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SULLIVAN, HOUSEWRIGHT, FANIO —
NEW INTERPRETATION OF THE 1965 ILLINOIS
TORT IMMUNITY ACT: THE EFFECT OF
LIABILITY INSURANCE

INTRODUCTION

Since its origin in the early English common law, the doctrine of governmental tort immunity has been the subject of frequent controversy.¹ In Illinois, its status has been affected by conflicting case law, legislative reaction, and judicial construction.

The Illinois courts adopted the immunity doctrine with reference to towns and counties in 1870,² and extended it to school districts in *Kinnare v. City of Chicago*.³ The rejection of this doctrine in *Molitor v. Kaneland Community Unit District No. 302*⁴ set the stage for the modern development of the immunity doctrine in Illinois. In the years between *Kinnare* and *Molitor*, several rationalizations in favor of the non-immunity rule were advanced,⁵ but equally strong arguments were made

¹ The earliest fully reported case applying the doctrine is the English case of *Russell v. The Men dwelling in the County of Devon*, 2 T.T. 667, 100 Eng. Rep. R. 359 (1788). In this case, the English court held that an action would not lie against the county for an injury "to the wag[g]ion of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county." This 1788 decision was apparently based on an antecedent case referred to therein as providing a precedent for the decision. In the majority opinion it was said:

[T]here is no law or reason for supporting the action; and there is a *precedent-against it in Brooks*, though even without that *authority* I should be of opinion that this action cannot be maintained. (Emphasis added.)

The court in *Russell* refers to "Bro. Abr. title 'Accion sur le Case,' pl. 93 where it is said that if an [sic] highway be out of repair by which my horse is mired, no action lies; 'cur est populas et surra reforme per presentment;' which must be understood to mean, that, as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from their neglect."

A reference in Holdsworth's *History of English Law* (II HOLDSWORTH, HISTORY OF THE ENGLISH LAW, 545, (3d ed. 1909) states that the author of Brooke's Abridgments died in 1558, so the case referred to as appearing therein must have been decided before that year. Thus, the doctrine originated at a very early time in the common law.

² *Town of Waltham v. Kemper*, 55 Ill. 346 (1870).

³ 171 Ill. 332, 49 N.E. 536 (1898). It should be noted that the English courts had abrogated the rule eight years before this Illinois case, definitely establishing that a school board or school district is subject to suit in tort for personal injuries on the same basis as a private individual or corporation. *Crisp v. Thomas*, 63 L.T.N.S. 756 (1890).

⁴ 18 Ill. 2d 11, 163 N.E.2d 89 (1959), (hereinafter cited as *Molitor*).

⁵ See *Leviton v. Board of Education*, 374 Ill. 594, 30 N.E.2d 497 (1940); *Thomas v. Broadlands Community Consolidated School Dist. No. 201*, 348 Ill. App. 567, 109 N.E.2d 636 (1952).

against it.⁶ The legislature had also made some inroads on the rule by making local public entities, including school districts, subject to liability under several acts.⁷ Cognizant of these developments,⁸ the *Molitor* court squarely rejected the theories in support of immunity, declaring: "We are of the opinion that none of the reasons advanced in support of school district immunity have any true validity today."⁹ Thus, the *Molitor* court held the school district liable in tort for the negligence of its employee and expressly overruled "all prior decisions to the contrary."¹⁰

The *Molitor* decision was applied to other areas of immunity, and, in reaction, the General Assembly soon enacted a number of statutes granting immunity from tort liability to local public entities. The case of *Harvey v. Clyde Park District*¹¹ was the first major judicial attack against these new enactments, and provided a basis on which to attack much of the immunity legislation then in force. *Harvey* applied section 22 of article IV of the 1870 Illinois Constitution, prohibiting special legislation, to strike down section 12.1 of the Park District Code,¹² which granted immunity to park districts. The General Assembly responded to *Harvey* by enacting the present Illinois Tort Immunity Act.¹³ The Act was written to comply with the constitutional interpretation of *Harvey*, granting immunities based solely on the function of the local public entity rather than on any arbitrary classification of persons or governmental units. Several provisions have already been tested in cases before the Illinois Supreme Court and have been held valid; typical of these decisions is *Maloney v. Elmhurst Park District*,¹⁴ where the court upheld a section granting immunity on the functional basis of areas used as park land.¹⁵

Having considered the constitutionality of the Act, the

⁶ See *Molitor*, at 90.

⁷ *Id.* at 91-2.

⁸ Notes 9, 10 *supra*.

⁹ *Molitor*, at 95.

¹⁰ *Id.* at 98.

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

¹² Law of April 9, 1959, ch. 105, ¶12-1, (1959) ILL. LAWS (repealed 1967).

¹³ Local Government and Governmental Employees Tort Immunity Act, ILL. REV. STAT. ch. 85, §§1-101 *et seq.* (1965) (hereinafter cited as Tort Immunity Act).

¹⁴ 47 Ill. 2d 367, 265 N.E.2d 654 (1970).

¹⁵ See *Maloney v. Elmhurst Park District: Park District Tort Immunity in Illinois, The Functional Dilemma*, 5 J. MAR. J. PRAC. & PROC. 368. Other cases upholding the validity of sections of the Act are: *Mills v. Winnebago County*, 104 Ill. App. 2d 366, 244 N.E.2d 65 (1969); *Stubblefield v. City of Chicago*, 48 Ill. 2d 267, 269 N.E.2d 504 (1971); *Shear v. City of Highland Park*, 104 Ill. App. 2d 285, 244 N.E.2d 72 (1969); *King v. Johnson*, 47 Ill. 2d 247, 265 N.E.2d 874 (1970).

courts are now beginning to examine the construction and application of various sections of the statute. This article will discuss three recent decisions involving the effect of section 9-103, which deals with the purchase of liability insurance by a governmental unit, and the effect of such purchase on the immunities granted by the other sections of the Act. The three cases to be discussed are: *Sullivan v. Midlothian Park District*,¹⁶ *Housewright v. City of La Harpe*,¹⁷ and *Fanio v. John W. Breslin Company*.¹⁸

JUDICIAL CONSTRUCTION

In the first of these cases, *Sullivan v. Midlothian Park District*, the Supreme Court of Illinois not only affirmed the constitutionality of both the immunity and waiver of immunity provisions but, more importantly, defined the relationship between the two. It held, in effect, that the purchase of liability insurance reestablishes the decisional law under the *Molitor* rationale.

In *Sullivan*, plaintiff, by her next friend, sought to recover damages for injuries incurred while riding on a merry-go-round, owned and maintained by the defendant, Midlothian Park District. Although count II contained allegations of willful and wanton misconduct, count I merely alleged ordinary negligence on the part of the park district, the existence of public liability insurance, and the waiver of immunity by the district for damages caused by ordinary negligence to the extent of the insurance coverage. Count III was a direct action against the insurance carrier incorporating the allegations of count I, and further contending that the insurance company had waived its right to refuse payment or to deny liability by virtue of section 9-103(b) of the Local Governmental and Governmental Employee Tort Immunity Act.¹⁹

The circuit court dismissed counts I and III of the complaint, stating that the park district and its employees were not liable for ordinary negligence pursuant to section 3-106 of

¹⁶ 51 Ill. 2d 274, 281 N.E.2d 659 (1972), (hereinafter cited as *Sullivan*).

¹⁷ 51 Ill. 2d 357, 282 N.E.2d 437 (1972), (hereinafter cited as *Housewright*).

¹⁸ 51 Ill. 2d 366, 282 N.E.2d 443 (1972), (hereinafter cited as *Fanio*).

¹⁹ Section 9-103(b) provides:

Every policy for insurance coverage issued to a local public entity shall provide or be endorsed 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.

ILL. REV. STAT. ch. 85, §9-103(b) (1971). The complaint, quoted in the opinion, states that the defendant insurance company:

[W]aived any right to refuse payment or to deny liability for the

the Act, which grants immunity to park districts and their employees,²⁰ except for injury caused by willful and wanton conduct. Further, the circuit court held that this immunity was not waived to the extent of the liability insurance carried by the district as provided in section 9-103(b) and held this section unconstitutional. Citing *Grasse v. Dealers Transport Co.*²¹ and *Harvey v. Clyde Park District*,²² the circuit court stated: "[N]o rational difference exists between liability for injuries of all public entities that happen to be protected by liability insurance and the liability of public entities that happen to be unprotected by an insurance policy."²³

On direct appeal, after a summary affirmation of the constitutionality of the immunity provision,²⁴ the Illinois Supreme Court addressed itself to the more formidable problem of the waiver of immunities presented by section 9-103. The defendant-appellee argued that this section was special legislation in violation of section 22 of the 1870 Illinois Constitution, since it made the remedy of an injured person dependent upon the unrestricted discretion of local governments to determine

damages claimed by the plaintiff, by reason of the non-liability of the insured public entity, for the wrongful or negligent acts of said entity or its employees, and also waived any right to refuse payment or to deny liability thereto within the limits of said policy by reason of any non-liability of the insured public entity because of its immunity from suit by reason of defenses or immunities provided in said statute.

12. That the plaintiff alleges in the alternative that she either has a right to proceed in an action against the municipal corporation claimed to be liable, and to recover her damages, or in the event said liability is barred by the provisions of said Act, which governs actions against local public entities and public employees, or if her right to so recover is barred by the Act, she then by virtue of the provisions of said policy of insurance and of said Act, if the action against the municipal corporation is barred, has a right to proceed in an action directly against the insurance carrier that issued the said public liability insurance and thereby assumed the responsibilities provided for in said Act by issuing said insurance and waived the defense and immunities which otherwise would have been available to the said municipal corporation.

51 Ill. 2d 274-76, 281 N.E.2d 659, 661 (1972).

²⁰ Section 3-106 provides:

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used as a park, playground, or open area for recreation purposes unless such local entity or public employee is guilty of willful and wanton negligence proximately causing such injury.

ILL. REV. STAT. ch. 85, § 3-106 (1971).

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

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

²³ 51 Ill. 2d at 276, 281 N.E.2d at 661.

²⁴ The Supreme Court first considered appellant's contentions that section 3-106 of the Act violates section 19 of article II and section 22 of article IV of the Illinois Constitution of 1870, and that she had been deprived of due process and equal protection of laws guaranteed by the fourteenth amendment of the United States Constitution. The plaintiff contended that section 3-106 deprived her of a legal remedy and that the privilege granted by this section is arbitrary and irrational. The Court, relying largely on *Maloney*, which considered substantially the same contentions in holding this section valid, found these contentions without merit.

whether they would be liable for their own negligence by either purchasing or failing to purchase liability insurance. The court found that section 9-103(b) was neither arbitrary nor unreasonable, and held that it was not, therefore, special legislation. In support, the court reasoned that this section was applicable to *all* public entities who elected to avail themselves of its provisions. The court stated that although the General Assembly could have chosen to omit section 9-103 entirely, to make insurance mandatory, or to exclude any waiver of defenses or immunities, it instead chose to enact this section to enable the applicable governmental units to shift the risk of loss to an insurance carrier. This provision, said the court, may evidence legislative recognition of the dominant role of the insurance industry in the field of personal injury litigation.²⁵

With respect to the direct action against the insurance carrier, the Supreme Court affirmed the trial court's dismissal citing *Marchlik v. Coronet Insurance Co.*,²⁶ which prohibits such a direct action.

The supreme court next considered the question raised by the contentions of count I: whether section 9-103(b) serves to waive the provision of section 3-106, which provides that a local public entity is not liable for an injury unless guilty of willful and wanton negligence.

The court, in holding section 3-106 within the contemplation of the waiver in section 9-103(b) of "defenses and immunities provided in this Act,"²⁷ stated that *Molitor* had enunciated the applicable common law of Illinois when it held such public entities liable for ordinary negligence. In reasoning that prior to the Act liability would have been imposed for injuries resulting from ordinary negligence, the court held that the immunity granted by section 3-106, originating in the Act itself, is clearly of the type referred to by section 9-103(b) as being waived by the purchase of liability insurance.

In the second of these cases, *Housewright v. City of La Harpe*, the Illinois Supreme Court extended the operation of the waiver provision to certain defenses apart from the immunity clauses. Here, plaintiffs sought to recover damages for personal injuries and for property damage to a truck resulting from a collision between the truck driven by the plaintiff and an automobile owned by defendant, City of La Harpe, and driven by defendant, Klinedinst, the city marshal. The complaint contained eight counts; the first four named both the

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

²⁶ 40 Ill. 2d 327, 239 N.E.2d 799 (1968).

²⁷ ILL. REV. STAT. ch. 85, §9-103 (1971).

city and Klinedinst as defendants on the theory of respondeat superior, while the last four named Klinedinst individually alleging alternatively that at the time of the collision he was not acting within the scope of his employment. Each alternative alleged counts of both negligence and willful and wanton misconduct.

The defendants moved to dismiss the complaint, contending that the plaintiffs had failed to allege the giving of notice to the defendant, City, as required by section 8-102 of the Tort Immunity Act and section 1-4-6 of the Illinois Municipal Code.²⁸

Plaintiffs moved to strike defendant's motion on the ground that section 8-102 of the Tort Immunity Act and section 1-4-6 of the Municipal Code were unconstitutional. The circuit court denied plaintiffs' motion and granted defendants' motion, dismissing the eight counts of the complaint.

On appeal, the supreme court once again affirmed the constitutionality of the Act, and held that section 1-4-6 of the Municipal Code did not apply in the instant case.²⁹

The court next considered the effect of section 9-103(b)

²⁸ ILL. REV. STAT. ch. 24, §1-4-6 (1971).

²⁹ Plaintiffs had contended that sections 8-102 and 8-103 of the Tort Immunity Act 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." Also, plaintiffs contended that these sections violated the constitutional guarantees of due process and equal protection of the law. The supreme court found sections 8-102 and 8-103 reasonably connected to the general subject of the Act, the tort immunity of local public entities and their employees and within the construction given to section 13 of article IV in previous decisions: *People ex rel. Adams v. Sanes*, 41 Ill. 2d 381, 243 N.E.2d 233 (1969); *Memorial Gardens Ass'n v. Smith*, 16 Ill. 2d 116, 156 N.E.2d 587 (1959); *People ex rel. Coutrakon v. Lohr*, 9 Ill. 2d 539, 138 N.E.2d 471 (1956); *Jordan v. Metropolitan Sanitary District of Greater Chicago*, 15 Ill. 2d 369, 155 N.E.2d 297 (1958); *People ex rel. Brenza v. Gebbie*, 5 Ill. 2d 565, 126 N.E.2d. 657 (1955); *King v. Johnson*, 47 Ill. 2d 247, 265 N.E.2d 874 (1970).

As to the plaintiffs' second contention, the court, relying on *King v. Johnson*, 47 Ill. 2d 247, 265 N.E.2d 874 (1970), held that neither the requirement of notice nor the time limitation within which the notice must be given deprives plaintiff of equal protection of the law.

Section 1-4-6 of the Municipal Code requires municipalities with less than 500,000 population to indemnify members of its police department to the extent of \$50,000 for judgments rendered against policemen based on *negligence* in the performance of their official duties. This section also requires that, in order to obtain the benefit of such insurance, the police officer sued must notify the municipality within ten days of service of process of the fact that the action has been brought against him. Citing *Andrews v. City of Chicago*, 37 Ill. 2d 309, 226 N.E.2d 597 (1967), the court held that this section does not bar the common law actions asserted in counts I through IV of the complaint and by its terms does not apply either to those counts alleging *willful and wanton* misconduct or those alleging that at the time of the collision the defendant, city marshal, was not acting in the scope of his employment. Thus, section 1-4-6 was held not to apply to counts I through VIII of the complaint, thereby rendering a determination of the constitutionality of the section unnecessary, as well as rendering the circuit court's allowance of the motion of dismissal, based on this section, reversible error.

on the six-month notice provision of section 8-102³⁰ and on the provision of section 8-103,³¹ which bars any action where section 8-102 has not been complied with. Plaintiffs contended that the waiver provision of section 9-103(b) served to waive the immunity granted by section 8-103 for failure to comply with the notice provision of section 8-102. Although the supreme court had not previously considered this question, it was noted that the appellate court had held in the negative in several cases.³² In its supporting reasoning, the appellate court had stated: "If the defense of limitations were contemplated by this language [that of section 9-103(b)], this would mean that the insurance company could not raise the statute even if the suit were brought some twenty years after the alleged injury. Clearly, it is unreasonable to suppose that such a result was intended by the legislature."³³ The appellate court also had said: "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 . . . the waiver described . . . is limited to 'immunities' created by the Act and it has no application to or effect upon 'defenses' based upon requirements of notice and limitations."³⁴

In reversing, the Illinois Supreme Court first noted that if section 9-103(b) waived the defense of the one-year limitation

³⁰ Section 8-102 provides in pertinent part:

Within 6 months from the date that the injury or cause of action . . . 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 . . . caused the injury, must personally serve in the Office of the Secretary or Clerk . . . for the entity against whom or against whose employee the action is contemplated a written statement . . . 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 and the name and address of the attending physician, if any.

ILL. REV. STAT. ch. 85, §8-102 (1971).

³¹ Section 8-103 provides:

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 . . . shall be dismissed and the person to whom such cause of injury [sic] accrued shall be forever barred from further suing.

ILL. REV. STAT. ch. 85, §8-103 (1971). Plaintiffs also alleged facts to show that the city had actual notice of the information required by section 8-102, but the court held that an allegation of actual notice does not satisfy the statute's requirement of written notice.

³² *Schear v. City of Highland Park*, 104 Ill. App. 2d 285, 244 N.E.2d 72 (1969); *Hoffman v. Evans*, 129 Ill. App. 2d 439, 263 N.E.2d 140 (1970); *Brown v. Shook*, 268 N.E.2d 883 (1971); *Rapacz v. Township High School District No. 207*, 2 Ill. App. 3d 1095, 278 N.E.2d 540 (1971).

³³ *Schear v. City of Highland Park*, 104 Ill. App. 2d 285, 293, 244 N.E.2d 72, 76 (1968).

³⁴ *Rapacz v. Township High School District No. 207*, 2 Ill. App. 3d 1095, 1102-03, 278 N.E.2d 540, 546 (1971).

for commencement of suit provided by section 8-101, the two-year limitation for personal injuries and the five-year limitation for property damage provided by the general limitations statutes would still be available³⁵ as defenses to any action brought "twenty years after the alleged injury," as the appellate court had hypothesized.

As to the intent of the legislature, the court cited *Erford v. City of Peoria*³⁶ which had considered the predecessor of section 8-102.³⁷ In *Erford*, the court said, with regard to the six-month notice provision: "[S]tatutes of this character are mandatory; and the giving of notice is a condition precedent to the right to bring suit, and the giving of the notice must be averred and proved by the plaintiff to avoid dismissal of his suit."³⁸ In *Walters v. City of Ottawa*³⁹ the court said, "The city has no power to waive the notice and is under no liability until it is given."⁴⁰ Finally, in *Ouimette v. City of Chicago*,⁴¹ the court said, "The question of this notice is entirely within legislative control."⁴²

Relying on the doctrines of *Molitor*⁴³ and *Ouimette*, the court held that, absent a statute, there would be no requirement of notice of the type provided by section 8-102, and, both notice and the defense or immunity created by section 8-103 for failure to comply with the provisions of section 8-102 are among those "defenses and immunities" waived by section 9-103(b), thus entirely within legislative control. Since this defense or immunity exists solely because of section 8-103 of the Act, and is not excepted from the waiver of section 9-103(b) of "immunity from suit by reason of the defenses and immunities provided in this Act," the court reasoned that failure to give notice was waived by the provision of section 9-103(b).

Finally, in *Fanio v. John Breslin Co.*, the Illinois Supreme Court again defined the relationship between the waiver provision and certain defenses granted by the Act. Here, plaintiff brought suit as administrator of her husband's estate, seeking damages both for his wrongful death, and obligations incurred

³⁵ ILL. REV. STAT. ch. 83, §15-16 (1971).

³⁶ 229 Ill. 546, 182 N.E. 374 (1907).

³⁷ Laws of 1905, at 111; ILL. REV. STAT. ch. 70, §7 (1913) reenacted as section 1-4-2 of the Illinois Municipal Code, ILL. REV. STAT. ch. 24, §1-4-2 (1963); and repealed by section 10-101 of the present Tort Immunities Act, ILL. REV. STAT. ch. 85, §10-101 (1971).

³⁸ Note 36 at 553 *supra*.

³⁹ 240 Ill. 259, 88 N.E. 651 (1909).

⁴⁰ *Id.* at 263.

⁴¹ 242 Ill. 501, 90 N.E. 300 (1909).

⁴² *Id.* at 507.

⁴³ *Molitor v. Kaneland Community School District*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

under the family expense statute,⁴⁴ by reason of the injuries and resulting death of her husband. Two counts of the complaint against the defendant were dismissed for failure to give the six-month notice and for failure to file suit within one year from the date the cause of action accrued, as required by sections 8-101 and 8-102 of the Tort Immunity Act.⁴⁵ The plaintiff contended, on appeal, that the "defense" of the required notice and one-year limitation period were waived by the provisions of section 9-103(b) of the Act.

Following the reasoning of *Housewright*, the court held that, like sections 8-102 and 8-103, section 8-101 is also subject to the waiver provision of section 9-103(b). The court further stated that the legislative history of the bill offered no basis of interpretation for section 9-103(b), and that it was the task solely of the legislature to remedy the construction placed upon the section by *Housewright*, if that construction was not in accord with the legislative intent.

INTERPRETATION OF SECTION 9-103

As the court pointed out in *Sullivan*,⁴⁶ section 9-103(b) of the Act seems to be an attempt to codify the decision of *Thomas v. Broadlands Community Consolidated School District*,⁴⁷ which had abolished immunity to the extent of the liability insurance carried by a school district. After considering the reasons supporting a grant of immunity, the *Thomas* court concluded that they could be condensed into two basic categories: first, the notion that "The King can do wrong" and second, public policy is to protect public funds, and funds intended for "public purposes" should not be diverted to the

⁴⁴ ILL. REV. STAT. ch. 68, §15, (1971).

⁴⁵ Section 8-101 provides:

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.

ILL. REV. STAT. ch. 85, §8-101 (1971).

⁴⁶ Note 16 *supra*.

⁴⁷ 348 Ill. App. 567, 109 N.E.2d 636 (1952). While never expressly approved by the Illinois Supreme Court, the rule of *Thomas* has become firmly established in Illinois, and is the rule in at least six other states as well: Indiana — *Flowers v. Bd. of Commissioners of the County of Vanderburgh*, 240 Ind. 668, 168 N.E.2d 224 (1960); Kentucky — *Taylor v. Knox County Bd. of Ed.*, 292 Ky. 767, 167 S.W.2d 700 (1943); Minnesota — *Schoening v. United States Aviation Underwriters*, 265 Minn. 119-20 N.W.2d 859 (1963); Oregon — *Vendrell v. School Dist. No. 26C Malheur County*, 226 Or. 263, 360 P.2d 282 (1961); Tennessee — *Rogers v. Butler*, 170 Tenn. 125, 92 S.W.2d 414 (1936); Wisconsin — *Marshall v. City of Green Bay*, 18 Wis. 2d 496, 118 N.W.2d 715 (1963).

Also, the Federal District Court for the Eastern District of Illinois acknowledged *Thomas* as the applicable Illinois law in *Tracy v. Davis*, 123 F. Supp. 160 (1954). The rule was extended to park districts in *Lynwood v. Decatur Park District*, 26 Ill. App. 2d 431, 168 N.E.2d 185 (1960), and to cities in *Beach v. City of Springfield*, 32 Ill. App. 2d 256, 177 N.E.2d 436 (1961).

payment of private judgments.⁴⁸ The court concluded that the first category has not survived to the present day as a sound basis upon which a grant of immunity can be supported, and reasoned further that, on a practical basis, it would seem better to distribute the burden of such damage, due to the acts of a local governmental body, to the community constituting the government, rather than letting the injured individual bear the loss without a remedy. The *Thomas* court found that the second category provided sound support for an immunity grant, but concluded that when liability insurance was present, and to the extent of its protection, the justification and reason for the rule of immunity was removed. In effect, *Thomas* held that the immunity of a local entity from tort liability extended only to the loss which exceeded the extent of liability insurance coverage. In reaching this conclusion, the *Thomas* court relied heavily on *Moore v. Moyle*,⁴⁹ in which the Illinois Supreme Court had come to the same conclusion in dealing with the immunity of charitable institutions, whose only basis for immunity was the protection of the funds of charitable trusts. Through analogy to the "only remaining valid" reason for local governmental immunity, the protection of public funds, *Thomas* was able to reach the same result; that the existence of insurance sufficiently protected these funds to remove the immunity to the extent of this protection.

Since the *Molitor* case later abolished immunity entirely, *Thomas* had become of little importance during the following years. However, with the 1965 Tort Immunity Act recreating the immunity of local public entities on a functional basis, the question of the effect of liability insurance was likely to arise once again. The inclusion of section 9-103 in the Act, authorizing the purchase of insurance and waiving immunity to the extent of insurance coverage, made this likelihood so great that such cases as *Sullivan*, *Housewright*, and *Fanio* were virtually inevitable.

The application of the *Thomas* rule to section 9-103(b) was the only logical way the court could have interpreted this provision of the Act. Unfortunately, this raised a constitutional issue by placing the injured party in the position where recovery would depend on whether the entity was insured. Although the effect of such dependence appears to create an unconstitutionally discriminatory situation, since the entity has the sole discretion as to whether and to what extent it will be liable, based on the purchase of liability insurance, the *Sulli-*

⁴⁸ Although in *Molitor*, seven years later, the rationale of "protecting public funds" was rejected.

⁴⁹ 405 Ill. 555, 92 N.E.2d 81 (1950).

van court, when faced squarely with this proposition, found section 9-103(b) to be "neither arbitrary nor unreasonable," and held that "it does not violate section 22 of article IV."⁵⁰ The court focused on the intent of the General Assembly to provide a method for local entities to shift the risk of loss to insurance carriers, noting that section 9-103(b) is "applicable to all local public entities who elect to avail themselves of its provisions."⁵¹

Thus, it remains questionable as to whether the court thoroughly examined the constitutional problem presented, or merely considered it briefly in reaching its decisive holding as to the effect of the section. This constitutional problem seems to be the only substantial ground for questioning the results of the three cases.⁵²

Apart from the constitutional issue, the reasons supporting the *Thomas* rule and the rationale for applying that rule to interpret section 9-103 of the Act are significant. Section 9-103(a) provides in pertinent part:

A local public entity may contract for insurance against any loss or liability which may be imposed upon it under this Act.⁵³

When section 9-103(b), providing for the "waiver" of immunity is also considered, it makes a strong case for applying *Thomas*. A compelling rationale for this application was stated in *Maffei v. Incorporated Town of Kemmerer*.⁵⁴ The Supreme Court of Wyoming severely criticized the *Thomas* court for the "impropriety of . . . [basing] decisions on [its] own concept of 'sociological enlightenment' rather than await legislative reaction to such claimed modern advancement."⁵⁵ The *Maffei* court went on to cite considerable authority in support of its proposition that any waiver of governmental tort immunity must come by "direct action of the legislature or through the clear and unmistakable implication of its legislative acts."⁵⁶ The Wyoming court then addressed itself to those Wyoming

⁵⁰ 51 Ill. 2d at 281, 281 N.E.2d at 664.

⁵¹ *Id.*

⁵² See *Illinois Tort Claims Act: a New Approach to Municipal Tort Immunity in Illinois*, 61 Nw. U.L. REV. 265 (1966). For a good discussion and critique of recent Illinois decisions establishing the criteria for determining constitutionality of legislative enactments, see *Maloney v. Elmhurst Park District: Park District Immunity in Illinois, the Functional Dilemma*, 5 J. MAR. J. PRAC. & PROC. 368 (1972), which focuses on the constitutionality of section 3-106 of the Tort Immunity Act.

⁵³ ILL. REV. STAT. ch. 85, §9-103(b) (1971).

⁵⁴ 80 Wyo. 33, 338 P.2d 808 (1959). In *Maffei*, the Supreme Court of Wyoming extensively discussed the history of governmental tort immunity, including an impressive analysis of the *Devon* case, note 1 *supra*, and the English common law leading to it.

⁵⁵ *Id.* at 815.

⁵⁶ Note 54 *supra* at 817.

statutes authorizing school districts to obtain insurance policies. Although it had agreed with appellants that these statutes neither specifically created liability nor waived immunity, the *Maffei* court did find certain “unmistakable implications”:

. . . by giving this express authority to obtain insurance, the strongest implication arises that the means of realizing the benefits of such policies were also intended to be granted. To this end the legislative waiver of the districts’ immunity was implied in order that the entitlement of all concerned, whether in benefit or protection, might be determined. The logical conclusion, therefore, is not that the acts mentioned give recognition that governmental elements are not possessed of immunity from tort action, but rather that they do have an immunity which *the legislature has seen fit to waive to the extent of subjecting them to a liability limited to moneys made available from “insurance.”*⁵⁷

The *Maffei* court was unable to find any similar statute applying to *towns* (the plaintiff here sought to recover from a town, not a school district) and therefore denied recovery. However, the reasoning of *Maffei* remains a forceful argument for applying *Thomas*, which had come to the same conclusion without the benefit of a statute, and *Sullivan*, which made the same argument with an applicable statute in force. It might even be reasoned that section 9-103(a) authorizing the purchase of insurance is sufficient statutory authority, standing alone, and without the waiver provisions of section 9-103(b), to apply this sort of an analysis in waiving immunity to the extent of insurance coverage. However, it must be considered that in section 3-106 of the Act, which applies to *Sullivan*, the Illinois General Assembly has specifically created immunity for negligence and said immunity does not extend to willful and wanton conduct, although an argument might be made that such immunity should not be waived by the implications arising from the authorization to obtain insurance. With the addition of the waiver provision of section 9-103(b), the implication becomes unmistakably clear that the legislature intended the *Thomas* rule to apply to local entities which avail themselves of the authorization of section 9-103(a), and thereby waive the immunity granted by section 3-106 to the extent of the insurance purchased.

Turning then to the questions of notice and limitations raised in the *Housewright* and *Fanio* cases, similarity to the immunity question of *Sullivan* is found. There is formidable authority for the proposition that the waiver of notice is

⁵⁷ *Id.* (emphasis added).

entirely within control of the legislature,⁵⁸ and this proposition is further strengthened by the fact that historically notice and limitation provisions have never been merely court-created doctrines, but have always been created by legislative enactment. Moreover, the notice and limitation provisions herein are part of the Act under consideration. Thus, any waiver of these provisions must likewise come from the legislature or be unmistakably implied in its acts. Section 9-103(b) refers not only to a waiver of "immunities" provided in the Act, but to "defenses" as well. No effect could be given to this language without applying it to the notice and waiver provisions of sections 8-101, 8-102, and 8-103, since these are, in fact, the only "defenses" provided by the Act. The General Assembly must be presumed to have intended some interpretation to be given to the term "defenses" in this section by the very fact of its inclusion. Thus, the court in *Housewright* and *Fanio* interpreted this section in the only logical way possible.

OTHER POSSIBLE INTERPRETATIONS OF SECTION 9-103

One alternative left open to the court in these three cases would have been to disregard section 9-103(b) entirely. Such a construction could be based on the language of subsection (a) authorizing insurance against *liability* imposed under this Act. This would indicate that the legislature merely intended to authorize the local entity to insure against tort judgments in the areas in which it might be liable, rather than insure its immune functions; but given the requirement of subsection (b), that the insurance company waive the entity's immunity, it can only be concluded that the legislature intended to authorize the purchase of insurance for the immune functions as well.

Another interpretation could rest on the fact that section 9-103(b) does not provide that the insured entity itself waive that immunity but rather that the insurance company waive the right to refuse payment because of the insured's immunity. Thus, one might say that the entity retains its immunity under the Act, so that an injured party must proceed directly against the insurance company.

However, this analysis is clearly contrary to the established public policy of Illinois. The *Marchlik* case, cited in *Sullivan*, points out that such a direct action against insurers has been permitted by express statutes in only three states, while the more common policy, and that of Illinois, is to permit an action against the insurer only after liability has been established and

⁵⁸ *Erford v. City of Peoria*, 229 Ill. 546, 82 N.E. 374 (1907); *Walters v. City of Ottawa*, 240 Ill. 259, 88 N.E. 651 (1909); *Ouimette v. City of Chicago*, 242 Ill. 501, 90 N.E. 300 (1909).

a judgment rendered against the insured.⁵⁹ The legislature must be assumed to have enacted this provision with the public policy of this state in mind and with an awareness of the rule of *Marchlik*. The intent of the legislature must have been to permit suit against an insured public entity to determine liability and obtain judgment before any action against its insurer. Since the insurer is required to waive any right to refuse payment or deny liability, this waiver must apply as well to the insured public entity in the necessary action against it to determine the insurer's liability. If this were not true, the requirement of waiver in this section would be meaningless as the insurer would have no reason to assert such immunities or defenses if they had already been successfully asserted by the entity in determining liability. Thus, the legislature must have intended that there be a means of obtaining the benefit of the insurance provided by section 9-103(a). Since the public policy of the state prohibits any other interpretation, the legislature must have intended section 9-103(b) to waive the immunities and defenses provided by the Act in any suit against an insured public entity to determine liability within the limits of the insurance, this being a necessary preliminary to the liability of the insurer.

CONCLUSION

The "immunities and defenses" considered in these three cases are found in sections based on the policy of protecting public funds. It is clear that the same protection rationale of reducing such to the extent of insurance coverage will apply to all other sections of the Tort Immunity Act, including the immunity-granting sections.

However, there are a few sections which are supported by a different policy consideration; that certain governmental functions should not be subject to judicial scrutiny beyond a review of any constitutional issues which might arise. In these areas the assumption is that the fundamental decision making functions of local bodies should be reviewed only by their electorate, and that any judicial review, except with respect to constitutional issues, would be a usurpation of the powers of the people. Such essential functions of local government are only those which are necessary to preserve safety and order in society, and are not merely for the convenience or enjoyment of the populace, or merely incident to the implementation of these necessities.

As an example, the immunity granted by section 4-102

⁵⁹ *Marchlik v. Coronet Insurance Company*, 40 Ill. 2d 327, 239 N.E.2d 799 (1968).

relates to the function of providing a police force. The necessary governmental function in this area includes the decision whether to establish a police force, the size of the force, and the duties of officers; any further actions merely being an implementation or extension of that fundamental decision making function. The entity would therefore be liable for the negligence of an officer driving his squad car, because this would be part of the implementation of the essential function, rather than a part of the function itself.⁶⁰

Aside from those few sections which are founded upon the policy of removing essential governmental functions from judicial review, all of the immunities granted in the Act are a result of the policy of protecting public funds. Thus, all of these immunities, following the rationale of *Sullivan*, *Housewright*, and *Fanio*, should be subject to the waiver provision of section 9-103(b).

It is not likely that the constitutional problems of section 9-103(b) will be given a favorable hearing by the Illinois courts in the near future, considering the precedent of *Sullivan's* upholding the constitutionality of section 9-103. However, considering its merit, this issue remains a real threat to 9-103(b).

Presently, however, those local entities covered by the Act, which purchase liability insurance, are going to be held to have waived most of the immunities granted by the Act to the extent of that coverage. The argument of removing essential functions from judicial review has not yet been advanced, and may protect some immunities from such a waiver; but the constitutional argument is not likely to produce the same results in the wake of these decisions.

Roger French

⁶⁰ ILL. REV. STAT. ch. 85, §4-102 (1971). Other examples are §§2-103, 2-108, and 5-101, which provide non-liability for failing to adopt or enforce any law, failure to grant public welfare goods or moneys, and failure to provide fire protection service, respectively.