Part One: STRUCTURE OF MUNICIPAL GOVERNMENT

Liability of Public Officials and the City
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Cities as well as city officials can be subject to liability in a variety of situations under both federal and state law. However, both cities and city officials are immune from certain types of liability under specific circumstances. This chapter addresses some of the types of liability that cities and city officials may face under both federal and state law and discusses the differing levels of immunity and standards for immunity for both cities and their officials.

STATE LAW

Cities are liable for breach of contract in largely the same way as private entities. However, in some instances, it may be alleged that a municipality’s actions promised under the contract were not authorized by law and that the contract is against public policy. When a city acts ultra vires, that is, it acts without authority, the contract will be held void.

With respect to torts, however, cities, counties and their employees and officers may be held liable. A tort is a wrongful act for which the law imposes civil liability to compensate or protect the injured party. Common examples of torts are personal injury actions based on accidents occurring in city facilities or based on actions of city employees. Generally, cities can be held liable for the acts of their officials or employees through “respondeat superior,” which according to Black’s Law Dictionary, is liability by a master for the wrongful acts of his servant, or liability by a principal for the acts of his agent, where the servant or agent is acting in the course of his or her agency or employment.

Sovereign Immunity

Municipalities and their officials are immune from suit except to the extent that sovereign immunity has been waived or in specifically limited circumstances. The waiver of sovereign immunity can be accomplished by action of the General Assembly or by a city’s purchase of liability insurance. Additionally immunity is waived for the performance of non-governmental, often called proprietary, functions. For example, a hospital is not covered by sovereign immunity because it performs the same functions as a private hospital.

An example of a waiver of sovereign immunity accomplished by action of the General Assembly is the waiver enacted for use of a local government entity’s covered motor vehicle by a local government officer or employee. This law essentially waives the sovereign immunity of cities and counties for injury or damage arising from motor vehicle claims up to certain prescribed minimum amounts. Local governments can increase the waiver of immunity by adopting a resolution or ordinance doing so or by obtaining coverage in excess of the statutorily prescribed amounts through the purchase of commercial liability insurance or participation in an interlocal risk management agency.
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Local governments may provide for the payment of claims through any method.⁸ Thus, local governments may purchase insurance, participate in an interlocal risk management agency, establish a reserve fund for the payment of claims, simply pay claims as they arise or any combination of the foregoing. Under the motor vehicle waiver law the fiscal year aggregate liability of a local government cannot exceed any insurance, contracts of indemnity, self-insurance, or other reserve or fund established to pay claims. Any judgment obtained in excess of the annual aggregate liability is to be paid within six months of the end of the local government’s fiscal year in which the final judgment was entered. All tort actions, including those filed against a local government as a joint tortfeasor, must be brought in the state or superior court of the county wherein the local government resides.⁹

**Official Immunity**

As aptly described by the Georgia Supreme Court:

> The doctrine of official immunity, also known as qualified immunity, offers public officers and employees limited protection from suit in their personal capacity. [Official] immunity protects individual public agents from personal liability for discretionary actions taken within the scope of their authority and done without willfulness, malice or corruption. Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or an intent to injure. The rationale for this immunity is to preserve the public employee’s independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight.¹⁰

For the purpose of this immunity, a “discretionary action” is one calling for the exercise of personal deliberation and judgment, entailing examining facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. City officials and employees are liable for the negligent performance of ministerial acts. “Ministerial acts” are those which are required by law or policy, that are simple, absolute and definite, and require little or no exercise of judgment.

An example of this distinction was provided in a case in which the Georgia Court of Appeals held that a county’s decision on how to allocate resources to repair roads after widespread flooding was discretionary.¹¹ The county officials were not liable for the alleged failure to repair a particular road and warn of a dangerous condition. The court found that since the decisions required the officials to use judgment and discretion in determining how to allocate work forces, equipment and time, the officials were entitled to official immunity.

Courts do not extend official immunity to ministerial actions. For example, a court declined to extend official immunity to former court clerks who failed to inform the Department of Corrections that an inmate’s sentence had been amended, causing the inmate to spend twenty-two extra months in jail.¹² Courts have also declined to extend sovereign immunity to inspectors when their failure to do an adequate job causes damages.¹³
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Nuisance

There is no sovereign immunity for nuisance. A nuisance is defined generally as anything that causes hurt, inconvenience, or damage to another. To make a claim for nuisance, the plaintiff must show that the defendant has performed continuous or regularly repetitious acts or created a continuous or repetitious condition that has injured the plaintiff. In order for a city to be liable for nuisance, the plaintiff must also establish more than mere negligence. Rather, the plaintiff must show that the city knew of a condition that constituted a nuisance and failed to take action within a reasonable time to correct it. A city will not be liable for nuisance resulting from factors, such as increased construction, when the city took no part in the activity that caused the damage. For example, a city can be held liable in a nuisance action when it fails to adequately maintain water and sewage systems. Cities can also be held liable in a nuisance action when a construction project disrupts drainage and causes damage.

FEDERAL LAW

The largest potential liability under federal law for cities and city officials is based on 42 U.S.C. § 1983, a statute that was part of the Civil Rights Act of 1866, which was enacted to implement the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution after the close of the Civil War. In pertinent part, Section 1983 states as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

Specifically, Section 1983 authorizes relief against a city, city official or city employee when an individual’s federally protected rights have been violated.

Section 1983 has been utilized to establish liability on the part of cities, city officials, and city employees in an ever expanding variety of situations. Some of the most common types of claims under Section 1983 are for excessive use of force during an arrest, for personal injuries based on use of a city vehicle or equipment, or for alleged mistreatment of employees or citizens. The U.S. Supreme Court has held that conduct by police officers, even when it violated state law, could constitute state action taken under color of state law and could thereby be actionable under Section 1983.

Under Section 1983 there is no respondeat superior liability. Over the years the Supreme Court has made it very clear that each possible defendant, whether a subordinate or a superior officer or a municipal entity, is responsible only for that defendant’s own wrongs. Although a municipality cannot be held liable under a theory of respondeat superior for purposes of Section 1983, a municipality can be held liable for the enforcement of a municipal policy, practice, or custom which violates the plaintiff’s federally established rights. Thus, when a city official or
employee acts based on an ordinance or recognized city policy, practice, or custom, the city can be held directly liable for the official’s or employee’s actions, even though the official or employee may be immune from suit in her or her individual capacity. There is no immunity for municipalities under Section 1983.22

**Absolute Immunity**

City officials have absolute immunity for acts taken as part of their legislative function. Whether an act is considered to be “legislative” for purposes of discerning absolute immunity is determined based on the nature of the act, rather than on the motive or intent of the official performing it. The courts will look at whether the act is part of a governmental function rather than whether the official had some bad or inappropriate motive.23

**Qualified Immunity**

Qualified immunity shields government officials and employees performing discretionary functions from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known.24 Again, there is a distinction between “discretionary functions” which require some judgment or decision making by the official or employee and “ministerial functions” which do not require any application of judgment or significant decision making by an official or employee.25

In order for an official or employee’s conduct to be found to violate a clearly established statutory or constitutional right, the law must be sufficiently well established so that a reasonable official would understand that his or her individual action would violate the plaintiff’s federal rights. However, it is not necessary for qualified immunity to be waived and liability to attach that there be a case already decided on the same or materially similar facts as the one presented by the plaintiff.26 It is enough if the officials have fair warning that their conduct violates established law.27 This is particularly true when the existing case law strongly indicates unconstitutionality and the conduct of the officials or employees is particularly egregious.28

**INDEMNIFICATION, INSURANCE AND RISK MANAGEMENT**

Cities are authorized to purchase liability or indemnity insurance covering mayors and councilmembers as well as city employees.29 Instead of or in addition to buying insurance, a city may adopt a policy to defend civil, criminal, or quasi-criminal actions brought against its officials and employees for actions taken in their official capacity, except for crimes involving theft of city property or money.30 Regarding the latter, a city may reimburse the defense costs of those found not guilty or of those against whom charges are dismissed. Municipalities may also spend state, federal, and local funds for this purpose.31 However, a city is not required to defend such actions.32 Municipalities are permitted to settle claims out of court, thereby avoiding costly and time-consuming court battles.
Georgia law also allows municipalities to form with other cities to establish interlocal risk management agencies through which they can jointly establish a self-insurance fund or purchase coverage to insure against general liability claims. Many cities have done this through GMA’s GIRMA program.

Municipal officials may reduce the possibility of lawsuits through the liability prevention process known as risk management. Risk management consists of identification, measurement, control and financing of losses and loss prevention. In this context, identification involves determining areas of potential liability such as law enforcement, personnel practices and procedures, regulatory functions, and the delivery and denial of services. Review of a city’s claims history can be useful in identifying areas for loss prevention activities. Measurement is predicting the frequency and financial severity of potential suits. Control means establishing, implementing, monitoring, and updating policies and procedures related to the exposure areas identified. Financing involves providing funds to reduce or eliminate risks and to cover risks that cannot be eliminated.

Additionally, the application of good old-fashioned common sense can help municipalities prevent liability. Several simple steps to bear in mind are:

1. Don’t use public office for private matters.
2. Correct mistakes; don’t ignore them.
3. Have, follow and update policies.
4. Conduct and attend training.
5. Only adopt those policies and regulations that the city is prepared to actually enforce.
6. Generate only the infrastructure that the city is prepared to maintain.
7. Conduct periodic liability coverage audits.
8. Consult with the city attorney on controversial matters or when in doubt about the legality or potential consequences of an action.

GEORGIA IMMIGRATION LAW LIABILITY

In recent years, the Georgia Legislature has taken on the issue of illegal immigration. The legislature has passed a series of laws which attempt to curb the flow of such immigration into the state. In order to effectuate these laws the state relies heavily upon local governments, including municipalities, to carry out the numerous requirements in these state immigration laws. Municipalities must collect affidavits from contractors, private employers, and applicants for public benefits, amongst the various mandates placed upon local governments. Failure to comply with these state mandates could result in some serious penalties for the municipality and for municipal employees and officials.

One requirement under Georgia’s immigration laws places a mandate upon municipalities to obtain affidavits from every contractor performing work for the city on public works contracts, including contracts involving the operation, maintenance, and repair of building and structures.
Municipalities face possible loss of qualified local government status if they fail to follow the provisions of this area of Georgia’s immigration laws.\(^\text{36}\)

In addition to the requirements for contractors, municipalities must obtain affidavits from private employers who employ a certain number of employees or face the possibility of criminal or civil action brought by the Attorney General.\(^\text{37}\) Similarly, public officials and employees who fail to follow the public works contractor affidavit requirements or the public benefit affidavit requirements of Georgia’s immigration laws face the possibility of action by the Attorney General or the newly created Immigration Enforcement Review Board, which may lead to civil fines of up to $10,000.00, restitution for the cost of the violation, and removal from office or employment.\(^\text{38}\) Therefore, the potential liability for public officials, employees and municipalities is substantial in regards to compliance with Georgia’s immigration laws.

**NOTES**

3. O.C.G.A. § 36-33-1.
4. Ibid.
6. O.C.G.A. § 36-92-1 et seq.
7. Effective January 1, 2008: $500,000 for bodily injury (1 person), $700,000 for bodily injury (2 or more persons), $50,000 for property damage, and $750,000 aggregate.
9. Ibid.
16. Ibid.
21. Ibid.
24. Pearson v. Callahan, 129 S.Ct. 808 (2009) (modifying the ruling in Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001) to give the court more flexibility when determining whether a person is entitled to immunity by analyzing (1) whether a constitutional right may have been abridged and (2) whether the right was “clearly established” at the time of defendant’s conduct).
Ibid.

Sheldon Nahmod, Professor of Law, Chicago-Kent College of Law, “Section 1983 Overview and Update”, 50th Annual Institute for City and County Attorneys (Athens: Institute of Continuing Legal Education in Georgia), 35


O.C.G.A. § 36-85-1 et seq.

Jose J. Anchondo, “Liability Prevention (Risk Management) for Public Employees and Officials,” Intergovernmental Brief no. 78-3 (Austin: Texas Advisory Commission on Intergovernmental Relations, September 1978)

O.C.G.A. § 13-10-91(b).

O.C.G.A. § 13-10-91(b)(7).

O.C.G.A. § 36-6-60(j).

O.C.G.A. § 45-10-28(c).