is expressly required by federal law in order. . . , to receive federal grants-in-aid." The statutes would seem to bar consequential claims arising from the denial of welfare benefits. These provisions have not been interpreted in judicial decisions.

7. Wild Animal Immunity

Minn. Stat. § 3.736, subd. 3(e) provides immunity for losses caused by wild animals in their natural state. This would seem to be a relatively straightforward immunity, but one should always be alert to the possibility of applying it in a creative fashion. For instance, in a case where a vehicle swerves to avoid a deer and hits a roadside obstacle that is alleged to be negligently placed, it might be argued that a wild animal caused the accident and that the county would therefore be immune. See Woller v. City of Granite Falls, No. CO-94-2616 (Minn. Ct. App. July 25, 1995). Further, cases have arisen where the falling of diseased tree limbs have been attributed to negligent inspection of the trees. If such resulted from insect damage to the tree, it might be argued that the immunity applies.

8. Patient and Inmate Immunity

Both tort claims acts contain provisions limiting liability to patients and inmates of state and municipal hospital and correctional facilities. See Minn. Stat. § 3.736, subd. 3(k) and (l); Minn. Stat. § 466.03, subd. 11 and 12. While these immunities provide protection from some claims by patients and inmates, these provisions will not bar tort suits brought by patients or prisoners in all instances. Compare Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988) (treating physician, medical director of state hospital, and commissioner of human services immune from liability), with Diedrich v. State, 393 N.W.2d 666 (Minn. Ct. App. 1986) (not all tort suits brought by patient or prisoner are barred by immunity provisions).

9. Logging Road Immunity

Governmental entities are immune from losses "arising out of a person's use of a logging road on public land...." Minn. Stat. § 466.03, subd. 17.

10. Additional State Immunities

The State Tort Claims Act also contains immunity for losses caused by bubblers that keep water open for fish during the wintertime, Minn. Stat. § 3.736, subd. 3(o); immunity for losses arising at the Minnesota Zoo, Minn. Stat. § 3.736, subd. 3(p); and losses related to property owned, leased or controlled by the Minnesota National Guard, Minn. Stat § 3.736, subd. 3(r). Since municipalities do not conduct these activities, these immunities would become relevant only where one was litigating against the State.

11. Additional Municipal Immunities

The Municipal Tort Claims Act also contains several narrow immunities. Amongst these are immunity from losses arising at water access sites, Minn. Stat. § 466.03, subd. 6c; immunity from liability where other statutes provide immunity to a municipality--a seemingly unnecessary immunity--Minn. Stat. § 466.03, subd. 7; immunity arising from the operation of all-terrain vehicles, off-road vehicles, and off-highway motorcycles, Minn. Stat. § 466.03, subd. 16; and immunity for losses arising out of beach or pool equipment, Minn. Stat. § 466.03, subd. 6f. This last immunity is interesting in that it seems to suggest immunity that is not as broad as the parks and recreation immunity. Whereas parks and recreation immunity does not exist in situations where a landowner would be liable to trespassers, the beach or pool equipment immunity provisions do not apply where the municipality's conduct "would entitle trespassing children to damages against a private person." Minn. Stat. § 466.03, subd. 6f(c).

Other recently added immunities provide immunity for losses related to school building security, where the school has obtained variances from the fire code for building security purposes, Minn. Stat. § 466.03, subd. 18; losses related to emergency medical dispatches, Minn. Stat. § 466.03, subd. 19; losses related to certain urban property available for highway use, Minn. Stat. § 466.03, subd.20; losses related to inaccuracies or alleged inaccuracies in GIS survey data, Minn. Stat. § 466.03, subd. 21; losses related to the operation of a recreational motor vehicle within a highway right-of-way, Minn. Stat. § 466.03, subd. 22; losses related to the recreational use of school facilities, Minn. Stat. § 466.03, subd. 23; and losses caused by used public safety equipment, Minn. Stat. § 466.03, subd. 24.

G. ADDITIONAL STATUTORY IMMUNITIES NOT FOUND IN THE STATE OR MUNICIPAL TORT CLAIMS ACTS

In addition to the immunities that are found in the State and Municipal Tort Claims Acts, dozens of additional immunities from civil liability are found sprinkled throughout Minnesota Statutes. See, e.g., Minn. Stat. § 97B.065, subd. 8 (immunity from civil and criminal liability arising out of custody of hunting equipment); Minn. Stat. § 7.193 (absolute immunity for state treasurer from claims regarding safe-keeping of money); Minn. Stat. § 31.09 (absolute immunity for those determining that food is not salable). Careful attorneys review those statutes and regulations that relate to the particular challenged activity to make sure that the statutes do not contain special immunity provisions apart from those contained in the tort claims acts.

COMMON-LAW IMMUNITIES

The enactment of the Municipal Tort Claims Act and the State Tort Claims Act created a wealth of different statutory immunities. The abolition of the broad common-law principle of sovereign immunity also gave rise to more well developed common-law immunities.

There are numerous types of existing common-law immunities. It is important to use clear and consistent terminology when referring to the various common-law (as well as statutory) immunities. The danger of not clearly labeling the various immunities can be seen from examining Rico v. State, 472 N.W.2d 100, 106, n.4 (Minn. 1991). There the court cited Theide v. Town Scandia Valley, 14 N.W.2d 400, 408 (Minn. 1944), for the proposition that "immunity is a prerogative of the state itself which cannot be invoked by public officers or agents when sued for their own torts." Rico, 472 N.W.2d at 106. Of course, the immunity that the court referred to in Theide was sovereign immunity. Sovereign immunity only applied to the state and did not apply to individuals. This, of course, is different than the issue the court was addressing in Rico, namely, whether discretionary immunity applied to individuals as well as the state. It would seem unhelpful to cite precedent relating to sovereign immunity as applicable after the courts abolished sovereign immunity. Such slips are avoided by clearly labeling the immunities that are being discussed.

A. OFFICIAL IMMUNITY

Policy and Purpose

Official immunity is a common-law doctrine that protects government officials from suit for discretionary actions taken by them in the course of their official duties. Kari v. City of Maplewood, 582 N.W.2d 921, 923 (Minn. 1998). The goal of official immunity is to

protect public officials from the fear of personal liability, which might deter independent action and impair effective performance of their duties. Elwood v. Rice County, 423 N.W.2d 671, 678 (Minn. 1988). The doctrine protects from personal liability public officials charged by law with duties that call for the exercise of judgment or discretion, unless the official is guilty of a willful or malicious wrong. Rico v. State, 472 N.W.2d 100 (Minn. 1991); Elwood v. Rice, 423 N.W.2d 671, 677 (Minn. 1988). As the court observed in Rico v. State, there are important differences between the discretionary immunity provision of the tort claims act and the official immunity doctrine:

Although the discretionary function exception to the tort claims act and the official immunity doctrine both protect discretionary acts, the discretionary acts protected by each are not identical. Governmental immunity under the discretionary function exception and official immunity serve different purposes: governmental immunity "is designed to preserve the separation of powers," whereas official immunity primarily is "intended to ensure that the threat of potential liability does not unduly inhibit the exercise of discretion required of public officers in the discharge of their duties." Holmquist v. State, 425 N.W.2d 230,233 n. 1. (Minn. 1988). Thus, discretion has a broader meaning in the context of official immunity. Elwood, 423 N.W.2d at 678.

Rico, 472 N.W.2d at 107.

The broad scope of official immunity is apparent when one considers that it is sometimes said to be as broad now as it was prior to the abolishment of sovereign immunity, at which time it served to deflect those claims which were brought against individual governmental employees. Thus, the present day official immunity test revolves around the distinction between "discretionary" duties, which are immunized, and "ministerial" duties, for which officers remain liable. Rico, 472 N.W.2d at 107. Further, the courts adhere to the notion that an official's duty is ministerial "when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts." Id., quoting Cook v. Trovatten, 274 N.W. 165, 167 (Minn. 1937).

Even Ministerial Decision May Be Protected If Action Pursuant to Policy Decision

There is an important exception to the rule that official immunity does not apply to "ministerial" activities. In Anderson v. Anoka Hennepin Ind. School Dist., 678 N.W.2d 651 (Minn. 2004), a student lost a finger while using table saw in industrial arts class. At the time, because he was rip sawing narrow strips of wood, no safety guard was being used on the saw. It was the department's policy to remove the table saw's guard when wood was being rip sawed. Summary judgment on discretionary immunity, official immunity and vicarious immunity was denied in the trial court. The Court of Appeals

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affirmed. Review was sought and granted only on the issues of official immunity and vicarious official immunity. The Minnesota Supreme Court first noted that the decision was a “ministerial” one, and therefore of a type that would normally be entitled to official immunity. The court nevertheless held that even a ministerial decision could be protected if it involved simply the action of a policy decision, as it did in this case. The effects of Anderson on immunity jurisprudence are uncertain, since in most cases, the policy nature of the decision would be before the court directly. In Anderson, since review of the discretionary immunity decision was not sought, the court could not face the issue directly.

Willful or Malicious Wrong Not Protected

Another distinction between official immunity and discretionary immunity is that official immunity does not protect an officer who commits a willful or malicious wrong. Rico, 472 N.W.2d at 107. Within the meaning of the official immunity doctrine, malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Rico, 472 N.W.2d at 107, quoting Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 462, 205 N.W. 630, 631 (1925).

Fact disputes on the issue of malice also precluded summary judgment in the case of Averbeck v. City of Minneapolis, No. A03-1284 (Minn. Ct. App. Apr. 27, 2004) (unpublished). Official immunity could not be granted where there was a sharp factual dispute as to how an injury was actually incurred. Plaintiff claimed that the officer intentionally slammed his finger in a car door. The officer denied this. The factual dispute precluded summary judgment.

The Development and Reemergence of the Official Immunity Doctrine

The official immunity doctrine in its present incarnation derives from the case of Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988). In Elwood a woman was receiving threatening phone calls from her ex-husband after a pattern of domestic abuse. Law enforcement officers reported to a residence from which the threatening calls were being made and, without the express consent of the owner, forced their way into the home in order to speak to the ex-husband. Elwood, 423 N.W.2d at 673-74. After talking with the ex-husband, and being unsure as to whether the telephone contact violated the outstanding restraining order, the officers left without making any arrests. Id. at 674. Plaintiffs, parents of the ex-husband and owners of the house that was broken into, brought suit against the officers involved in the entry, asserting both federal civil rights violations pursuant to 42 U.S.C. § 1983 and state tort claims.

The court found that the federal civil rights claims were disposed of by the doctrine of qualified immunity, a common defense to 1983 claims. Id. The court then went on to

address the question of whether qualified immunity existed for the state common-law tort claims. The Elwood court expressly refused to apply federal qualified immunity to these common-law tort claims. The court, however, recognized that it needed to provide law enforcement officers some protection. Primarily relying upon cases that predated abolition of the doctrine of sovereign immunity, the court found that the common-law doctrine of official immunity still retained independent vitality in state tort actions. Id. at 677. Elwood demonstrates the most frequent use of the official immunity doctrine: a form of "good faith" immunity, similar to qualified immunity, applied to actions involving law enforcement officers.

With Rico v. State, 472 N.W.2d 100 (Minn. 1991), it became clear that the official immunity doctrine finds application even when law enforcement officers are not involved. In Rico, a disgruntled former employee of the Department of Veteran Affairs brought suit against the State and the commissioner of veteran's affairs alleging breach of an employment contract and wrongful discharge. It was alleged that the commissioner had intentionally committed acts which constituted illegal retaliation. The court, however, held that the commissioner's acts were not willful or malicious within the meaning of the official immunity doctrine. Id. In so doing, the Rico court adopted a standard that is remarkably similar to § 1983 qualified immunity:

In this sense, Gregg's actions would be intentional or willful. But the willful or malicious wrong exception to official immunity contemplates something more. The defendant must have reason to know that the challenged conduct is prohibited. The exception does not impose liability merely because an official intentionally commits an act that a court or a jury subsequently determines is wrong. Instead, the exception anticipates liability only when an official intentionally commits an act that he or she has reason to believe is prohibited.

Id. The Rico court then went on to cite the section 1983 standard: no liability unless the official's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Id., citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). While the Rico court carefully maintained that the doctrine of official immunity and qualified immunity are separate, the court nevertheless noted that federal decisions interpreting qualified immunity under § 1983 were "instructive." Id. at 108.

Police Chases

Another important Minnesota Supreme Court case, Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992), held that police officers who engaged in a dangerous high speed car chase of a fleeing suspect were immune from suit because of the official immunity doctrine. Further, the Pletan court defined the differences between official and discretionary

immunity as follows:

The discretion involved in official immunity is different from the policymaking type of discretion involved in discretionary function immunity afforded to governmental entities. Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires something more than the performance of "ministerial" duties.

Pletan, 494 N.W.2d at 40.

The Pletan court also established that official immunity applies to the governmental entity that employs the official as well as to the individual official. Id. at 43. The court noted that the public policy considerations underlying official immunity would be undermined if official immunity did not apply to the governmental entity as well as to the individual official. Id.

Pletan has been applied in a number of subsequent unreported cases involving police chases. It has also been extended to the related situation of emergency responders responding to medical emergencies. In the important case of Bailey v. City of St. Paul, 678 N.W.2d 697 (Minn. Ct. App. 2004), ambulance personnel that responded to medical emergency and made decisions in an emergency situation were protected by official immunity and vicarious official immunity was extended to the city. The court observed that if ambulance personnel driving to the scene of an emergency are entitled to official immunity, that those responding to the emergency should also be protected once they actually provide emergency treatment, citing Kari v. City of Maplewood 582 N.W.2d 921 (Minn. 1998).

Mumm v. Mornson, 708 N.W.2d 475 (Minn. 2006) complicated the analysis applicable to police chase cases. Mumm declined to extend official immunity to a situation where Minneapolis officers were said to have no objective reason to initiate or continue a chase. A pedestrian was killed when the officers decided to "take the driver out," something the court concluded was totally unjustified. Important to the court's decision was its conclusion that the chase violated the city's written chase policy. Mumm was later distinguished in a case involving the St. Paul Police Department's chase policy. Xia Yang v. Scott, No. A07-1921 (Minn. Ct. App. Nov. 25, 2008) (unpublished). In Xia Yang the court found that official immunity applied because the applicable multi-factor chase protocol could not be said to have been violated with malice.

Defenses to Official Immunity

Limitations on the doctrine of official immunity were noted in the case of Bauer v. State, 511 N.W.2d 447 (Minn. 1994). The court held that official immunity could not be applied

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to a common law defamation claim, observing that it did not appear that official immunity had ever been applied to public officials charged with defamation and noting that defamation had an intricate set of special rules which included a qualified privilege for remarks made on proper occasion. Bauer, 511 N.W.2d at 449.

The application of official immunity was similarly rejected in Waste Recovery Co-op v. County of Hennepin, 517 N.W.2d 329 (Minn. 1994), wherein the court found that an employee who failed to enforce statutes establishing absolute, certain, and imperative duties could not avail himself of the doctrine. Id. at 333. The Waste Recovery line of reasoning was further developed in Sletten v. Ramsey County, 675 N.W.2d 291 (Minn. Ct. App. 2004). In Sletten the city was not entitled to vicarious immunity where it failed to adhere to its own policies and applicable environmental regulations. The city operated a composting site. Waste pickups were not always made on time. The court found that city's failure to comply with its own rules concerning timeliness of the pickups deprived it of vicarious official immunity. Three Justices, Blatz, Page and Anderson, dissented.

Types of Governmental Employees Protected by Official Immunity

Employees other than law enforcement officers have been protected by the doctrine of official immunity in several cases. In Olson v. Ramsey County, 509 N.W.2d 368 (Minn. 1993), the court held that Ramsey County social workers were immune from a wrongful death claim upon the death of a child who had been abused by his mother and was subject to a case management plan intended to forestall further abuse. In Hyland v. State, 509 N.W.2d 561 (Minn. Ct. App. 1993), overruled on other grounds, Stresemann v. Jesson, 868 N.W.2d 32 (Minn. 2015) (overruling portion of decision applying absolute prosecutorial immunity to activities of investigator) the court held that MNDOT personnel conducting investigations pursuant to motor carrier statutes were entitled to official immunity for their acts within the scope of their investigation. Id. at 565. After Stresemann, Hyland will need to be cited with great care, though its official immunity discussion was not addressed in Stresemann. A city administrator was also permitted to claim official immunity for actions taken concerning negotiations of a contract for the sale of land in McDonough v. City of Rosemount, 503 N.W.2d 493 (Minn. Ct. App. 1993).

Even human rights claims may be barred by the doctrine of official immunity. In Beaulieu v. Moundsview, 518 N.W.2d 567 (Minn. 1994), the court held that the doctrine of official immunity is available to officials faced with Human Rights Act claims pursuant to Minn. Stat. § 363.03. Id. at 571. While the court noted that the defense of official immunity would be available, it nevertheless found that fact issues existed which precluded summary judgment. Id. at 573. Fact issues also precluded summary judgment in the case Soucek v. Banham, 503 N.W.2d 153 (Minn. Ct. App. 1993), a highly unusual case where Minneapolis police officers shot a German Shepherd and later claimed that they thought it was a wolf. Since there was a fact issue as to whether the Minneapolis police officers really believed that the German Shepherd was a wolf, official immunity

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could not be decided on summary judgment. Id. at 161.

In the context of an employment law claim, official immunity was applied to bar suit where the employer had acted in a good faith attempt to afford and employee accommodations. Mowatt v. County of Hennepin, No. C0-01-1518 (Minn. Ct. App. May 7, 2002) (unpublished). There the employer went to great lengths to accommodate plaintiff's serious medical condition, myasthenia gravis and was entitled to official immunity from claims that the employer should have provided additional accommodations, including permission for the employee to be absent on short notice.

Official immunity has also been held to bar a claim against an individual who participates in the commitment of someone under the Civil Commitment Act, Minn. Stat. § 253B. Mjolsness v. Riley, No. C1-94-356 (Minn. Ct. App. Dec. 6, 1994) (unpublished).

The 1996 Trio of Minnesota Supreme Court Official Immunity Cases

In 1996 the Minnesota Supreme Court handed down a series of cases that are important in defining the contours of official immunity.

One of the most important official immunity decisions is the Minnesota Supreme Court's decision in Watson v. Metropolitan Transit Comm'n, 553 N.W.2d 406 (Minn. 1996). There the court held that an MTC bus driver and the MTC were immune for decisions that a bus driver made while gang members were throwing a passenger out the window. The court mentioned that the driver's response was not "absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts."

Official immunity also barred suit against governmental entities in the case of Johnson v. State, 553 N.W.2d 40 (Minn. 1996). There a felon failed to report to a halfway house and murdered a young girl. The court found that official immunity applied.

Official immunity is a broad doctrine that can be asserted in a wide variety of cases involving alleged wrongful acts of government officials. With respect to "whistleblower claims," the Minnesota Supreme Court has held that official immunity would not apply where no individual, but instead a board terminated the employee. Janklow v. Minn. Bd. Of Examiners for Nursing Home Adm'rs., 552 N.W.2d 711 (Minn. 1996).

Highway Design Cases

Of great use in the defense of highway maintenance and design claims is Ireland v. Crow's Nest Yachts, 552 N.W.2d 269 (Minn. Ct. App. 1996). There the court applied the principles of official immunity to a claim that a warning sign and rumble strips should have been erected on a highway. The court held that these issues involved the exercise of

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professional judgment and discretion and therefore held that official immunity and vicarious official immunity barred the claim. However, in another case, a city employee's decision to place a barricade with a flasher rather than take other action was an action not protected by official immunity, because the court said the employee's actions did not involve the exercise of discretion. Dewitt v. Metropolitan Council, No. C6-01-2141 (Minn. Ct. App. Aug. 6, 2002)(unpublished).

Later, in Benson v. Itasca County, No. C1-02-1487 (Minn. Ct. App. May 6, 2003) (unpublished), the a decision not to locate a double arrow sign directly in front of the oncoming lane was protected by official immunity, pursuant to Zank. Imperfections in sign placement and condition were not sufficient to avoid the application of immunity.

One contrary case is Olmanson v. LeSeuer County, 673 N.W.2d 506 (Minn. Ct. App. 2004). There the court refused to extend official immunity to signing decision on snowmobile trails. The reasoning seems strained, however. The court refused to apply official immunity because there was no claim by the county that a county employee was attempting to implement a policy in a discretionary manner. This analysis seems weak, but when the Minnesota Supreme Court granted review of this case in March of 2004, it only reviewed the applicability of the ten-year statute of repose and did not revisit the Court of Appeals' official immunity analysis. Olmanson v. LeSeuer County, 693 N.W.2d 876 (Minn. 2005)

Vicarious Official Immunity

One question of particular significance is whether official immunity applies to the governmental entity itself. This is referred to as "vicarious official immunity." Vicarious official immunity allows the government to receive an employee's official immunity. S.L.D. v. Kranz, 498 N.W.2d 47, 51 (Minn. Ct. App. 1993). It is a policy question in each case whether to extend vicarious official immunity to the government. Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn.1992); see Olson v. Ramsey County, 509 N.W.2d 368, 372 (Minn. 1993) (county entitled to vicarious official immunity to avoid "the focus of a stifling attention on the [employee's] performance, to the serious detriment of that performance"); Ireland v. Crow's Nest Yachts, Inc., 552 N.W.2d 269, 274 (Minn. Ct. App. 1996) ("vicarious official immunity serves to avoid chilling the [employee's] exercise of his independent judgment by allowing him to act without fearing that his conduct may eventually be subject to review by the judiciary and may expose his employer to civil liability"), review denied (Minn. Sept. 20, 1996). Vicarious immunity may apply even if the public employee is not named in the suit. Anderson v. Anoka Hennepin Ind. School Dist., 678 N.W.2d 651 (Minn. 2004); Wiederholt v. City of Minneapolis, 581 N.W.2d 312, 316-17 (Minn. 1998). In many lawsuits the question of whether the court will agree to extend vicarious immunity to the governmental entity may be an important battleground.

Vicarious official immunity may be denied where the challenged conduct does not relate to an employee's assigned duties. See S.W. v. Spring Lake Park Sch. Dist. No. 16, 592 N.W.2d 870, 877 (Minn. Ct. App. 1999) aff'd, 606 N.W.2d 61 (Minn. 2000) (no vicarious official immunity where school district had not assigned a duty applicable to the employees' operational act).

One odd vicarious official immunity case was Meier v. City of Columbia Heights, 686 N.W.2d 858 (Minn. Ct. App. 2004). City employees cleaned out a garbage house. The homeowner sued, claiming damage to property. The court held that the plaintiff's claim was really one for failure to adopt a procedure to be used in abating garbage houses and analogized the situation to S.W. v. Spring Lake Park, where the failure to adopt a safety policy was not itself protected. The case was decided on vicarious official immunity, but the decision is in some respects difficult to grasp.

Sundry Types of Official Immunity Cases

Enactment of Permit Fees

Podruch v. State, 674 N.W.2d 252 (Minn. Ct. App. 2004), held that the Commissioner of Public Safety's decision to charge five dollars for issuance of handicapped permit parking card was protected by official immunity.

Training Drills

In Fedke v. City of Chaska, 685 N.W.2d 725 (Minn. Ct. App. 2004), a claim by a participant in a simulated emergency drill was barred by official immunity and vicarious official immunity. The court cited two other cases involving training exercises: Clingan v. Anoka County, No. CX-02-1049 (Minn. Ct. App. Jan. 21, 2003); Armstrong v. County of Sherburne, No. CO-00-732 (Minn. Ct. App. Dec.12, 2000). These cases had come to a similar conclusion and the court found their reasoning persuasive.

B. SECTION 1983 QUALIFIED IMMUNITY

One of the most burdensome types of actions that can be brought against government officials is a civil rights action pursuant to 42 U.S.C. § 1983, which provides:

Every person who under color of any statute, ordinance, regulation, custom or usage . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983. Plaintiffs frequently bring § 1983 claims along with their state tort

claim because proving a violation of § 1983 entitles them to attorney's fees. 42 U.S.C. § 1988. Even a nominal recovery by plaintiff can result in a huge award of attorney's fees. See, e.g., Riverside v. Rivera, 477 U.S. 561 (1986) (affirming an award of \$245,456.25 in attorneys' fees to prevailing civil rights plaintiff who obtained recovery of only \$33,350 in damages); Nephew v. Aurora, 830 F.2d 1547 (10th Cir. 1987) (award of \$12,500 in attorneys' fees was not excessive even though damage award was only \$1.00).

The most important defense available to governmental defendants in § 1983 litigation is qualified or "good faith" immunity. Qualified immunity is an affirmative defense to public officials sued for damages under 42 U.S.C. § 1983. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). The United States Supreme Court recognized the doctrine in Pierson v. Ray, 386 U.S. 547 (1967), where it permitted police officers to raise a "good faith" defense in a § 1983 action. The court later extended that decision to high-ranking government officials and held that the immunity analysis included both objective and subjective factors. Scheuer v. Rhodes, 416 U.S. 232 (1974). Soon after Scheuer, the court explicitly adopted a two-factor test whereby the immunity defense failed if officials either knew or reasonably should have known their action violated plaintiffs' clearly established constitutional rights or if they maliciously intended that result. Wood v. Strickland, 420 U.S. 308 (1975).

The qualified immunity standard was reformulated in Harlow v. Fitzgerald, 457 U.S. 800 (1982). There the court eliminated the subjective component of the qualified immunity tests. Harlow, 457 U.S. at 816-18. The court reasoned that to retain a subjective component was inconsistent with the purposes of the doctrine, namely protecting government officials from the burdens of discovery and trial. Id. After Harlow the test is whether the official's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. Further, after Harlow, it is clear that qualified immunity is a purely legal question conceptually distinct from an ordinary defense to the merits of plaintiff's claim. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Importantly, an order denying qualified immunity is immediately appealable. Further, issues of qualified immunity should be resolved at the earliest possible stages of litigation to shield officers from the disruptive effects of broad-ranging discovery and the effects of litigation. Elwood v. Rice County, 423 N.W.2d 671, 675 (Minn. 1988). Dismissal pursuant to the doctrine of qualified immunity is encouraged prior to discovery and can be obtained at that stage if the actions plaintiff alleges are wrongful are those a reasonable officer could have believed are lawful. Id.

In Malley v. Briggs, 475 U.S. 335 (1986), the U.S. Supreme Court stressed the objective reasonableness standard as the focus of qualified immunity analysis. Under Malley, the "good faith" inquiry is confined to the question of "whether a reasonably well trained officer would have known" the act was illegal. Malley, 475 U.S. at 334, citing United State v. Leon, 468 U.S. 987, 922 (1984). The Malley court also noted that immunity should be recognized "if officers of reasonable competence could disagree on this issue." Malley,

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475 U.S. at 341.

The case of Anderson v. Creighton, 483 U.S. 635 (1987), made it clear that, for qualified immunity not to apply, the official charged with violating a right must not only be aware of the existence of the right but a reasonable official in his position must understand that his conduct actually violates the right. Id. at 640. As the court noted in Stone v. Badgerow, 511 N.W.2d 747 (Minn. Ct. App. 1994),

A plaintiff does not overcome an official's claim of immunity by simply asserting a general constitutional right; the plaintiff must show that a reasonable official would have known that their specific action was in violation of clearly established law.

Stone, 511 N.W.2d at 751, citing Anderson v. Creighton, 483 U.S. at 641. The Stone court, citing Malley v. Briggs, also observed that:

The scope of the qualified immunity doctrine is sufficiently broad to protect "all but the plainly incompetent or those who knowingly violate the law."

Stone, 511 N.W.2d at 751, quoting Malley, 475 U.S. at 341.

Qualified immunity finds its most frequent application in instances involving allegations of police misconduct. In Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988), the court applied qualified immunity where reasonably well-trained officers could differ as to whether exigent circumstances justified entry into a residence. Elwood, 423 N.W.2d at 675-76. In Reuter v. City of New Hope, 449 N.W.2d 745, 750 (Minn. Ct. App. 1990), the court held that an officer who placed an emergency medical hold on a hysterical driver was entitled to qualified immunity. Qualified immunity has also been granted to police officials' decision to drive a front-end loader through the side of an apartment building to gain access to individuals suspected of illegal drug activity. McGovern v. City of Minneapolis, 480 N.W.2d 121 (Minn. Ct. App. 1992). The McGovern court noted that because of

the fortress-like condition of the premises, the likely presence of weapons and the need to safeguard the lives of officers, suspects, and any bystanders, exigent circumstances justify the mode of entry chosen by the officers.

Id. at 123-24.

Despite the breadth of the qualified immunity doctrine, a court has held that qualified immunity would not apply to an officer's split-second decision to shoot a suspect who is carrying a knife. Maras v. City of Brainerd, 502 N.W.2d 69 (Minn. Ct. App. 1993). In an odd bit of analysis, the Maras court noted:

the question is whether any reasonable police officer could determine that [the police officer] was sufficiently threatened so as to justify the use of deadly force. We conclude [he] was not sufficiently threatened. [The suspect] never raised the knife above his waist. None of the police officers felt that [another individual who was present] was in any danger. [The suspect] was obviously intoxicated and could barely stand. As a whole, reviewing the facts in a light most favorable to the trustee, Peterson's actions were relatively benign and did not justify the use of deadly force.

Maras, 502 N.W.2d at 77. The Court of Appeals' decision appears to ask police officers to place their lives in jeopardy when confronting suspects carrying weapons or face the prospect of civil liability. It was undisputed in Maras that the officer shouted at the suspect three to five times that he should drop the knife. The officer shot the suspect when the suspect was between five and fourteen feet away. Given the Malley court's holding that immunity should be recognized "if officers of reasonable competence could disagree on this issue," the Maras court's ruling seems somewhat suspect. Malley, 475 U.S. at 314. The court's decision in Maras is best explained by the vastly different factual versions of the incident that were related by plaintiff and the defendant officer. See Maras, 502 N.W.2d at 77. In other cases, however, the Court of Appeals has noted that

the focus for qualified immunity is not whether questions of fact exist. Rather, it is whether the officers violated a particularized law at the time of their conduct and whether no reasonable officer would have acted similarly.

Reuter v. City of New Hope, 449 N.W.2d 745, 750 (Minn. Ct. App. 1990).

The doctrine of qualified immunity has been applied to government officials other than law enforcement officers. In the context of political discharge claims, qualified immunity acts to bar claims arising out of political firings. Stone v. Badgerow, 511 N.W.2d 747 (Minn. Ct. App. 1994). An official enjoys qualified immunity from political discharge claims as long as the position "potentially concerns matters of partisan political interest and involved a least a modicum of policymaking responsibility, access to confidential information or official communication." Stone, 511 N.W.2d at 751, quoting Mandez-Palou Rohena-Betancow, 813 Fd.2d 1255, 1259 (1st Cir. 1987).

Qualified immunity is often the best line of defense in cases brought pursuant to 42 U.S.C. § 1983. The doctrine seems favored by the courts, is intended to be used prior to discovery, and permits appellate review of an adverse decision at an early stage in the litigation.

C. ABSOLUTE IMMUNITY

Certain governmental actions have been accorded "absolute immunity." "Absolute immunity" can take many different forms. In most instances, it arises out of judicial or quasi-judicial activities. But it is preferable to abandon the generic "absolute immunity" for a more specific name, such as "absolute judicial immunity" or "absolute prosecutorial immunity."

1. Absolute Judicial Immunity

The doctrine of absolute judicial immunity bars claims against judges for the decisions they make in their judicial capacity. Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947). This immunity applies even where the plaintiff alleges that a conspiracy exists. Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947); Linder v. Foster, 209 Minn. 43, 205 N.W. 299 (1940). Absolute judicial immunity is "rooted deeply in the common law." Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364, 368 (1955). It rests upon considerations of public policy, its purpose being to preserve the integrity and independence of the judiciary and assure that judges will act upon their convictions free from the apprehensions of possible consequences. Id. The immunity extended to judges is not limited to the judiciary, however.

[Absolute immunity] also extends to quasi-judicial officers,..., to grand and petit jurors in the discharge of their duties, ... to assessors upon whom is imposed the duty of valuing property for the purpose of levying taxes, ... to commissioners approved to appraise damages when property is taken under the right of eminent domain, ... [and] to prosecuting attorneys.

Linder v. Foster, 209 Minn. 43, 47, 295 N.W. 299, 301 (1940). Thus, absolute immunity as afforded the judiciary is the source of the other forms of absolute immunity that apply to various quasi-judicial activities.

2. Absolute Prosecutorial Immunity

Both state and federal courts recognize that a criminal prosecutor is absolutely immune from suit for actions connected with the charging or prosecution of a criminal case. See Imbler v. Pachtman, 424 U.S. 409 (1976); Myers v. Morris, 810

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F.2d 1437, 1445 (8th Cir. 1987); Brown v. Dayton Hudson Corp., 314 N.W.2d 210, 214 (Minn. 1981); Brotzler v. Scott County, 427 N.W.2d 685, 689 (Minn. Ct. App.1988). This doctrine of absolute prosecutorial or "quasi-judicial" immunity has long shielded prosecutors from civil litigation arising out of acts "intimately associated with the judicial phase of the criminal process...." Imbler, 424 U.S. at 430. This immunity not only protects prosecutors from allegations of improper charging decisions and unmeritorious prosecution, Brown, 314 N.W.2d at 214; but also from allegations of vindictive prosecution, Wahl v. Mciver, 773 F.2d 1169, 1173 (11th Cir. 1985); and prosecution based on malice, self interest, or illegal conduct, Myers, 810 F.2d at 1446.

The doctrine of absolute prosecutorial immunity was applied in Kipp v. Saetre, 454 N.W.2d 639 (Minn. Ct. App. 1990). The Kipp court noted that:

the ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to. . . liability. . . . To be sure this immunity does leave the genuinely wronged defendant without civil redress against the prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disservice the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Kipp, 454 N.W.2d at 643, quoting Imbler v. Pachtman, 424 U.S. 409 (1976).

Prosecutors' opponents, public defenders, are also entitled to absolute immunity. Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993). The Dziubak court noted that:

the public defender is appointed to protect the best interest of her or his client and must be free to exercise independent, discretionary judgment when representing the client without weighing every decision in terms of potential civil liability.

Id. at 775. In establishing absolute immunity for public defenders, the court rejected the contention that public defender liability was necessary to ensure the vigorous defense of indigents. The court noted that there were many differences between a public defender and ordinary private counsel: the public defender is appointed to represent a client and does not always enter into the relationship voluntarily; public defenders are limited in their representation by the resources available; and there is no disincentive for indigent clients to bring frivolous claims against public defenders. Id. at 776.

Minnesota courts also extend absolute immunity to investigative and administrative tasks performed at the direction of a prosecuting attorney when initiating criminal charges. Stresemann v. Jesson, 868 N.W.2d 32 (Minn. 2015) (holding that investigators must be assisting with initiation of prosecutions to be entitled to absolute immunity). Stresemann overruled earlier cases, including Barry v. Johnson, 350 N.W.2d 498, 499 (Minn. Ct. App. 1984) and Hyland v. State, 509 N.W.2d 561 (Minn. Ct. App. 1993), that had extended immunity to investigators that were not connected with the process of initiating charges. See also Carridine v. State, 511 N.W.2d 733 (Minn. 1994) (finding law enforcement officer not absolutely immune from defamatory statements made to the press, but absolutely immune for statements in police reports).

3. Other Forms of Absolute Immunity

Because judicial immunity is intended to protect the judicial process, it also extends to persons who are integral parts of that process. Sloper v. Dodge, 426 N.W.2d 478 (Minn. Ct. App. 1988). Court appointed psychiatrists and physicians who prepare and submit medical evaluations relating to judicial proceedings are entitled to absolute immunity. Koelln v. Nexus Res. Treatment Facility, 494 N.W.2d 914 (Minn. Ct. App. 1993). Further, court-appointed guardians ad litem are also entitled to absolute immunity for actions within the scope of their appointment. Tindell v. Rogosheske, 428 N.W.2d 386 (Minn. 1988) Absolute immunity has also been applied to court appointed therapists. Meyers v. Price, 463 N.W.2d 773 (Minn. Ct. App. 1990). Courts have refused, however, to extend the doctrine of absolute immunity so far that it necessarily applies to private residential treatment facilities to which offenders are placed. Koelln v. Nexus Res. Treatment Facility, 494 N.W.2d 914 (Minn. Ct. App. 1993)

D. THE PUBLIC DUTY DOCTRINE

The public duty doctrine is not technically an immunity at all. Since it is a broad-based public policy doctrine that bars claims brought against governmental entities, it warrants consideration alongside immunities. One practical difference that arises from the fact that it is not technically an immunity is the fact that an interlocutory appeal from a motion denying summary judgment based upon the public duty doctrine is not appropriate. It should also be noted that the public duty doctrine is available to private actors as well as government entities. Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979); In re Norwest Bank Fire Cases, 410 N.W.2d 875 (Minn. Ct. App. 1987). The Cracraft court noted that

[t]he concept of a special duty is not unique to government torts [and] it is somewhat unfortunate that the terms "public" duty and "special" duty

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have been used, in as much that they give the misleading impression that the distinction applies only to governmental tortfeasors.

Cracraft, 279 N.W.2d at 806. While it is true that the public duty doctrine is available to private as well as public entities, it is undeniable that the public duty doctrine finds its most common application in cases involving governmental entities. The public duty doctrine recognizes the basic principle of negligence law that public duties created by statute cannot be the basis of a negligence action. Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 805 (Minn. 1979). Litigants attempting to recover from governmental authorities must prove that those authorities breached a duty owed to them in their individual capacity and not that it merely breached an obligation owed to the general public. Hoffert v. Owatonna Inn Towne Motel, 199 N.W.2d 158 (Minn. 1972).

The tests that applies to determining whether a public duty exists was stated in Cracraft, wherein the Minnesota Supreme Court held that city fire inspections were public duties which did not create a special duty upon which liability could be imposed against a municipality. Cracraft, 279 N.W.2d at 808. The Cracraft court identified four factors that should be considered in determining whether a special duty, one that would form the basis for liability, exists:

1. Whether the alleged tortfeasor had actual knowledge of the dangerous condition;
2. Whether the injured party relied upon the representations and conduct of the alleged tortfeasor;
3. Whether a statute exists which sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and
4. Whether the acts or omissions of the tortfeasor increase the risk of harm.

Id. The Cracraft court applied these factors as a balancing test to conclude that no liability exists for a municipality for negligent fire inspections that allegedly lead to a property loss. Id.

The public duty doctrine was revisited in Andrade v. Ellefson, 391 N.W.2d 836 (Minn. 1986), where a parent sued a county for negligent inspection of a daycare home. The court set forth the Cracraft factors and analyzed each of the factors individually at some length. Id. at 841-43. The court concluded that certain daycare statutes created a "special duty" within the meaning of the Cracraft test since these statutes were undoubtedly

enacted for the protection of a particular class of persons rather than the public as a whole. Andrade, 391 N.W.2d at 837. Andrade makes it clear that the factors are not prerequisites to establishing a special duty, but are instead factors to be analyzed under a totality of circumstances. Id. at 841-43. In conducting its analysis, the Andrade court found that one of the four factors, the third factor, was decisive. Id. at 842-43. In so doing, it might be argued that the court created a "superfactor" which can trump all the other factors, even when analysis of other factors undeniably favors the governmental entity.

Perhaps the most common use of the public duty doctrine has been in relation to fires and fire fighting. Courts have applied the public duty doctrine to fire-fighting and have held governmental entities not liable for fire-fighting activities in Dahlmeier v. City of Dayton, 441 N.W.2d 534 (Minn. Ct. App. 1989) and Frank's Livestock v. City of Wells, 431 N.W.2d 574 (Minn. Ct. App. 1988). These cases acknowledge the continuing existence of the public duty doctrine and conclude that there is no liability on behalf of the governmental entity. More recently, however, a different result obtained in Invest Cast, Inc. v. City of Blaine, 471 N.W.2d 368 (Minn. Ct. App. 1991), where the court held that a municipality could be liable for its selection of fire-fighting methods. While the Invest Cast court noted that many of the Fire Department's decisions were protected by discretionary immunity, it also noted that decisions regarding fire-fighting methods are tactical decisions without larger policy implications. Id. at 371. In its analysis, the Invest Cast court places little emphasis on the public duty doctrine and, in an offhand fashion, dismisses the public duty doctrine with the comment that "the special duty idea is simply a way to avoid sovereign immunity." Id. The court, however, never addresses the fact that the public duty doctrine has retained vitality after abolishment of sovereign immunity.

The public duty doctrine, however, has found application in contexts other than fire fighting. For instance, the court held, in Flour Exchange Building Corp. v. State, 524 N.W.2d 496 (Minn. Ct. App. 1994), that the Minnesota building preference statute, which urges the use of "suitable historic buildings" for governmental offices, did not create a private cause of action, since the statute created only a public duty. Id. at 500. The court noted that the "Minnesota preference statute is designed not for the benefit of particular land-owners, but rather for the benefit of the general public." Id. In Danielson v. City of Brooklyn Park, the court held that, despite a city ordinance that requires the city to inspect and order removal of trees infected with Dutch Elm disease, a municipality could not be liable to a homeowner who injured himself while trying to remove a tree which the city had erroneously ordered should be cut down. Danielson, 516 N.W.2d at 204-05. The court observed:

We accept, in this case, that the city incorrectly diagnosed Dutch Elm disease in the Danielsons' tree. We conclude, nonetheless, as did the court in Cracraft, that because the ordinance in question was enacted for the

benefit of the general public, and not for the benefit of a special class of which the Danielsons are members, the Danielsons cannot recover against the city for the injuries they suffered.

Id.

The public duty doctrine is a vital doctrine that acts to bar suits based on duties owed to the public at large rather than individuals. Whenever a claimant asserts a claim based upon violation of a particular statutory provision, careful attorneys and claim representatives will scrutinize the claim to determine whether the statute referred to creates a "special" or instead a "public" duty.

CONCLUSION

The numerous immunities available to governmental defendants form a maze for those defending governmental claims and those prosecuting them alike. Those unfamiliar with them can face a nightmare. Without careful analysis one may confuse separate immunity doctrines, fail to recognize the applicability of doctrines to specific cases, and fail to recognize the unique effects that assertions of immunity can have on the procedural manner in which a case proceeds. The application of immunities to specific cases should be considered from the inception of the case. Governmental entities have arguable immunity defenses in nearly every case and aggressive use of immunities in defending cases can deflect a very high percentage of claims and cases brought against governmental entities.

CHAPTER 466
TORT LIABILITY, POLITICAL SUBDIVISIONS

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466.01 DEFINITIONS.

Subdivision 1. **Municipality.** For the purposes of sections 466.01 to 466.15, "municipality" means any city, whether organized under home rule charter or otherwise, any county, town, public authority, public corporation, nonprofit firefighting corporation that has associated with it a relief association as defined in section 424A.001, subdivision 4, special district, school district, however organized, county agricultural society organized pursuant to chapter 38, joint powers board or organization created under section 471.59 or other statute, public library, regional public library system, multicounty multitype library system, the following local collaboratives whose plans have been approved by the Children's Cabinet: family services collaboratives established under section 124D.23, children's mental health collaboratives established under sections 245.491 to 245.495, or a collaborative established by the merger of a children's mental health collaborative and a family services collaborative, other political subdivision, community action agency, or a limited partnership in which a community action agency is the sole general partner.

Subd. 2. **Governing body of a town, school district.** For the purposes of sections 466.01 to 466.15, the "governing body of a town" means the board of supervisors thereof; "school district" includes an unorganized territory as defined in Minnesota Statutes 1961, section 120.02, subdivision 17.

Subd. 3. **Release, hazardous substance.** For the purposes of sections 466.01 to 466.15, "release" and "hazardous substance" have the meanings given in section 115B.02.

Subd. 4. [Repealed, 1997 c 7 art 1 s 140]

Subd. 5. [Repealed, 1997 c 7 art 1 s 140]

Subd. 6. **Employee, officer, or agent.** For the purposes of sections 466.01 to 466.15, "employee," "officer," or "agent" means a present or former employee, officer, or agent of a municipality, or other person acting on behalf of the municipality in an official capacity, temporarily or permanently, with or without compensation, but does not include an independent contractor other than a nonprofit firefighting corporation that has associated with it a relief association as defined in section 424A.001, subdivision 4. "Employee" includes court administrators who are not under section 480.181, subdivision 1, paragraph (b), and their staff under chapter 485, district administration staff in the Second and Fourth Judicial Districts, and other employees within the court system whose salaries are paid by the county, other than employees who remain on the county payroll under section 480.181, subdivision 2.

History: 1963 c 798 s 1; 1973 c 123 art 5 s 7; 1978 c 659 s 3; 1983 c 121 s 27; 1983 c 280 s 2; 1986 c 395 s 12,13; 1986 c 455 s 64; 1988 c 708 s 7; 1989 c 335 art 3 s 12; 1994 c 632 art 4 s 75; 1996 c 412 art 3 s 34; 1996 c 448 art 6 s 1,2; 1997 c 203 art 5 s 23; 1998 c 397 art 11 s 3; 1999 c 205 art 1 s 59; 1999 c 216 art 7 s 25; 1Sp2003 c 14 art 11 s 11; 2004 c 193 s 1

466.02 TORT LIABILITY.

Subject to the limitations of sections 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.

History: 1963c798 s 2; 1976 c 2s 142

466.03 EXCEPTIONS.

Subdivision 1. **Scope.** Section 466.02 does not apply to any claim enumerated in this section. As to any such claim every municipality shall be liable only in accordance with the applicable statute and where there is no such statute, every municipality shall be immune from liability.

Subd. 2. [Repealed, 1987 c 346 s 18]

Subd. 3. **Tax claims.** Any claim in connection with the assessment and collection of taxes.

Subd. 4. **Accumulations of snow and ice.** (a) Any claim based on snow or ice conditions on any highway or public sidewalk that does not abut a publicly owned building or publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of the municipality.

(b) Notwithstanding paragraph (a), a municipality that owns or leases a building or parking lot in another municipality is not immune from a claim based on snow or ice conditions on a public sidewalk abutting the building or parking lot, but the other municipality is immune, except when the condition is affirmatively caused by its own negligent acts.

Subd. 5. **Execution of statute.** Any claim based upon an act or omission of an officer or employee, exercising due care, in the execution of a valid or invalid statute, charter, ordinance, resolution, or rule.

Subd. 6. **Discretionary acts.** Any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

Subd. 6a. **Driving under the influence; custody of motor vehicle.** Any claim for which recovery is prohibited by section 169A.48, subdivision 2.

Subd. 6b. **Unimproved property.** Any claim based upon the condition of unimproved real property owned by the municipality.

Subd. 6c. **Water access sites.** Any claim based upon the construction, operation, or maintenance by a municipality of a water access site created by the Iron Range Resources and Rehabilitation Board. A water access site under this subdivision that provides access to

an idled, water filled mine pit also includes the entire water filled area of the pit, and, further, claims related to a mine pit water access site under this subdivision include those based upon the caving or slumping of mine pit walls.

Subd. 6d. Licensing of providers. A claim against a municipality based on the failure of a provider to meet the standards needed for a license to operate a day care facility under chapter 245A for children, unless the municipality had actual knowledge of a failure to meet licensing standards that resulted in a dangerous condition that foreseeably threatened the plaintiff. A municipality shall be immune from liability for a claim arising out of a provider's use of a swimming pool located at a family day care or group family day care home under section 245A.14, subdivision 10, unless the municipality had actual knowledge of a provider's failure to meet the licensing standards under section 245A.14, subdivision 10, paragraph (a), clauses (1) to (3), that resulted in a dangerous condition that foreseeably threatened the plaintiff.

Subd. 6e. Parks and recreation areas. Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or from any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Subd. 6f. Beach or pool equipment. (a) Subject to paragraphs (b) and (c), any claim based upon an injury arising out of the use by any person of a diving board, diving platform, diving raft, water slide, nonwater slide, or dock installed at a beach or swimming pool owned, leased, or operated by a municipality other than a school district, if the injury occurred when the beach or swimming pool was closed as indicated by a sign posted at the beach or pool.

(b) A municipality has a duty to use reasonable care to warn trespassers of any danger or risk involved with the use of beach or pool equipment described in paragraph (a) if the municipality:

- (1) knows or has reason to know that trespassers regularly use certain portions of the beach or pool equipment;
- (2) installs, operates, or maintains the equipment in a way known as likely to cause death or serious bodily harm; and
- (3) has reason to believe trespassers would not discover the risks involved in the use of the equipment.

The requirements of this paragraph do not apply if a trespasser knows or has reason to know of the condition of the equipment and the risk involved in its use.

(c) Nothing in this subdivision limits the liability of a municipality for conduct that would entitle trespassing children to damages against a private person.

Subd. 7. Other immunity. Any claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute.

Subd. 8. Other than property, personal injury, death. Any claim for a loss

other than injury to or loss of property or personal injury or death.

Subd. 9. **Welfare benefits; exceptions.** Any claim for a loss of benefits or compensation due under a program of public assistance or public welfare, except where municipal compensation for loss is expressly required by federal law in order for the municipality to receive federal grants-in-aid.

Subd. 10. **Municipal authorization standard not met.** Any claim for a loss based on the failure of any person to meet the standards needed for a license, permit, or other authorization issued by the municipality or its agents.

Subd. 11. **Usual care and treatment, hospital, corrections.** Any claim for a loss based on the usual care and treatment, or lack of care and treatment, of any person at a municipal hospital or corrections facility where reasonable use of available funds has been made to provide care.

Subd. 12. **Loss by municipal patient or inmate.** Any claim for a loss, damage, or destruction of property of a patient or inmate of a municipal institution.

Subd. 13. **Unimproved realty, old mines.** Any claim for a loss caused by the condition of unimproved real property owned by a municipality, which means land that the municipality has not improved, land that is owned or administered by the municipality that contains idled or abandoned mine pits or shafts, and appurtenances, fixtures, and attachments to land that the municipality has neither affixed nor improved.

Subd. 14. **Arrestee's motor vehicle; care and custody.** Any claim for a loss for which recovery is prohibited by section 169A.48, subdivision 2.

Subd. 15. **Section 3.736-like claim.** Any claim against a municipality, if the same claim would be excluded under section 3.736, if brought against the state.

Subd. 16. **Special vehicles; exception.** Any claim against a county, arising from the operation of an all-terrain vehicle, as defined in section 84.92, subdivision 8, an off-road vehicle, as defined in section 84.797, subdivision 7, or an off-highway motorcycle on land administered by a county under chapter 280, 281, or 282, except that the county is liable for conduct that would entitle a trespasser to damages against a private person.

Subd. 17. **Logging roads.** Any claim arising out of a person's use of a logging road on public land that is maintained exclusively to provide access to timber on the land by harvesters of the timber, and is not signed or otherwise held out to the public as a public highway.

Subd. 18. **School building security.** Any claim based on injury arising out of a decision by a school or school district to obtain a fire code variance for purposes of school building security, if the decision was made in good faith and in accordance with applicable law governing variances.

Subd. 19. **Emergency medical dispatch.** Any claim based upon the acts or omissions of a 911 telecommunicator or dispatcher, who is certified in emergency medical dispatch by a program incorporating nationally recognized standards, acting in good faith in providing prearrival medical instruction based upon the emergency medical dispatch protocols adopted by the dispatching agency.

Subd. 20. **Use of land held under section 473.167.** Any claim based on the condition, use, or maintenance of land acquired and held by the municipality under section 473.167. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

Subd. 21. **Geographic information systems (GIS) data.** (a) Any claim against a municipality, based on alleged or actual inaccuracies in geographic information systems data, arising from the public's use of GIS data, if the municipality provides a disclaimer of the accuracy of the information at any point of initial contact with a geographic information system to which the public has general access.

(b) Geographic information systems data is government data subject to the presumption of section 13.01, subdivision 3. GIS data is data generated by a computer database or system that is designed to electronically capture, organize, store, update, manipulate, analyze, and display all forms of geographically referenced information that is compiled, from private or public sources, either alone or in cooperation with other public or private entities, for use by a municipality. GIS data is accurate for its intended use by a municipality and may be inaccurate for other uses.

Subd. 22. **Highway right-of-way.** Any claim for a loss involving or arising out of the use or operation of a recreational motor vehicle, as defined in section 84.90, subdivision 1, within the right-of-way of a road or highway as defined in section 160.02, subdivision 26, except that the municipality is liable for conduct that would entitle a trespasser to damages against a private person.

History: 1963 c 798 s 3; 1975 c 359 s 23; 1982 c 423 s 13; 1983 c 362 s 1; 1985 c 248 s 70; 1Sp1985 c 13 s 346; 1986 c 395 s 14; 1986 c 455 s 65-74; 1988 c 530 s 9,10; 1989 c 331 s 24; 1991 c 162 s 1; 1991 c 313 s 2; 1993 c 311 art 1 s 15; art 2 s 15; 1995 c 226 art 3 s 46; 1997 c 7 art 1 s 141; 1999 c 108 s 1; 1999 c 188 s 1; 1999 c 230 s 36; 2000 c 468 s 27; 2000 c 478 art 2 s 7; 1Sp2001 c 8 art 2 s 68; 2002 c 333 s 3

466.04 MAXIMUM LIABILITY.

Subdivision 1. **Limits; punitive damages.** (a) Liability of any municipality on any claim within the scope of sections 466.01 to 466.15 shall not exceed:

(1) \$300,000 when the claim is one for death by wrongful act or omission and \$300,000 to any claimant in any other case, for claims arising before January 1, 2008;

(2) \$400,000 when the claim is one for death by wrongful act or omission and \$400,000 to any claimant in any other case, for claims arising on or after January 1, 2008, and before July 1, 2009;

(3) \$500,000 when the claim is one for death by wrongful act or omission and \$500,000 to any claimant in any other case, for claims arising on or after July 1, 2009;

(4) \$750,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 1998, and before January 1, 2000;

(5) \$1,000,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2000, and before January 1, 2008;

(6) \$1,200,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2008, and before July 1, 2009;

(7) \$1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009; or

(8) twice the limits provided in clauses (1) to (7) when the claim arises out of the release or threatened release of a hazardous substance, whether the claim is brought under sections 115B.01 to 115B.15 or under any other law.

(b) No award for damages on any such claim shall include punitive damages.

Subd. 1a. Officers and employees. The liability of an officer or an employee of any municipality for a tort arising out of an alleged act or omission occurring in the performance of duty shall not exceed the limits set forth in subdivision 1, unless the officer or employee provides professional services and also is employed in the profession for compensation by a person or persons other than the municipality.

Subd. 1b. Total claim. The total liability of the municipality on a claim against it and against its officers or employees arising out of a single occurrence shall not exceed the limits set forth in subdivision 1.

Subd. 2. Inclusions. The limitation imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

Subd. 3. Disposition of multiple claims. Where the amount awarded to or settled upon multiple claimants exceeds the applicable limit under subdivision 1, paragraph (a), clauses (2) to (4), any party may apply to any district court to apportion to each claimant a proper share of the total amount limited by subdivision 1. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to each bears to the aggregate awards and settlements for all claims arising out of the occurrence.

History: 1963 c 798 s 4; 1976 c 264 s 1-3; 1983 c 121 s 28; 1983 c 331 s 2,3; 1986 c 444; 1989 c 325 s50; 1997c210s 3,4; 2006 c232s 2

466.05 NOTICE OF CLAIM.

Subdivision 1. Notice required. Except as provided in subdivision 2, every person, whether plaintiff, defendant or third-party plaintiff or defendant, who claims damages from any municipality or municipal employee acting within the scope of employment for or on account of any loss or injury within the scope of section 466.02 shall cause to be presented to the governing body of the municipality within 180 days after the alleged loss or injury is discovered a notice stating the time, place and circumstances thereof, the names of the municipal employees known to be involved, and the amount of compensation or other relief demanded. Actual notice of sufficient facts to reasonably put the governing body of the municipality or its insurer on notice of a possible claim shall be construed to comply with the notice requirements of this section. Failure to state the amount of compensation or other relief demanded does not invalidate the notice; but in such case, the claimant shall furnish full information regarding the nature and extent of the injuries and damages within 15 days after demand by the municipality. The time for giving such notice does not include the time, during which the person injured is incapacitated by the injury from giving the notice.

Subd. 2. Claims for wrongful death; notice. When the claim is one for death by

wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin, or the consular officer of the foreign country of which the deceased was a citizen, within one year after the alleged injury or loss resulting in such death; if the person for whose death the claim is made has presented a notice that would have been sufficient had the person lived an action for wrongful death may be brought without any additional notice.

History: 1963 c 798 s 5; 1974c311 s 1; 1976 c 264s 4,5; 1986 c 444; 1986 c 455s 75; 1991 c 199 art 1 s 74

466.06 LIABILITY INSURANCE.

The governing body of any municipality may procure insurance against liability of the municipality and its officers, employees, and agents for damages, including punitive damages, resulting from its torts and those of its officers, employees, and agents, including torts specified in section 466.03 for which the municipality is immune from liability. The insurance may provide protection in excess of the limit of liability imposed by section 466.04. If a municipality other than a school district has the authority to levy taxes, the premium costs for such insurance may be levied in excess of any per capita or local tax rate tax limitation imposed by statute or charter. Any independent board or commission in the municipality having authority to disburse funds for a particular municipal function without approval of the governing body may similarly procure liability insurance with respect to the field of its operation. The procurement of such insurance constitutes a waiver of the limits of governmental liability under section 466.04 only to the extent that valid and collectible insurance, including where applicable, proceeds from the Minnesota Insurance Guaranty Association, exceeds those limits and covers the claim. The purchase of insurance has no other effect on the liability of the municipality or its employees. Procurement of commercial insurance, participation in a self-insurance pool pursuant to section 471.981, or provision for an individual self-insurance plan with or without a reserve fund or reinsurance shall not constitute a waiver of any governmental immunities or exclusions.

History: 1963 c 798 s 6; 1977 c 447 art 6 s 11; 1983 c 314 art 6 s 30; 1984 c 463 art 6 s 12; 1987 c 79 s 1; 1987 c 260 s 1; 1987 c 344 s 9; 1987 c 398 art 1 s 22; 1988 c 719 art 5 s 84; 1Sp1989 c 1 art 2 s 11; 1992 c 513 art 4 s 44; 2006 c 212 art 1 s 18

466.07 INDEMNIFICATION.

Subdivision 1. **Indemnification required.** Subject to the limitations in section 466.04, a municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee:

- (1) was acting in the performance of the duties of the position; and
- (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

Notwithstanding any provisions to the contrary in section 123B.25, paragraph (b), or 466.12, this section applies to all school districts, however organized.

Subd. 1a. [Repealed, 1987 c 79 s 3]

Subd. 2. [Repealed, 1987 c 79 s 3]

Subd. 3. **Effect on other laws.** This section does not repeal or modify Minnesota Statutes 1961, sections 471.44, 471.45 and 471.86.

Subd. 4. [Repealed, 1987 c 79 s 3]

History: 1963c798s 7; 1979c205s 1; 1986c444; 1986c 455s76; 1987c 79s2; 1987 c 346 s 3; 1998 c 397 art 11 s 3

466.08 COMPROMISE OF CLAIMS.

Notwithstanding sections 466.03 and 466.06, the governing body of any municipality, the administrator of a self-insurance pool, or the authorized representative of a private insurance carrier may compromise, adjust and settle tort claims against the municipality for damages under section 466.02 and may, subject to procedural requirements imposed by law or charter, appropriate money for the payment of amounts agreed upon. When the amount of a settlement exceeds \$10,000, the settlement shall not be effective until approved by the district court.

History: 1963 c 798 s 8; 1987 c 260 s 2; 1990 c 555 s 12

466.09 PAYMENT OF JUDGMENTS.

When a judgment is entered against or a settlement is made by a municipality for a claim within the scope of section 466.02, payment shall be made and the same remedies shall apply in case of nonpayment as in the case of other judgments or settlements against the municipality. If the municipality has the authority to levy taxes and the judgment or settlement is unpaid at the time of the annual tax levy, the governing body shall, if it finds that other funds are not available for payment of the judgment, levy a tax sufficient to pay the judgment or settlement and interest accruing thereon to the expected time of payment. Such tax may be levied in excess of any per capita or local tax rate tax limitation imposed by statute or charter.

History: 1963 c 798 s 9; 1988 c 719 art 5 s 84; 1Sp1989 c 1 art 2 s 11

466.10 [Repealed, 1996 c 310 s 1]

466.101 LAW ENFORCEMENT COSTS.

When costs are assessed against a municipality for injuries incurred or other medical expenses connected with the arrest of individuals violating Minnesota Statutes, the municipality responsible for the hiring, firing, training, and control of the law enforcement and other employees involved in the arrest is responsible for those costs.

History: 1986 c 455 s 77

466.11 RELATION TO CHARTERS AND SPECIAL LAWS.

Sections 466.01 to 466.15 are exclusive of and supersede all home rule charter provisions and special laws on the same subject heretofore and hereafter adopted.

History: 1963 c 798 s 11

466.12 MS 2006 [Expired, 1963 c 798 s 12; 1965 c 748 s 1; 1969 c 826 s 1-3; 1973 c 123 art 5 s 7; 1974 c 472 s 1; 1996 c 310 s 1]

466.13 [Expired]

466.131 INDEMNIFICATION BY STATE.

Until July 1, 1987, a municipality is an employee of the state for purposes of the indemnification provisions of section 3.736, subdivision 9, when the municipality is required by the Public Welfare Licensing Act and rules promulgated under it to inspect or investigate a provider. After July 1, 1987, a municipality is an employee of the state for purposes of the indemnification provisions of section 3.736, subdivision 9, when the municipality is required by sections 245A.01 to 245A.16, the Human Services Licensing Act, and rules adopted under it to inspect or investigate a provider, and the municipality has been duly certified under standards for certification developed by the commissioner of human services.

History: 1986c395 s 15;1992 c464art1 s 45

466.132 INDEMNIFICATION BY STATE.

Municipalities, when performing, as required or mandated by state law, inspections or investigations of persons prior to the issuance of state licenses, are employees of the state for purposes of the indemnification provisions of section 3.736, subdivision 9. A municipality is not, however, an employee of the state for purposes of this section if in hiring, supervising, or continuing to employ the person performing an inspection or investigation for the municipality, the municipality was clearly negligent. In no event shall the state be obligated to defend or indemnify a municipality for inspections or investigations relating to licensing to the extent of insurance purchased by the municipality covering liability therefor. The municipality's right to indemnity shall not be considered a waiver of the limitations, defenses, and immunities available to the municipality and state by law.

History: 1986 c 455s 90;1988c 411 s 8

466.14 [Expired]**466.15 CIVIL DAMAGES ACT, APPLICATION.**

Sections 466.01 to 466.15 do not modify section 340A.801.

History: 1963 c 798 s 15; 1985 c 305 art 12 s 5; 1Sp1985 c 16 art 2 s 26;

3.736 TORT CLAIMS.

Subdivision 1. **General rule.** The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment or a peace officer who is not acting on behalf of a private employer and who is acting in good faith under section 629.40, subdivision 4, under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial, quasi-judicial, or legislative immunity except to the extent provided in subdivision 8.

Subd.2. **Procedure.** Claims of various kinds shall be considered and paid only in accordance with the statutory procedures provided. If there is no other applicable statute, a claim shall be brought under this section as a civil action in the courts of the state.

Subd. 3. **Exclusions.** Without intent to preclude the courts from finding additional cases where the state and its employees should not, in equity and good conscience, pay compensation for personal injuries or property losses, the legislature declares that the state and its employees are not liable for the following losses:

(a) a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule;

(b) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused;

(c) a loss in connection with the assessment and collection of taxes;

(d) a loss caused by snow or ice conditions on a highway or public sidewalk that does not abut a publicly owned building or a publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of a state employee;

(e) a loss caused by wild animals in their natural state, except as provided in section 3.7371;

(f) a loss other than injury to or loss of property or personal injury or death;

(g) a loss caused by the condition of unimproved real property owned by the state, which means land that the state has not improved, state land that contains idled or abandoned mine pits or shafts, and appurtenances, fixtures, and attachments to land that the state has neither affixed nor improved;

(h) a loss involving or arising out of the use or operation of a recreational motor vehicle, as defined in section 84.90, subdivision 1, within the right-of-way of a trunk highway, as defined in section 160.02, except that the state is liable for conduct that would entitle a trespasser to damages against a private person;

(i) a loss incurred by a user arising from the construction, operation, or maintenance of the outdoor recreation system, as defined in section 86A.04, or for a loss arising from the construction, operation, maintenance, or administration of grants-in-aid trails as defined in section 85.018, or for a loss arising from the construction, operation, or maintenance of a water access site created by the Iron Range Resources and Rehabilitation Board, except that the state is liable for conduct that would entitle a trespasser to damages against a private person. For the purposes of this clause, a water access site, as defined in section 86A.04 or created by the Iron Range Resources and Rehabilitation Board, that provides access to an

idled, water filled mine pit, also includes the entire water filled area of the pit and, further, includes losses caused by the caving or slumping of the mine pit walls;

(j) a loss of benefits or compensation due under a program of public assistance or public welfare, except if state compensation for loss is expressly required by federal law in order for the state to receive federal grants-in-aid;

(k) a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the state or its agents;

(l) a loss based on the usual care and treatment, or lack of care and treatment, of a person at a state hospital or state corrections facility where reasonable use of available appropriations has been made to provide care;

(m) loss, damage, or destruction of property of a patient or inmate of a state institution;

(n) a loss for which recovery is prohibited by section 169A.48, subdivision 2;

(o) a loss caused by an aeration, bubbler, water circulation, or similar system used to increase dissolved oxygen or maintain open water on the ice of public waters, that is operated under a permit issued by the commissioner of natural resources;

(p) a loss incurred by a visitor to the Minnesota Zoological Garden, except that the state is liable for conduct that would entitle a trespasser to damages against a private person;

(q) a loss arising out of a person's use of a logging road on public land that is maintained exclusively to provide access to timber on that land by harvesters of the timber, and is not signed or otherwise held out to the public as a public highway; and

(r) a loss incurred by a user of property owned, leased, or otherwise controlled by the Minnesota National Guard or the Department of Military Affairs, except that the state is liable for conduct that would entitle a trespasser to damages against a private person.

The state will not pay punitive damages.

Subd. 4. Limits. The total liability of the state and its employees acting within the scope of their employment on any tort claim shall not exceed:

(a) \$300,000 when the claim is one for death by wrongful act or omission and \$300,000 to any claimant in any other case, for claims arising before August 1, 2007;

(b) \$400,000 when the claim is one for death by wrongful act or omission and \$400,000 to any claimant in any other case, for claims arising on or after August 1, 2007, and before July 1, 2009;

(c) \$500,000 when the claim is one for death by wrongful act or omission and \$500,000 to any claimant in any other case, for claims arising on or after July 1, 2009;

(d) \$750,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 1998, and before January 1, 2000;

(e) \$1,000,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2000, and before January 1, 2008;

(f) \$1,200,000 for any number of claims arising out of a single occurrence, for claims arising on or after January 1, 2008, and before July 1, 2009; or

(g) \$1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009.

If the amount awarded to or settled upon multiple claimants exceeds the applicable limit under clause (d), (e), (f), or (g), any party may apply to the district court to apportion to each claimant a proper share of the amount available under the applicable limit under clause (d), (e), (f), or (g). The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement bears to the aggregate awards and settlements for all claims arising out of the occurrence.

The limitation imposed by this subdivision on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

Subd. 4a. Securities claims limits. The total liability of the state and its employees acting within the scope of their employment on any claim of whatever matter arising from the issuance and sale of securities by the state shall not exceed:

(a) \$100,000 to any one person or

(b) \$500,000 to all claimants in respect of the securities of the same series.

The limitations in clauses (a) and (b) shall not affect the obligation of the issuing state entity to pay the indebtedness under the securities in accordance with their terms and from the sources pledged to their payment.

Subd. 5. Notice required. Except as provided in subdivision 6, every person, whether plaintiff, defendant or third-party plaintiff or defendant, who claims compensation from the state or a state employee acting within the scope of employment for or on account of any loss or injury shall present to the attorney general or, in the case of a claim against the University of Minnesota, to the person designated by the regents of the university as the university attorney, and any state employee from whom the claimant will seek compensation, within 180 days after the alleged loss or injury is discovered, a notice stating its time, place and circumstances, the names of any state employees known to be involved, and the amount of compensation or other relief demanded. Actual notice of sufficient facts to reasonably put the state or its insurer on notice of a possible claim complies with the notice requirements of this section. Failure to state the amount of compensation or other relief demanded does not invalidate the notice, but the claimant shall furnish full information available regarding the nature and extent of the injuries and damages within 15 days after demand by the state. The time for giving the notice does not include the time during which the person injured is incapacitated by the injury from giving the notice.

Subd. 6. Claims for wrongful death; notice. When the claim is one for death by wrongful act or omission, the notice may be presented by the personal representative, surviving spouse, or next of kin, or the consular officer of the foreign country of which the deceased was a citizen, within one year after the alleged injury or loss resulting in the death. If the person for whose death the claim is made has presented a notice that would have been sufficient had the person lived, an action for wrongful death may be brought without additional notice.

Subd. 7. Payment. A state agency, including an entity defined as part of the state in section 3.732, subdivision 1, clause (1), incurring a tort claim judgment or settlement obligation or whose employees acting within the scope of their employment incur the obligation shall seek approval to make payment by submitting a written request to the commissioner of management and budget. The request shall contain a description of the

tort claim that causes the request, specify the amount of the obligation and be accompanied by copies of judgments, settlement agreements or other documentation relevant to the obligation for which the agency seeks payment. Upon receipt of the request and review of the claim, the commissioner of management and budget shall determine the proper appropriation from which to make payment. If there is enough money in an appropriation or combination of appropriations to the agency for its general operations and management to pay the claim without unduly hindering the operation of the agency, the commissioner shall direct that payment be made from that source. Claims relating to activities paid for by appropriations of dedicated receipts shall be paid from those appropriations if practicable. On determining that an agency has sufficient money in these appropriations to pay only part of a claim, the commissioner shall pay the remainder of the claim from the money appropriated to the commissioner for the purpose. On determining that the agency does not have enough money to pay any part of the claim, the commissioner shall pay all of the claim from money appropriated to the commissioner for the purpose. Payment shall be made only upon receipt of a written release by the claimant in a form approved by the attorney general, or the person designated as the university attorney, as the case may be.

No attachment or execution shall issue against the state.

Subd. 8. Liability insurance. A state agency, including an entity defined as a part of the state in section 3.732, subdivision 1, clause (1), may procure insurance against liability of the agency and its employees for damages resulting from the torts of the agency and its employees.

Procurement of the insurance is a waiver of the limits of governmental liability under subdivisions 4 and 4a only to the extent that valid and collectible insurance, including where applicable, proceeds from the Minnesota Insurance Guaranty Association, exceeds those limits and covers the claim. Purchase of insurance has no other effect on the liability of the agency and its employees. Procurement of commercial insurance, participation in the risk management fund under section 16B.85, or provisions of an individual self-insurance plan with or without a reserve fund or reinsurance does not constitute a waiver of any governmental immunities or exclusions.

Subd. 9. Indemnification. The state shall defend, save harmless, and indemnify any employee of the state against expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any tort, civil, or equitable claim or demand, or expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any claim or demand arising from the issuance and sale of securities by the state, whether groundless or otherwise, arising out of an alleged act or omission occurring during the period of employment if the employee provides completed disclosure and cooperation in the defense of the claim or demand and if the employee was acting within the scope of employment. Except for elected employees, an employee is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overruled by the attorney general. The determination of whether an employee was acting within the scope of employment is a question of fact to be determined by the trier of fact based upon the circumstances of each case:

(i) in the absence of a certification,

- (ii) if a certification is overruled by the attorney general,
- (iii) if an unfavorable certification is made, or
- (iv) with respect to an elected official.

The absence of the certification or an unfavorable certification is not evidence relevant to a determination by the trier of fact. It is the express intent of this provision to defend, save harmless, and indemnify any employee of the state against the full amount of any final judgment rendered by a court of competent jurisdiction arising from a claim or demand described herein, regardless of whether the limitations on liability specified in subdivision 4 or 4a are, for any reason, found to be inapplicable. This subdivision does not apply in case of malfeasance in office or willful or wanton actions or neglect of duty, nor does it apply to expenses, attorneys' fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

Subd. 9a. Peace officer indemnification. The state shall defend, save harmless, and indemnify a peace officer who is not acting on behalf of a private employer and who is acting in good faith under section 629.40, subdivision 4, the same as if the officer were an employee of the state.

Subd. 10. Judgment as bar. The judgment in an action under this section is a complete bar to any action by the claimant, by reason of the same subject matter, against the state employee whose act or omission gave rise to the claim.

Subd. 11. Statute of limitation. The statute of limitations for all tort claims brought against the state is as provided in chapter 541 and other laws.

History: 1976 c 331 s 33; 1978 c 669 s 2,3; 1978 c 793 s 32; 1982 c 423 s 1; 1983 c 331 s 1; 1985 c 84 s 1,2; 1985 c 166 s 2,3; 1985 c 248 s 70; 1Sp1985 c 13 s 64; 1Sp1985 c 16 art 1 s 1; 1986 c 444; 1986 c 455 s 1,2; 1987 c 184 s 1; 1987 c 373 s 1; 1988 c 469 art 1 s 1; 1988 c 530 s 2; 1989 c 331 s 1; 1990 c 594 art 1 s 39; 1991 c 313 s 1; 1992 c 513 art 4 s 26; 1997 c 210 s 1; 1997 c 249 s 1; 2000 c 373 s 1; 2000 c 478 art 2 s 7; 2006 c 212 art 1 s 1; 2006 c 232 s 1; 2007c54art5s3; 2008c288s1; 2009c 101art2 s 109

GOVERNMENT CLAIMS IMMUNITY CHECKLIST

1. Review for immunities found in the Municipal Tort Claims Act
 - Discretionary or "statutory immunity"
 - Snow and ice immunity
 - Park and recreation immunity
 - Licensing and permitting immunity
 - Due care in the execution of a statute
 - Tax collection immunity
 - Unimproved real property immunity
 - DWI impoundment immunity
 - Wild animal immunity
 - Patient and inmate immunity
 - Other statutory immunities
2. Review the substantive statutes involved
 - If there is a statute covering the subject of the dispute, review it for an indication as to what the legislature thought the governmental entity should be liable for (for example, child abuse reporting act or vulnerable adults reporting act has specific provisions specifying when liability will attach)
3. Consider immunities created by the courts
 - Official immunity
 - Public duty doctrine
 - Section 1983 qualified immunity
 - Absolute immunity for judges, prosecutors, and litigants
4. Consider application of "catch all" immunity
Would the State be liable under the State Tort Claims Act?
5. Re-evaluate case for application of immunities as case develops through discovery
6. Remember that governmental entities have the right to appeal denials of summary judgment based on immunities, but immunities only