

# Chapter Twelve

## *Liability Limitations and Immunities*

### § 12-1. Historical Perspective

Old English law held that the King could do no wrong. This rationale, called “sovereign immunity,” protected all levels of government from lawsuits. However, in 1962 the Minnesota Supreme Court questioned the validity of that rationale and in *Spanel v. Mounds View Sch. Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962), it signaled an end to governments’ blanket protection against liability. Since then, the Legislature enacted a series of statutes and amendments to establish when and to what extent local governments would be liable. Furthermore, the courts continue to recognize certain court created, or common law, immunities from liability.

The rationale for protecting governmental entities is generally based upon the following concepts:

- 1) Governmental entities are charged with making decisions for the public good that involve the weighing of multiple factors that often have both negative and positive outcomes;
- 2) The judicial branch, through the medium of lawsuits, should not second guess those political balancing decisions of governmental entities;
- 3) An award obtained against a governmental entity is paid out of public funds, which are funded by the taxpayer;
- 4) Public funds are better protected, and it is a better use of public funds, if a few individuals suffer as opposed to the public in general;
- 5) Governmental agents will perform their duties more effectively if not hampered by fear of tort liability.

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## § 12-2. Statutory Provisions

The major body of statutory local government liability law is found in Minnesota's tort liability act, Minn. Stat. Chap. 466. These statutes expressly make local governments liable for their torts, but also carves out certain exceptions and limitations.

### A. Tort Liability Immunities

The Legislature has created several exceptions to the general rule that local governments are liable for their torts. This recognizes that, unlike private business, government is expected to undertake certain activities and deal with certain situations that create unavoidable risks. These protections are offered in recognition of the fact local governments would likely avoid certain activities, to the detriment of the public good, if they were exposed to liability.

The Legislature has provided local governments immunity in the following instances, which are found in Minn. Stat. § 466.03:

- assessment and collection of taxes; (subd. 3)
- accumulation of snow and ice on roads, sidewalks, or public parking lots; (subd. 4)
- acts of officers or employees in executing a statute, ordinance, or resolution; (subd. 5)
- the condition of unimproved municipal-owned real property; (subd. 6a)
- construction, operation, or maintenance of a water access site; (subd. 6c)
- construction, operation, or maintenance of parks and recreation areas; (subd. 6e)
- beach or pool equipment and structures on public land after the beach or pool is closed; (subd. 6f)
- actions for which immunity is provided elsewhere in the statutes; (subd. 7)
- actions resulting in losses other than injury to or loss of property or personal injury or death; (subd. 8)
- failure of persons to meet standards needed for a license or permit issued by the municipality; (subd. 10)
- condition of unimproved municipal-owned property; (subd. 13)

- claims for which the state is not liable under Minn. Stat. § 3.736; (subd. 15)
- use of non-public logging roads; (subd. 17)
- use of geographic information system data; (subd. 21)
- use of road rights-of-way by recreational motor vehicles; (subd. 22)
- use of public safety equipment donated to another local government; (subd. 24)
- Use of surplus equipment donated to a non-profit under a policy the board adopted under Minn. Stat. § 471.3459. (subd. 25)

### B. Statutory (Discretionary) Immunity

Towns are also immune from claims "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. § 466.03, subd. 6. Usually referred to as statutory or discretionary immunity, this provision protects local government from judicial second guessing of legislative or executive policy decisions.

It is important that a local government be able to demonstrate that it exercised its legislative discretion by considering different alternatives before it acted. The minutes of the meeting at which the decision was made should reflect the alternatives and policy considerations that were discussed in arriving at that decision.

This means planning-level decisions are protected while operational level ones are not. *Conlin v. City of Saint Paul*, 605 N.W.2d 396, 400 (Minn. 2000). "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. Operational-level decisions, on the other hand, involve decisions relating to the ordinary day-to-day operations of the government." *Id.* The application of scientific and technical skill in carrying out established policy is considered operational and is not protected. In any case, the burden is on the local government to show that a decision involved protected policy making. *Id.* at 402.

## § 12-3. Common Law Immunities

Very few people would agree to hold public office if they were subject to personal liability for suits brought against the public entity. Fortunately, courts have long protected persons serving in public office and public employment.

### A. Common Law Official Immunity

Common law official immunity offers protections like those provided by statutory immunity. Official immunity “protects government officials from suit for discretionary actions taken in the course of their official duties.” *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). “The doctrine of official immunity protects from personal liability a public official 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, 106-07 (Minn. 1991).

Like statutory immunity, official immunity does not protect ministerial acts or duties. Oftentimes the main issue of contention between the parties is whether an act was ministerial or discretionary. It is not always easy to determine. “[T]he discretionary-ministerial distinction is a nebulous and difficult one because almost any act involves some measure of freedom of choice as well as some measure of perfunctory execution.” *Williamson v. Cain*, 310 Minn. 59, 61, 245 N.W.2d 242, 244 (1976).

Ministerial actions are those which “involv[e] merely execution of a specific duty,” and independent action by the employee “is neither required nor desired.” *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004) An example may be not following a state law, like stopping at a stop sign.

Discretionary actions on the other hand must assess the “nature, quality, and complexity” of the decision-making process, and how much an “evaluation” was used in making the decision. *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988)

While the purpose of statutory immunity is to preserve the separation of powers between judicial and legislative bodies, the primary purpose

of official immunity is “to insure that the threat of potential liability does not unduly inhibit the exercise of discretion required of public officers in the discharge of their duties.” *Rico v. State*, at 107. In short, statutory immunity protects public entities while official immunity protects public officials. The two immunity doctrines also differ in that while statutory immunity applies even if there is an abuse of discretion, official immunity is not available for officials who commit a willful or malicious wrong. *Id.*

### B. Vicarious Official Immunity

Vicarious official immunity is a doctrine designed to protect a public entity from liability when the entity’s employee is protected by official immunity. “Generally, if a public official is found to be immune from suit on a particular issue, his or her government employer will be vicariously immune from a suit arising from the employee’s conduct and claims against the employer are dismissed without explanation.” *Anderson v. Anoka Hennepin Ind. Sch. Dist. 11*, 678 N.W.2d 651, 663-664 (Minn. 2004). The purpose behind vicarious official immunity is to avoid the negative impact to employee performance that would occur from the “stifling attention” the government employer would pay to employee activities out of fear of liability.

### C. Qualified Immunity

One of the types of actions increasingly brought against public officers and their employees are civil rights claims under 42 U.S.C. § 1983. To protect officers who were acting in good faith from the burdens of having to defend against § 1983 claims, the United States Supreme Court recognized public officials have qualified immunity from such suits. In applying the immunity, the question is whether the officer violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Elwood v. County of Rice*, 423 N.W.2d 671, 674 (Minn. 1988). A statutory or constitutional right is “clearly established” for the purposes of the qualified immunity analysis if the scope of the right is “sufficiently clear that a reasonable official would

understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

#### **D. Absolute Immunity**

Absolute immunity bars suits even in situations where the officer intentionally acted with malice. See, e.g., *Matthis v. Kennedy*, 67 N.W.2d 413, 416 (Minn. 1954). Because of the extraordinary nature of absolute immunity, it exists in only very limited circumstances. Traditionally, absolute immunity was only available to high-level officials such as legislators and judges. However, in recent years the courts have started considering the application of the absolute immunity to other public officials.

Protecting the release of defamatory statements is one example of the application of absolute immunity. In such cases, the courts have applied absolute immunity more to protect the public’s right to remain informed about public business rather than to protect the public officer. *Johnson v. Dirkswager*, 315 N.W.2d 215, 220 (Minn. 1982). Application of the immunity depends on the relationship between the release of the information and the officer’s governmental duties. *Redwood County Tel. Co. v. Luttmann*, 567 N.W.2d 717, 220-21 (Minn. Ct. App. 1991). It remains unclear whether and to what extent the courts will allow town officers to claim this immunity.

## **§ 12-4. Defense and Indemnification of Public Officers**

In addition to the immunities provided public officers, there are statutes that allow or require the public entity to defend and indemnify its officers and employees if they are sued. The tort liability act provides that 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 ...” Minn. Stat. § 466.07. However, the duty to defend and indemnify only applies if the officer or employee was acting in the performance of the duties of the position and was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

In limited circumstances, the state indemnifies municipalities when performing required inspections or investigations as part of issuing a state license. Minn. Stat. § 466.132. In some cases, indemnification of the local government can be required as part of the regulations related to the issuance of a permit. It is also possible to bargain for the inclusion of a hold harmless and indemnification clause as part of a contract. Towns should carefully read proposed contracts to determine whether the agreement obligates the town to hold harmless or indemnify the other party to the agreement.

A local government’s authority to defend its of-

ficers or employees against criminal actions is more limited. A town officer or employee’s costs incurred in the defense of criminal charges may be reimbursed by the town if the charges arose out of the reasonable and lawful performance of duties for the town. Minn. Stat. § 465.76, subd. 1. Reimbursement is only possible if the person was not found to have violated any laws in the performance of his or her duties.

Police officers must be defended by the local government for whom they work for suits arising out of arrests made by the officer in good faith and in the performance of official duties. Minn. Stat. §§ 471.44; 471.45. Similarly, firefighters are to be provided defense counsel to defend against actions arising out of the use of a motor vehicle in the performance of official duties. Minn. Stat. § 471.86.

The practical effect of the requirement that local governments defend and indemnify is that in most situations a public officer is not left on his or her own to defend against a suit naming them for acts taken during their employment or duties with the town. The most significant exceptions to this general rule are when an officer intentionally acts wrongfully or conducts an act that is punishable as a crime even if it is administrative in nature (e.g., failure to follow the bid law when it applies).

## § 12-5. Other Statutory Limitations on Liability

There are a variety of other statutory provisions that limit or exclude liability:

- **Liability Caps:** Liability that may be imposed under the municipal tort act is capped at \$500,000 per claim and \$1,500,000 for any number of claims arising out of a single occurrence. Minn. Stat. § 466.04, subd. 1(a)(3) & (7). These limits are doubled if the claim arises out of the release or threatened release of a hazardous substance. Minn. Stat. § 466.04, subd. 1(a)(8).
- **Joint Ventures:** Local governments participating in a joint venture or joint enterprise, including those undertaken pursuant to a joint powers agreement, are not liable for the actions of other entities participating in the venture unless they expressly accept such responsibility. Minn. Stat. § 471.59, subd. 1a. The total liability for the local governments participating in the venture is a single governmental unit limit for the purposes of determining total liability.
- **Road Designations:** Once a town board properly designates and signs a road as minimum-maintenance, “its officers and employees, are exempt from liability for any tort claim for injury to person or property arising from travel on the minimum-maintenance road and related to its maintenance or condition.” Minn. Stat. § 160.095, subd. 4. Liability protections are offered for properly designated rustic roads if proper speed signs are posted, the maintenance, design, or condition of the road is consistent with its anticipated use and the town not grossly negligent. Minn. Stat. § 160.83, subd. 5. Towns officers and employees are not liable for injuries occurring on a road that has been closed and barricaded by resolution. Minn. Stat. § 164.152. Limited liability is also available on certain roads located entirely within parks. Minn. Stat. § 160.82, subd. 3.
- **Punitive Damages Prohibited:** Punitive damages are those imposed in addition to other damages and are intended as punishment to deter similar acts in the future. Any damages awarded on a claim falling within the scope of the municipal tort act may not include punitive damages. Minn. Stat. § 466.04, subd. 1(b).
- **Municipal Contracting Law:** In any action against a local government challenging the validity of a contract under the municipal contracting law, “the court shall not award, as any part of its judgment, damages, or attorney’s fees, but may award an unsuccessful bidder the costs of preparing an unsuccessful bid.” Minn. Stat. § 471.345, subd. 14.
- **Town Treasurer:** In the absence of negligence, a town treasurer is not liable for the loss of money properly deposited if the designated depository closes or becomes insolvent. Minn. Stat. § 366.08.
- **Open Meeting Law:** Before certain penalties provided for violating the open meeting law may be imposed, the officer must be shown to have intentionally violated the law. Minn. Stat. § 13D.06, subd. 4(d).
- **Removal from Office:** Under Art. 8, § 5 of the Minnesota Constitution, removal of local elected officers may only be provided for in the case of malfeasance or nonfeasance in the performance of their duties.
- **Firefighter and Peace Officer Investigations:** Employers who provide information in conjunction with employment investigations of applicants for fire protection service positions or peace officer positions are immune from liability. Minn. Stat. § 604A.31.
- **Good Samaritan Law:** Volunteer firefighters, first responders and other persons are protected from liability when providing assistance at an emergency unless they act in a willful and wanton or reckless manner in providing the assistance. Minn. Stat. § 604A.01. This immunity is for the individual and does not extend to the employer or local government.
- **Statutes of Limitation:** Suits, including those against local governments, must be brought within a certain period of time. Actions involving issues such as contracting, trespass, and actions against a public officer’s bond must be brought within six years. Minn. Stat. § 541.05. Notice of a tort claim against a local government must normally be made within 180 days of discovery of the alleged loss or injury. Minn. Stat. § 466.05, subd. 1. An action for damages caused by the establishment of a street or highway grade or a change in the originally established grade must be brought within two years. Minn. Stat. § 541.07(6). Only persons who filed written objections with the clerk before the assessment hearing or who present objections at the hearing may appeal the amount of a special assessment. Minn. Stat. §§ 429.061, subd. 1; 429.081.
- **Adverse Possession:** Public property and public ways may not be acquired by adverse possession. Minn. Stat. § 541.01.
- **Used Public Safety Equipment:** Protects a community from a tort claim resulting from the use of public safety equipment (fire, ambulance, etc.) the community donated to another community, unless the claim is a direct result of fraud or intentional misrepresentation. Minn. Stat. § 466.03, subd. 24.

