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THE CONSTITUTIONALITY OF SECTION 9-103 OF THE
LOCAL GOVERNMENT AND GOVERNMENTAL
EMPLOYEES TORT IMMUNITY ACT.

INTRODUCTION

In Illinois, the Local Governmental and Governmental Employees Tort Immunity Act¹ governs the liability of local public entities and their employees. A key provision of the Act, section 9-103(b),² has been subject to confused interpretation and much litigation. The difficulty is with the meaning and operative effect of the words:

every policy for insurance . . . shall provide . . . that the company issuing such policy waives . . . any right to refuse payment or to deny liability . . . by reason of the defenses and immunities provided in this Act.³

The question posed is whether the purchase of liability insurance by a local public entity constitutes a waiver of the entity's defenses and immunities provided by the Act? Further and contrary to prior appellate court decisions interpreting section 9-103(b),⁴ a recent Illinois Supreme Court case, *Housewright v. City of LaHarpe*,⁵ held "that the failure to give notice in accordance with section 8-102 is subject to the waiver provision of section 9-103(b);"⁶

The *Housewright* decision represents a significant change from the prior law of local governmental tort immunity. The immediate effect is that an uninsured local public entity can raise the defenses and immunities provided in the Act, while an insured local public entity waives the right to raise

1. Ill. Rev. Stat. ch. 85, §§ 1-101 *et seq.* (1971) [hereinafter cited as the Tort Immunity Act or the Act.]

2. Ill. Rev. Stat. ch. 85, § 9-103 (1971):

(a) A local public entity may contract for insurance against any loss or liability which may be imposed upon it under this Act. Such insurance shall be carried with a company authorized by the Department of Insurance to write such coverage in Illinois. The expenditure of funds of the local public entity to purchase insurance is proper for any local public entity. (b) Every policy for insurance coverage issued to a local public entity shall provide or be indorsed to provide that the company issuing such policy waives any right to refuse payment or to deny liability thereto within the limits of said policy by reason of the non-liability of the insured public entity for the wrongful or negligent acts of itself or its employees and its immunity from suit by reason of the defenses and immunities provided in this Act.

3. *Id.*

4. *Rapacz v. Township High School Dist. No. 207*, 2 Ill. App. 3d 1095, 278 N.E.2d 540 (1971); *Brown v. Shook*, 2 Ill. App. 3d 1103, 268 N.E.2d 883 (1971); *Hoffman v. Evans*, 129 Ill. App. 2d 439, 263 N.E.2d 140 (1970); *Schear v. City of Highland Park*, 104 Ill. App. 2d 285, 244 N.E.2d 72 (1968).

5. 51 Ill. 2d 357, 282 N.E.2d 437 (1972).

6. *Id.* at 365, 282 N.E.2d at 442.

them.⁷ The net effect is that a plaintiff's ability to recover damages is directly influenced by the fortuitous event of whether the local public entity is insured. This comment will examine the constitutionality of section 9-103 and propose alternatives to remedy the discrimination created by it.

THE SULLIVAN DECISION

In a case decided the same day as *Housewright*, *Sullivan v. Midlothian Park District*,⁸ the Illinois Supreme Court upheld the constitutionality of section 9-103(b). The court reviewed a circuit court finding that section 9-103(b) was special legislation and as such violative of section 22 of article IV of the constitution of 1870.⁹

On appeal to the Supreme Court, the defendant argued that section 9-103(b) discriminates against those persons injured by a local public entity,

for the reason that it makes the nature of the remedy of the person . . . dependent upon the unrestricted freedom of local governments to determine for themselves, whether or not, as to those immune functions, they will be liable for their own negligence.¹⁰

Without stating a reason, the Court did not respond to that argument. Rather, it tested section 9-103(b) in light of its classification of local public entities as insured and uninsured.

The Court did take judicial notice of the unequal treatment of injured persons as a result of section 9-103(b). Emphasizing that the "General

7. *Gowler v. City of Mt. Vernon*, 7 Ill. App. 3d 466, 288 N.E.2d 80 (1972); *Crowe v. Doyle*, 6 Ill. App. 3d 1098, 287 N.E.2d 99 (1972).

8. 51 Ill. 2d 274, 281 N.E.2d 659 (1972).

9. Ill. Const. art. IV, § 22 (1870):

The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—Granting divorces; Changing the names of persons or places; Laying out, opening, altering and working roads or highways; Vacating roads, town plats, streets, alleys and public grounds; Locating or changing county seats; Regulating county and township affairs; Regulating the practice in courts of justice; Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables; Providing for changes of venue in civil and criminal cases; Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village; Providing for the election of members of the board of supervisors in townships, incorporated towns or cities; Summoning and impaneling grand or petit juries; Providing for the management of common schools; Regulating the rate of interest on money; The opening and conducting of any election, or designating the place of voting; The sale or mortgage of real estate belonging to minors under disability; The protection of game fish; Chartering or licensing ferries or toll bridges; Remitting fines, penalties or forfeitures; Creating, increasing or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed; Changing the law of descent; Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purposes; Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted.

10. 51 Ill. 2d at 280, 281 N.E.2d at 663.

Assembly was aware of the history of local governmental immunity. . .¹¹ and that it could have achieved complete uniformity. . .¹² if it had wanted to, the Court stated, "We find section 9-103(b) neither arbitrary nor unreasonable and hold that it does not violate section 22 of article IV."¹³

The *Sullivan* decision is somewhat of an anomaly. On the one hand it upholds section 9-103(b) as neither arbitrary nor unreasonable, and on the other hand, it takes judicial notice of the inequality created by the section. It is proposed that the constitutionality of section 9-103 is not completely settled since the Court failed to test the section's injured party classification. "It is established that a decision sustaining the constitutionality of a statute is not decisive of its validity against subsequent attacks upon different grounds. . . ."¹⁴

THE CONSTITUTIONAL FRAMEWORK

The 1970 Illinois constitution provides the basic framework for a constitutional argument. Because most of the Illinois case law is grounded on provisions of the constitution of 1870, a brief comparison will be made between the appropriate sections of the 1970 constitution and the parallel provisions of the 1870 constitution.

Three sections of both constitutions are particularly apropos. The basic right to find a remedy in the law for all injuries and wrongs is contained in both article I, section 12, of the 1970 constitution and article II, section 19, of the 1870 constitution.¹⁵ Article IV, section 13, of the 1970 constitution is similar to article IV, section 22, of the 1870 constitution.¹⁶ Both prohibit the enactment of special legislation where a general law can be made applicable. The principal change effected by the 1970 provision "is that it specifically *rejects* the rule enunciated in a long line of decisions of this court that whether a general law can be made applicable is for the legislature to determine."¹⁷ In short, the responsibility for determining whether a general law can be made applicable is with the courts.

11. *Id.*

12. *Id.* at 280-81, 281 N.E.2d at 663-64.

13. *Id.*

14. *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 184, 106 N.E.2d 124, 127 (1952).

15. Ill. Const. art. I, § 12: Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property, or reputation. He shall obtain justice by law, freely, completely, and promptly. Ill. Const. art. II, § 19 (1870): Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

16. Ill. Const. art. IV, § 13: The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination. See Ill. Const. art. IV, § 22 (1870) note 9 *supra*.

17. *Bridgewater v. Hotz*, 51 Ill. 2d 103, 110, 281 N.E.2d 317, 321 (1972).

Article I, section 2, of the 1970 constitution and article II, section 2, of the 1870 constitution both contain a due process clause.¹⁸ For the first time, the 1970 provision includes an equal protection clause. Although article I, section 2 and article IV, section 13 of the 1970 constitution are not duplicates, "In many cases the protection provided by Section 13 is also provided by the equal protection clause of Article I, section 2."¹⁹ Together, these provisions proscribe the constitutional standards against which the injured party classification of section 9-103 must be tested.

The tests of special legislation, due process, and equal protection, though distinct, all involve common inquiries. A statute does not violate the constitutional proscription of article IV, section 13, against special legislation, "if there is a reasonable basis for the classification and it bears a reasonable and proper relation to the purposes of the act and the evil it seeks to remedy."²⁰ Recognizing that "the guaranty of equal protection of the laws goes beyond the requirements of due process. . .,"²¹ the Illinois Supreme Court in *Grasse v. Dealer's Transport Co.*²² stated a general test:

[To] be deemed constitutional, . . . it must appear that the particular classification is based upon some real and substantial difference in kind, situation or circumstance in the persons or objects on which the classification rests, and which bears a rational relation to the evil to be remedied and the purpose to be attained by the statute.²³

To determine the constitutionality of section 9-103(b), one must necessarily analyze the purposes of the Act, the basis for the classification of injured persons by section 9-103(b), and the relationship of the classifications to the purposes of the Act.

ANALYSIS OF SECTION 9-103

The first inquiry is what is the purpose of the Tort Immunity Act? By its holding in *Moliter v. Kaneland Community Unit School Dist. No. 302*,²⁴ the Illinois Supreme Court abolished local governmental immunity. Responding immediately to the *Moliter* decision, the General Assembly enacted a series of stopgap statutes in an attempt to reinstate the immunity doctrine. Most of these statutes proved to be constitutionally defective.²⁵

18. Ill. Const. art. I, § 2: No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws. Ill. Const. art. II, § 2 (1870): No person shall be deprived of life, liberty or property, without due process of law.

19. Ill. Const. art. IV, § 13.

20. 51 Ill. 2d at 111, 281 N.E.2d at 322.

21. *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 194, 106 N.E.2d 124, 132 (1952).

22. 412 Ill. 179, 106 N.E.2d 124 (1952).

23. *Id.* at 193-94, 106 N.E.2d at 132.

24. 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

25. *Treece v. Shawnee Community Unit School Dist. No. 84*, 39 Ill. 2d 136, 233 N.E.2d 549 (1968); *Lorton v. Brown County Community Unit School Dist. No. 1*,

With the purpose of providing a comprehensive plan for administering local governmental immunity, the General Assembly enacted the Tort Immunity Act. The Act adopts the rule, enunciated in *Moliter*, that a public entity is liable for its negligent acts but, catalogs specific exceptions to the rule.

Secondly, the purpose of the section 9-103(b) classifications must be ascertained. Section 9-103(a) is an insurance authorization provision. Section 9-103(b) states a condition that must be included in every policy issued to a local public entity. As a result, local public entities are classified as insured or uninsured, and those persons injured by local public entities are also classified. As previously mentioned, the classification of local public entities was held constitutional in *Sullivan* since it applies equally to all local public entities. The classification of injured persons by section 9-103 (b) has not been tested constitutionally.

At the time section 9-103(b) was adopted, there was no recognizable purpose for the classification of injured persons. In no way does such a classification contribute to the administration of local governmental tort immunity. In fact, it is unlikely that the legislature intended the classification to arise. This issue was not raised prior to *Housewright* because under prior appellate court interpretation of section 9-103(b), all injured persons were treated equally.²⁶ The *Housewright* decision has resulted in this unequal treatment of injured persons.

The section seems to have been inspired by the holding in *Thomas v. Broadlands Consolidated School Dist.*,²⁷ wherein a school district's immunity was waived to the extent of the amount of liability insurance which it carried. This holding was criticized in *Moliter*²⁸ and is contrary to the prevailing view in many other jurisdictions that a governmental entity's immunity from tort liability is unaffected by its procurement of liability insurance.²⁹

Third, the injured party classification of section 9-103(b) must be examined to determine if it bears a reasonable relation to the purposes of the Act. The question raised is, whether the comprehensive administration of tort immunity is aided by limiting the recovery of those persons injured by an uninsured public entity, while no limits are imposed upon a person injured by an insured public entity?

A similar classification was struck down in *Grasse v. Dealer's Transport Co.*³⁰ Involved was the first paragraph of section 29 of the Workmen's Compensation Act which limited the recovery of injured parties to those

35 Ill. 2d 362, 220 N.E.2d 161 (1966); *Hutchings v. Kraject*, 34 Ill. 2d 379, 214 N.E.2d 274 (1966); *Harvey v. Clyde Park Dist.*, 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

26. Cases cited note 4 *supra*.

27. 348 Ill. App. 567, 109 N.E.2d 636 (1952).

28. 18 Ill. 2d at 22, 163 N.E.2d at 94.

29. 68 A.L.R.2d 1439 (1959).

30. 412 Ill. 179, 106 N.E.2d 124 (1952).

third party tort-feasors not covered by the Act. The court stated, "it is apparent that in ascertaining the constitutionality of a statute the court is concerned with its practical operation, and its natural and reasonable effect on the rights involved."³¹ Focusing on the rights of the injured party the court noted, "[t]he sole basis for differentiation as far as the injured employee is concerned, is a fortuitous circumstance, whether the third party tort-feasor happens to be under the Act."³² Similarly, under section 9-103(b) the injured party will have to differentiate between those public entities that are insured and those that are uninsured. The ability to recover damages is directly influenced by the status of the public entity.

Another classification similar to section 9-103(b) was involved in the *Moliter* case.³³ In fact, the language of the school code provision there at issue is strikingly similar to section 9-103(b).³⁴ According to the school code, a person injured by an insured school bus could recover to the extent of such insurance, while a person injured by an uninsured school bus could recover nothing at all. The court in *Moliter* recognized the inherent discrimination in the provision,

The difficulty with this legislative effort to curtail the judicial doctrine is that it allows each school district to determine for itself whether, and to what extent, it will be financially responsible for the wrongs inflicted by it.³⁵

The same infirmity is present in section 9-103(b). It is conceded that the classification of section 9-103(b) is distinguishable from the *Grasse* and *Moliter* cases, since recovery is not completely cut off in every case when a person is injured by an uninsured local entity. However, in cases where recovery is not completely cut off, it is sharply curtailed.³⁶

Another statute creating a classification analogous to the classification in section 9-103(b) was held unconstitutional in *Harvey v. Clyde Park Dist.*³⁷ The statute granted park districts immunity from suit for their negligent acts. The court recognized the classification of injured persons by the statute:

Far more is involved here than just the classification of governmental units. Those persons who are injured by the negligence of particular governmental units are also classified. . . .³⁸

Holding the statute arbitrary and unreasonable, the court emphasized "[i]n this pattern there is no discernible relationship to the realities of life."³⁹

31. *Id.* at 193, 106 N.E.2d at 132.

32. *Id.* at 196, 106 N.E.2d at 133.

33. 18 Ill. 2d at 11, 163 N.E.2d at 89.

34. *Id.* at 17-18, 163 N.E.2d at 92.

35. *Id.*

36. Ill. Rev. Stat. ch. 85, articles II, III, VIII (1971).

37. 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

38. *Id.* at 65, 203 N.E.2d at 576.

39. *Id.* at 67, 203 N.E.2d at 577.

Although the foregoing decisions are all distinguishable from section 9-103(b), their rationale is undeniably appropriate and applicable to the discriminatory classification of injured persons by section 9-103(b). The purpose of the Act is to provide a plan for administering local governmental tort immunity. According to *Housewright*, Section 9-103(b) operates as a waiver of a local public entity's defenses and immunities when it purchases liability insurance. As a consequence those persons injured by an uninsured local public entity are discriminated against. Following the rationale of *Grasse*, *Moliter*, and *Harvey*, the classification of injured persons is arbitrary and unrelated to the purposes of the Tort Immunity Act. Therefore, section 9-103 section 9-103 should be amended to conform to the mandates of the Illinois-constitution.⁴⁰

PROPOSALS FOR AMENDING SECTION 9-103

The Illinois Supreme Court in the *Sullivan* decision noted there were possible alternatives to the present form of section 9-103(b). The discriminatory effect of the section can be alleviated and uniform treatment of injured persons can be achieved if one of the following proposals is adopted: (1) amend section 9-103 by repealing subsection (b); or (2) amend section 9-103 by requiring mandatory liability insurance and repealing subsection (b); or (3) repeal the Tort Immunity Act and require mandatory liability insurance for all local public entities.

The problem with the wording of section 9-103(b) was recognized when the Act was first drafted, and alternatives were suggested.⁴¹ However, as discussed earlier, the section did not pose constitutional problems until the *Housewright* decision.

All three proposals would classify local public entities and persons injured by them in a non-discriminatory manner. The first proposal follows the legislative plan adopted in the California Torts Claims Act of 1963,⁴² which served as the model for the Illinois Act.⁴³ Flexibility is present in this alternative; a local public entity can either insure against liability or rely on one of the provisions in the Act to pay for damages incurred. The defenses and immunities present in the Act would remain intact for all local public entities.

The second proposal is slightly more drastic. By repealing subsection (b) of section 9-103 and requiring mandatory insurance, the proposal demands more local governmental responsibility for torious conduct. It still allows for the statutory defenses and immunities while providing injured

40. Ill. Const. art. I, § 12; Ill. Const. art. IV, § 13; and Ill. Const. art. I, § 2.

41. See, Comment, *Illinois Tort Claims Act: A New Approach To Municipal Tort Immunity in Illinois*, 61 Nw. U.L. REV. 265, 274-75 (1966).

42. Cal. Gov't Code § 991.2 (West 1966).

43. 4 *Illinois Law* § 40-72 (1971).

persons with a uniform opportunity to recover damages, regardless of which local public entity is the tort-feasor.

The third proposal is the most drastic. Local public entities would have the same status as any private citizen or corporation, and would be liable for their negligent acts. In addition, mandatory insurance would provide a uniform opportunity to recover damages once liability is proved. As the duty concept of negligence is expanded, this proposal becomes more palatable. At this time, however, it is unlikely that the General Assembly will move in this direction.

CONCLUSION

Although the doctrine of local governmental immunity has been criticized in many jurisdictions, it is apparent that many of the activities engaged in by local public entities, having no counterparts in private society, require a separate system of public tort liability administration." Structured on functional distinctions, the Tort Immunity Act provides such a system for administering liability in Illinois. Under its present interpretation, section 9-103(b) is inconsistent with the purposes of the Act and fosters governmental irresponsibility. It allows a local public entity to determine for itself whether or not it will waive the defenses and immunities provided in the entity, the section is illogical, arbitrary, and most importantly, unconstitutionally discriminatory. Therefore, the General Assembly should act immediately to correct the injustices created by section 9-103(b).

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44. See, Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 Law Forum 920 (1966).