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Torts - Local Governmental and Governmental Employees Tort Immunity Act

Ralph C. Spooner

DISCUSSION OF RECENT DECISIONS

TORTS—LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT — Failure to Give Notice in Accordance with Section 8-102 Is Subject to the Waiver Provision of Section 9-103 (b)—A car owned by the City of LaHarpe and driven by the city marshal collided with a truck owned by a partnership, Housewright Soil Service, and driven by one of the partners. As a result of the collision, an action was brought by the truck driver to recover for personal injuries and by the partnership to recover for property damage to the truck. Both the City of LaHarpe and the city marshal were named defendants. In the circuit court, defendants moved to dismiss plaintiffs' third amended complaint on the ground that notices required by section 8-102 of the Local Governmental and Governmental Employees Tort Immunity Act[1] and section 1-4-6 of the Illinois Municipal Code were not alleged to have been given to defendants in the complaint. Plaintiffs moved to strike portions of defendants' motion on the ground that these sections were unconstitutional. The court denied plaintiffs' motion and granted defendants' motion to dismiss. On appeal, plaintiffs raised four contentions, one of which was that section 8-102, requiring notice to be given to the local public entity, is waived when the public entity purchases liability insurance according to section 9-103(b) of the Act. The Supreme Court of Illinois in *Housewright v. City of LaHarpe*[2] reversed and remanded. The court held that failure to give notice in accordance with section 8-102 is subject to the waiver provision of section 9-103(b).

The significance of the *Housewright* decision is readily apparent to Illinois lawyers familiar with the Tort Immunity Act. The practical effect is that when the defendant public entity has procured liability insurance in accordance with section 9-103 of the Act, an injured plaintiff can maintain an action even though he has not complied with the notice and statute of limitations provisions of sections 8-101 and 8-102. Under prior Illinois appellate court decisions, however, strict compliance with sections 8-101 and 8-102 was a prerequisite to bringing an action, and section 9-103(b) did not operate as a waiver of those provisions.

The impact of *Housewright* is far reaching. An *insured* local public entity has the same legal status as any private corporation or individual,

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

2. 51 Ill. 2d 357, 282 N.E.2d 437 (1972); *See also* Fanio v. John W. Breslin Co., 51 Ill. 2d 366, 282 N.E.2d 443 (1972); Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972).

while an *uninsured* local public entity may still raise the defenses and immunities granted in the Act. The purpose of this casenote is to establish the legal setting in which *Housewright* was decided and determine what immediate effects it will have on Illinois law.

THE EVOLUTION OF LOCAL GOVERNMENTAL TORT IMMUNITY IN ILLINOIS

To place the Tort Immunity Act in perspective, a cursory review of the evolution of sovereign immunity is necessary. It is generally accepted that sovereign immunity was founded on the principle that "the King can do no wrong."[3] Allowing suit to be brought was offensive to the concept of sovereignty. With the replacement of the king by the modern state, a mutation of the theory resulted; that is, to allow a suit against the government was inconsistent with the "supreme executive power."[4] The adoption of the theory in the United States represents an interesting paradox in legal history. "Just how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America is today a bit hard to understand."[5] The history of federal immunity from liability in tort is not at issue. Significantly, though, federal immunity was waived with the passage of the Federal Tort Claims Act[6] in 1946. Contrary to the federal example, the abolition of state and local governmental immunity is less than complete.[7]

The eleventh amendment to the United States Constitution has been interpreted to protect the several states from suit by a private citizen, absent their consent. Illinois first extended state immunity to local municipalities in 1870.[8] While an analysis of the next ninety years of Illinois history is beyond the scope of this casenote, there existed a general dissatisfaction with the doctrine on the part of the legislature and the courts: (1) governmental units, including school districts, were made subject to liability under the Workmen's Compensation Act; (2) the Court of Claims Act established state liability in 1945; (3) limited statutory liability was imposed upon cities, villages, and park districts; (4) municipal activities were judicially classified as "governmental" and "proprietary" with tort liability attaching to the latter activities; (5) the Illinois School Code waived immunity when a school district insured against liability and retained immunity when a school district did not insure.[9] This haphazard erosion of

3. Prosser, Handbook of the Law of Torts, 996 (3d ed. 1964).
4. *Id.* at 997.
5. *Id.*
6. 28 U.S.C. 2671, *et seq.* (1964).
7. Prosser, *supra* n.2 at 1012; *see,* Kionka, *The King is Dead, Long Live the King: State Sovereign Immunity in Illinois,* 59 Ill. B.J. 660, 663 (1971).
8. Town of Waltham v. Kemper, 55 Ill. 346 (1870).
9. Moliter v. Kaneland Community Unit School Dist. No. 302, 18 Ill. 2d 11, 16-18, 163 N.E.2d 89, 91-92 (1959).

sovereign immunity ended in 1959, when the Illinois Supreme Court abolished the doctrine in *Moliter v. Kaneland Community Unit School District No. 302.*[10]

In *Moliter*, the court emphasized that governmental immunity runs counter to the basic concept of tort law that liability follows negligence.[11] The protection-of-public funds theory, a key argument of the proponents of governmental immunity, was rejected.[12] Overruling a long line of cases, the court held that "the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society."[13] Responding immediately to *Moliter*, the Illinois General Asembly enacted a series of statutes in an attempt to nullify the decision.[14] Shortly after enactment, however, most of these acts proved defective by constitutional standards.[15] Ultimately the Tort Immunity Act was passed in 1965.

THE TORT IMMUNITY ACT

While adopting the general rule as stated in *Moliter*, that the public entity is liable, the Tort Immunity Act catalogs specific exceptions to the general rule. The Act is limited to tort claims for injury to person or property against local public entities and their employees.[16] Local public entity includes "a county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district, and all other local governmental bodies."[17] Specifically excluded is "the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State."[18] Four of the sections of the Act are particularly relevant to the issue at hand.

Section 8-101[19] displaces the general tort statute of limitations with a one year statute of limitation. This section applies only to actions against

10. 18 Ill. 2d 11, 163 N.E.2d 89 (1959).
11. *Id.* at 20, 163 N.E.2d at 93.
12. *Id.* at 20-25, 163 N.E.2d at 94-96.
13. *Id.* at 25, 163 N.E.2d at 96.
14. For example, park districts and counties had general immunity from negligence actions. Ill. Rev. Stat. ch. 105, § 12.1-1; ch. 34, § 301.1 (1963). School districts and non-profit private schools were granted a liability ceiling of $10,000, a six months notice of suit provision, and a one year statute of limitations provision. Ill. Rev. Stat. ch. 122, §§ 821-31 (1963).
15. Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964); Hutchings v. Kraject, 34 Ill. 2d 379, 214 N.E.2d 274 (1966); Lorton v. Brown County Community Unit School Dist. No. 1, 35 Ill. 2d 362, 220 N.E.2d 161 (1966); Treece v. Shawnee Community Unit School Dist. No. 84, 39 Ill. 2d 136, 233 N.E.2d 549 (1968).
16. Ill. Rev. Stat. ch. 85, §§ 1-206, 2-101 (1971).
17. *Id.* at § 1-206.
18. *Id.*
19. *Id.* § 8-101:
No civil action may be commenced in any court against a local entity for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued.

the local entity, and it leaves the general limitation period in effect for actions against the employee. However, the employee will still be protected against actions commenced in the second year by the indemnity provisions of the Act.[20] The effect of this section is to require an injured plaintiff to bring his action within a shorter period than required under the general tort statute of limitations.

Sections 8-102[21] and 8-103[22] are closely related and will be considered together. Section 8-102 requires that a detailed written notice of intent to sue be served within six months for any possible action against a local public entity or any of its employees. Section 8-103 specifies that the notice requirement must be complied with or the action will be dismissed with prejudice.

The constitutionality of sections 8-102 and 8-103 was at issue in *King v. Johnson.*[23] The plaintiff argued that these sections offended article II, section 14, and article IV, section 22, of the Illinois Constitution which prohibited laws granting corporations and individuals special privileges or immunities. The Illinois Supreme Court held that the provisions of sections 8-102 and 8-103 apply equally to the whole class of local governmental entities and their employees and are not special privileges or immunities granted to a particular public entity. The court also held, "Notice of possible tort claims within six months is reasonably related to the legislative purpose of imposing tort liability on all local governmental entities on a fair and orderly basis."[24] This holding was specifically approved in the *Housewright* decision.[25]

20. *Id.* at §§ 2-301, 2-302.
21. *Id.* § 8-102:
Within 6 months from the date that the injury or cause of action, referred to in Sections 8-102 and 8-103, was received or accrued, any person who is about to commence any civil action for damages on account of such injury against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, must personally serve in the Office of the Secretary or Clerk, as the case may be, for the entity against whom or against whose employee the action is contemplated a written statement, signed by himself, his agent or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, the general nature of the accident, the name and address of the attending physician, if any, and the name and address of the treating hospital or hospitals, if any.
22. *Id.* § 8-103:
If the notice under Section 8-102 is not served as provided therein, any such civil action commenced against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, shall be dismissed and the person to whom such cause of injury accrued shall be forever barred from further suing.
23. 47 Ill. 2d 247, 265 N.E.2d 874 (1970).
24. *Id.* at 250-51, 265 N.E.2d at 876.
25. 51 Ill. 2d at 361, 282 N.E.2d at 440.

Section 9-103[26] is an insurance authorization provision. Subsection (a) authorizes local public entities to purchase insurance against losses or liabilities under the Act. Subsection (b) has been the subject of much litigation and does not lend itself to easy analysis. The subsection expressly states that "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." One of the most difficult questions in the Tort Immunity Act has been posed by this subsection: does it waive the defenses and immunities of the entire Act or only parts of the Act?

ILLINOIS APPELLATE COURT DECISIONS CONSTRUING SECTION 9-103 (b)

The first case dealing with the question was *Schear v. City of Highland Park*.[27] There, plaintiff failed to comply with sections 8-101 and 8-102, and his complaint was dismissed. On appeal, plaintiff argued that the purchase of liability insurance by the defendant city waived, according to section 9-103(b), the right to raise defenses and immunities granted by the Act, including the notice requirement and statute of limitations. Contrary to plaintiff's argument, the court held that the waiver in section 9-103(b) did not apply to sections 8-101 and 8-102. The court reasoned:

> If the defense of limitations were contemplated by this language, this would mean that the insurance company could not raise the statute even if the suit were to be brought some twenty years after the alleged injury.[28]

The reasoning of the *Schear* opinion was adopted by the Fourth District appellate court in *Hoffman v. Evans*.[29] A trend was developing when the court held, "We agree with the reasoning of *Schear* and hold that the language of section 9-103 has no application to the six month notice requirement."[30] Strict compliance with section 8-102, as a condition precedent to bringing suit, was required by the court.

26. 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 such 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.
27. 104 Ill. App. 2d 285, 244 N.E.2d 72 (2d Dist. 1968).
28. *Id.* at 293, 244 N.E.2d at 76.
29. 129 Ill. App. 2d 439, 263 N.E.2d 140 (4th Dist. 1970).
30. *Id.* at 443, 263 N.E.2d at 142.

The trend continued in *Brown v. Shook*[31] in which the plaintiff failed to serve the notice required by section 8-102. On appeal, plaintiff argued that the defendant, who had purchased liability insurance, by reason of section 9-103(b), had waived the right to raise a defense based on plaintiff's non-compliance with section 8-102. The court rejected plaintiff's contention stating that nothing in the record indicated the purchase of insurance by the defendant, and even if it were so indicated, the action would be barred according to the *Schear* rationale.

Brown was followed by a decision in the First District appellate court, *Rapacz v. Township High School District No. 207.*[32] The trial court dismissed plaintiff's complaint for noncompliance with section 8-102. In an attempt to clarify the previous decisions and properly construe section 9-103(b), the court said:

> The intent of this Section 9-103, as above stated, is to prevent any insurer from avoiding liability by reason of immunities granted to uninsured municipalities. The immunities created by Articles II to VII inclusive are granted only for the benefit of uninsured municipalities. Defenses established elsewhere in the Act, apply to all municipalities whether they are uninsured and depend on statutory immunity or whether they have procured insurance. The Legislature did not intend that the waiver of immunities by the insurance company have any effect upon defenses granted to all municipalities including those without insurance.[33]

Although the *Rapacz* decision limits the applicability of section 9-103(b), a literal reading of the section does not indicate any limitation on the section's waiver of the defenses and immunities in the Act. It is against these interpretations by the Illinois appellate courts that the Illinois Supreme Court decided *Housewright v. City of LaHarpe.*

Analysis of the Housewright Decision

The *Housewright* decision was structured on four principal arguments raised by the plaintiffs. Plaintiffs' first contention was that sections 8-102 and 8-103 violated section 13 of article IV of the constitution of 1870 which provided: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." Plaintiffs argued that the subject of sections 8-102 and 8-103 was not expressed in the title of the Act and that the Act embraced more than one subject. Rejecting plaintiffs' argument and citing several prior cases construing section 13 of atricle IV, the court stated: "We find sections 8-102 and 8-103 to be reasonably connected to the general subject of the tort immunity of local

31. 2 Ill. App. 3d 1103, 268 N.E.2d 883 (2d Dist. 1971).
32. 2 Ill. App. 3d 1095, 278 N.E.2d 540 (1st Dist. 1971).
33. *Id.* at 1102, 278 N.E.2d at 545-46.

public entities and their employees. . . ."[34] The court's holding is consistent with a literal reading of the Act. Certainly, the sections are a main component of the legislative plan for local governmental immunity.

Plaintiffs' second argument suggested that sections 8-102 and 8-103 constituted a grant of a special privilege or immunity, and therefore, they violated the constitutional guarantees of due process and equal protection of the law. Relying on the *King* decision, discussed earlier, the court held that "neither the requirement of notice nor the limitation of time within which the notice must be given deprives plaintiffs of equal protection of the law in violation of the fourteenth amendment."[35] Thus, the court sustained sections 8-102 and 8-103 against two strong contentions of unconstitutionality.

Third, plaintiffs argued that the defendant city had actual notice of the information required by section 8-102, and, therefore, compliance with section 8-102 was not necessary. Rejecting the argument and emphasizing that the legislative intent was clear, the court stated, "the allegation of actual notice does not satisfy the statutory requirement of written notice."[36] This holding follows the general rule that statutes must be strictly construed.

Consideration of plaintiffs' fourth contention resulted in a significant change in the law. Plaintiffs contended that the defense or immunity of the defendant city, which was based on plaintiffs' failure to give notice in compliance with section 8-102, was waived according to section 9-103(b) because the defendant city had procured liability insurance. Although appellate courts had considered the question several times, it was a matter of first impression for the supreme court.

The court reviewed the appellate court decisions in *Schear*, *Hoffman*, *Brown*, and *Rapacz* briefly and rejected their rationale. Next, the history of predecessor sections to sections 8-101, 8-102, and 8-103 was traced and the general rule was stated: "the question of notice is entirely within legislative control."[37] Following this rule and applying a literal construction to section 9-103(b), the court stated:

> For the reason that the defense or immunity which results from failure to comply with section 8-102 exists solely because of that section of the Governmental Employees Tort Immunity Act and because it is not excepted from the "immunity from suit by reason of the defenses and immunities provided in this Act" provided in section 9-103(b), we hold that the failure to give notice in accordance with section 8-102 is subject to the waiver provision of section 9-103(b).[38]

34. 51 Ill. 2d at 360, 282 N.E.2d at 439.
35. *Id.* at 361, 282 N.E.2d at 440.
36. *Id.*
37. *Id.* at 364, 282 N.E.2d at 441.
38. *Id.* at 365, 282 N.E.2d at 442.

In short, if the legislature had intended section 8-102 to be exempted from the operative effect of section 9-103(b), they should have so provided. Finally, the court considered and rejected defendants' contention that plaintiffs were required to give notice pursuant to section 1-4-6 of the Illinois Municipal Code.

Housewright represents a significant change in the law of local governmental immunity. The ability of a local public entity to lessen the impact of liability through the procurement of insurance undoubtedly influenced the court. The immediate effect is that an *uninsured* public entity can raise defenses and immunities provided in the Act, while an *insured* public entity waives the right to raise them. This classification by section 9-103 between insured and uninsured is subject to a possible equal protection attack. This argument was considered and rejected by the Illinois Supreme Court in a case decided the same day as *Housewright*.[39] Under the current interpretation of section 9-103(b), a plaintiff's ability to recover is directly influenced by the fortuitous event of whether the local public entity has insurance.

CONCLUSION

The new Illinois constitution provides:

> 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.[40]

The doctrine of local governmental immunity is contrary to the notion expressed in the above provision. *Housewright* represents a line of attack that the longstanding doctrine cannot withstand. Focusing on the effect of insurance, the decision clearly establishes that when a local public entity has distributed the risks of tort liability through the procurement of insurance, it should not enjoy the protection of the Tort Immunity Act. Although *Housewright* results in only a partial abolition of local governmental immunity in Illinois, it marks the beginning of a trend that will undoubtedly influence the total abolition of sovereign immunity by the judiciary and legislature in the future.

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39. Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 280-81, 281 N.E.2d 659, 663, 664 (1972).
40. Ill. Const. art. 1, § 12.