# Liability for Injuries Occurring on Public Property

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# Common Law Premises Liability

- Premises liability involves the liability imposed upon possessors of land for injuries occurring on their property.
- Prior to 1984, the scope of the duty owed by a possessor of land depended on whether the entrant was a licensee (i.e., a social guest), an invitee (i.e., a business customer), or a trespasser. In 1984, the Illinois General Assembly enacted the Premises Liability Act, 740 ILCS 130/1, *et seq*, which eliminated the distinction between licensees and invitees.

# Illinois Premises Liability Act

The Premises Liability Act now provides that the duty owed by a possessor of land to a lawful entrant is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.
740 ILCS 130/2; *see also* ***Clifford v. Wharton Business Group, L.L.C.***, 353 Ill. App. 3d 34, 42, 817 N.E.2d 1207, 1214 (1st Dist. 2004)

# Traditional Tort Duty Analysis

- The plaintiff and the defendant must have a relationship to one another that obligates the defendant to act reasonably for the protection of the plaintiff. ***Ziemba v. Mierzwa***, 142 Ill. 2d 42, 566 N.E.2d 1365 (1991). The question of whether a duty exists is one of law for the courts to determine at the outset. ***Cunis v. Brennan***, 56 Ill. 2d 372, 308 N.E.2d 617 (1974).

- "[T]he concept of duty . . . is very involved, complex and indeed nebulous… this court has identified certain factors" ***Ward v. K Mart Corp.***, 136 Ill. 2d 132, 554 N.E.2d 223 (1990).

- The factors weighed by the court to determine the existence of a duty include:
  - Reasonable foreseeability of injury;
  - Likelihood of injury;
  - Magnitude of the burden of guarding against it; and
  - Consequences of placing that burden upon the defendant.

# Elements of a Premises Liability Claim

To recover in a premises-liability case, a plaintiff must prove the following elements:

1. Condition on the property presented an unreasonable risk of harm to people on the property;
2. Defendant knew or in the exercise of ordinary care should have known of both the condition and the risk;
3. Defendant could reasonably expect that people on the property would not discover or realize the danger or would fail to protect themselves against such danger;
4. Defendant was negligent in one or more ways;
5. Plaintiff was injured; and
6. Defendant's negligence was a proximate cause of the plaintiff's injury.

See ***Hope v. Hope***, 398 Ill. App. 3d 216, 219, 924 N.E.2d 581, 584 (4th Dist. 2010).

# Notice of the Condition

Actual Notice: Did the defendant know of the dangerous condition?

- Prior complaints
  - ***Bloom v. Bistro Restaurant Limited Partnership***, 304 Ill.App.3d 707, 710 N.E.2d 121 (1st Dist. 1999) (a restaurant patron injured when ice fell from the canopy entrance of the restaurant used prior complaints of falling ice to establish that the restaurant had actual notice of the dangerous condition);

# Notice of the Condition

- *Prior accidents/near misses*
  - ***Sullivan-Coughlin v. Palos Country Club, Inc.***, 349 Ill.App.3d 553, 812 N.E.2d 496 (1st Dist. 2004) (a golfer injured when she was struck by a golf ball while riding in a golf cart near the pro shop and cart return area established that the golf course had notice of the dangerous condition by introducing evidence that golf balls occasionally landed in that area);

# Notice of the Condition

Constructive Notice: Should the defendant have been aware of the dangerous condition?

- Constructive notice exists when "the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care."
  ***Smolek v. K.W. Landscaping***, 266 Ill. App. 3d 226, 639 N.E.2d 974 (2d Dist. 1994).

# Frequently-Used Common Law Affirmative Defenses

- Open and Obvious Doctrine
- Natural Accumulation Doctrine
- *De Minimis* Rule
- Contributory Negligence

# Open and Obvious Doctrine

- Persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. ***Bucheleres v. Chicago Park District***, 171 Ill. 2d 435, 665 N.E.2d 826 (1996)
- In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks. *See* ***id.***

# Exceptions to the Open and Obvious Doctrine

The open and obvious doctrine does not apply if there is a:

- **Distraction**—The possessor has reason to expect that an entrant's attention may be distracted, so that he or she will not discover what is obvious, or will forget what he or she has discovered, or fail to protect himself or herself.
- **Deliberate Encounter**—The possessor has reason to expect that the entrant will proceed to encounter a known or obvious danger because the advantages of doing so would outweigh the apparent risk.

# Examples of the Open and Obvious Doctrine

- ***Bruns v. City of Centralia***, 2014 IL 116998, 21 N.E.3d 684 (city owed no legal duty to warn or protect a pedestrian from tripping on a crack in a sidewalk caused by roots from a nearby tree making the sidewalk uneven, as the condition constituted an open and obvious danger);
- ***Bucheleres v. Chicago Park District***, 171 Ill. 2d 435 (1996) (park district owed no legal duty to warn of or protect against the risks associated with diving off of concrete seawalls into Lake Michigan, since it is generally known that water levels of a lake will fluctuate, and that storms and strong currents change conditions of water; the fact that park district had added sand to lake bottom, thereby lessening depth of water, did not alter open and obvious nature of the condition);

# Examples of the Open and Obvious Doctrine

- ***Zumbahlen v. Morris Community High School, District No. 101***, 205 Ill. App.3d 601, 563 N.E.2d 1228 (3d Dist. 1990) (a spectator at a high school football game left the ticket booth in a crowded area and tripped over a concrete parking curb while trying to avoid the crowd and the curb)

- ***Durham v. Forest Preserve District of Cook County***, 152 Ill. App. 3d 472 (1st Dist. 1987) (local public entity owed no legal duty to warn of or protect 16-year-old from danger of drowning after jumping into muddy pond);

# Natural Accumulation Doctrine

- Possessors of land are not liable for injuries resulting from the natural accumulation of ice, snow, or water.
  ***Handy v. Sears, Roebuck & Co.***, 182 Ill. App. 3d 969, 971, 538 N.E.2d 846, 848 (1st Dist. 1989).
- A possessor of land does have a duty, and therefore may be liable, where an injury is a result of an unnatural or artificial accumulation, or a natural condition aggravated by the owner.
  ***Bernard v. Sears, Roebuck & Co.***, 166 Ill. App. 3d 533, 535 (1st Dist. 1988).
- Since possessors of land are not liable for failing to remove natural accumulations of ice, snow, or water, they have no duty to warn of such conditions

# *De Minimis* Rule

- Municipalities are not obligated to keep sidewalks in perfect condition at all times. ***Putman v. Village of Bensenville***, 337 Ill. App. 3d 197, 786 N.E.2d 203 (2d Dist. 2003)
- A municipality has no duty to repair sidewalk defects unless a reasonably prudent person should anticipate danger to persons walking on the sidewalk; thus, *de minimis* or slight defects frequently found in traversed areas are not actionable as a matter of law.
- The *de minimis* rule stems largely from the recognition that placing such a duty on a municipality would create an intolerable economic burden.

# *De Minimis* Rule (Cont'd)

- There is no bright line to determine whether a condition is de minimis; each case must be determined on its own facts.
- The size of the defect or the height differential from the rest of the sidewalk often has a key role in the determination of whether the defect is de minimis.
- For example, several cases involving variations of less than 2 inches to be *de minimis* and thus not actionable as a matter of law:
  - ***Putman v. Village of Bensonville***, 337 Ill. App. 3d 197, 202 (2d Dist. 2003) (1 inch);
  - ***St. Martin v. First Hospitality Group, Inc.***, 2014 IL App (2d) 130505, ¶ 4 (2d Dist. 2014) (1½ - 1¾ inches); and
  - ***Birck v. City of Quincy***, 241 Ill. App. 3d 119, 122 (4th Dist. 1993) (1-7/8 inches)

# Contributory Negligence

- "Contributory negligence" is defined as a lack of due care for one's own safety as measured by an objective reasonable person standard.
  ***Drakeford v. University of Chicago Hospitals***, 2013 IL App (1st) 111366, 994 N.E.2d 119 (1st Dist. 2013); 735 ILCS 5/2-613(d).
- Under the comparative fault statute, if the plaintiff is more than 50% liable for the negligent act, then the plaintiff is barred from recovery; if the plaintiff liability is less than that then his or her damages are reduced accordingly.
  735 ILCS 5/2-1116

# Sovereign Immunity

- Our legal system is based on the English common law.
- Ancient legal doctrine of sovereign immunity prevents the government from being liable for *any* type of injury or harm it causes.
- Sovereign immunity is a remnant of the idea that "the King can do no wrong."
- The government simply could not be sued in Illinois up until 1959, when the Illinois Supreme Court abolished sovereign immunity altogether due to its "rotten foundation."

# Claims against the Federal Government

- Claims against the federal government are subject to the Federal Tort Claims Act (FTCA).
- The FTCA authorizes the imposition of tort liability on the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b)(1).
- The FTCA provides that jurisdiction for such cases is in the federal court system, and it also sets forth certain procedures that must be followed to present such a claim and to file suit. *See* 28 U.S.C. §2671, *et seq.*

# Claims against the State of Illinois

- Claims against the State of Illinois fall under the Court of Claims Act, 705 ILCS 505/1, *et seq.*, which provides a special Court of Claims with exclusive jurisdiction over all tort claims against the state.
- The "state" includes all offices, agencies, etc., and any state employees acting in the scope of their employment. 705 ILCS 505/8(d). The Court of Claims Act limits the state's liability for most tort claims to the amount of $100,000.

# Claims against Local Public Entities

- The Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act), 745 ILCS 10/1-101, *et seq.*, governs whether and in what situations local public entities are immune from civil liability.
- The stated purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government.
- The Tort Immunity Act provides a wide range of immunities for various governmental bodies performing various functions. There are sections ranging from recreational activities to traffic signals and just about everything in between. See 745 ILCS 10/3-101, *et seq.*
- The Act generally shortens the statute of limitations to one year.

# Definition of a local public entity

The Tort Immunity Act defines a public entity as:

> a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. "Local public entity" also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act as well as any not-for-profit corporation organized for the purpose of conducting public business. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.
> 745 ILCS 10/1-206.

# Immunity for Claims Arising from Maintenance of Property

Section 3-102 of the Tort Immunity Act provides:

- **a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used**, *and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.*
- In other words, the Tort Immunity Act imposes a duty of ordinary care on local public entities only for intended users. A local public entity cannot be liable for an injury unless it is proven that the entity had actual or constructive notice of the dangerous condition in reasonably adequate to time to remedy or protect against the condition.

# Immunity for Claims Arising from Maintenance of Property

- Section 3-102 effectively strengthens the elements than the common law cause of action.
- However, once a local entity embarks on a repair, it then has a duty to perform the repair in a reasonably safe and skillful manner, with reasonable care, and in a nonnegligent manner.

  *See* ***Robinson v. Washington Township***, 2012 IL App (3d) 110177, 976 N.E.2d 610 (3d Dist. 2010) (The defendant township's act of repairing potholes on the roadway required the defendant to make the repairs in a reasonably safe manner).

# Immunity for Claims Arising from the Failure to Provide Traffic Signals and Signs

Section 3-104 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers. 745 ILCS 10/3-102.
  - ***Hoxsey v. Houchlei***, 135 Ill.App.3d 176, 481 N.E.2d 990 (5th Dist. 1985) (Where flooding of road under jurisdiction and maintenance of township and its road commissioner resulted from weather conditions, and not from any action taken by township, or road commissioner, widower of motorist who drowned when swept away by flood waters while attempting to walk to high ground after her truck had stalled in attempt to cross flooded portion of road could not recover from road commissioner or township for failure to erect barricades or signs indicating alternate routes)
  - ***West v. Kirkham***, 147 Ill. 2d 1, 4, 588 N.E.2d 1104, 1105 (1992) (Under Section 3-104, city had no obligation to warn motorists of dip in roadway or place speed control sign at dip).

# Immunity for Claims Arising from the Effects of Weather

Section 3-105 of the Tort Immunity Act provides:

- **Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions as such on the use of streets, highways, alleys, sidewalks or other public ways, or places, or the ways adjoining any of the foregoing . . . . For the purpose of this section, the effect of weather conditions as such includes but is not limited to the effect of wind, rain, flood**, hail, ice or snow but does not include physical damage to or deterioration of streets, highways, alleys, sidewalks, or other public ways or place or the ways adjoining any of the foregoing, or the signals, signs, markings, traffic or pedestrian control devices, equipment or structures on or near any of the foregoing or the ways adjoining any of the foregoing resulting from weather conditions.
  745 ILCS 10/3-105.

- ***Patch v. Township of Persifer***, Ill. App. 3d 108, 573 N.E.2d 834 (3d Dist. 1991) (Township had no duty to post warning signs at rail crossing to warn motorists of icy conditions of roadway and therefore was not liable to motorist who slid into railroad crossing)

# Immunity for Claims Arising from Property Used for Recreational Purposes

Section 3-106 of the Tort Immunity Act 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 for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, **unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury**.
  745 ILCS 10/3-106.

- The Tort Immunity defines "willful and wanton conduct" as "a *course of action* which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a "willful and wanton" exception is incorporated into any immunity under this Act. 745 ILCS 10/1-210.

# Examples of 3-106 Immunity

- ***Foley v. City of LaSalle***, 241 Ill. App. 3d 54 (3d Dist. 1993) (6 to 12-inch-wide ruts *created by defendant's truck tires, and post holes which had been dug for erection of fence on softball field*, were insufficient to establish willful and wanton misconduct in maintenance of field);
- ***Bielema v. River Bend Community School District No. 2***, 2013 IL App (3d) 120808 (the failure to effectively warn of *a known danger or hazard*—there, a "puddle" caused by a spilled drink on a gymnasium floor—did not rise to the level of willful and wanton conduct as a matter of law, because "the District took some action to remedy the danger posed by the spill and reduce the risk of harm to others", even if those actions were ineffectual)

# Examples of 3-106 Immunity (Cont'd)

- ***Pomaro v. Community Consolidated School District 21***, 278 Ill. App. 3d 266 (1st Dist. 1995) (*Directing* fifth grade student to run 50-yard-dash across school's 51-yard long blacktop surface, which terminated in loose and broken sections of asphalt (*i.e., a known defect and tripping hazard*), did not rise to level of willful and wanton misconduct);
- ***Rooney v. Franklin Park Park District***, 256 Ill. App. 3d 1058 (1st Dist. 1993) (Re-positioning of unsecured gym mats in front of bleacher openings by park district referees, *despite knowledge that mats periodically fell onto floor hockey field and created a tripping hazard*, held insufficient to state cause of action for willful and wanton misconduct against park district)

# Immunity for Claims Arising from Recreational Access Roads or Trails

Section 3-107 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail. 745 ILCS 10/3-107.

- ***Corbett v. Cty. of Lake***, 2016 IL App (2d) 160035, 64 N.E.3d 90, ***appeal allowed***, 77 N.E.3d 81 (Ill. 2017) (Paved bicycle path in developed city park was not located within a forest or mountainous region, and thus was not a riding "trail" within meaning of statute providing local governments immunity in connection with injuries caused by the condition of such trails; bike path was bordered merely by narrow bands of greenway containing shrubs and a few trees, and was surrounded by industrial development, residential neighborhoods, parking lots, railroad tracks, and major vehicular thoroughfares).

- ***Scott v. Rockford Park Dist.***, 263 Ill. App. 3d 853, 636 N.E.2d 1075 (2d Dist. 1994) (Parents brought personal injury action against park district and city for injuries suffered by their son when the bicycle he was riding over a bridge allegedly struck a crack in bridge and son was thrown over side of bridge into creek and the Appellate Court held that the defendants were fully immune from liability for any negligent actions connected with bridge because it was part of the access road to a recreational park).

# Immunity for Claims Arising from Failure to Supervise

Section 3-108 of the Tort Immunity Act provides:

a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.
745 ILCS 10/3-108

# Examples of 3-108 Immunity

- ***Barnett v. Zion Park District***, 171 Ill. 2d 378, 665 N.E.2d 808 (1996) (Park district was immune, under Section 3-108, from liability arising out of drowning death of patron in pool owned and operated by district where 11 lifeguards were physically present and were actually supervising pool during operating hours posted for pool)

- ***Jarvis v. Herrin City Park District***, 6 Ill. App. 3d 516, 285 N.E.2d 564 (5th Dist. 1972) (Minor plaintiff who sustained injuries on children's sliding board-jungle bars combination owned and possessed by park district and located in park operated by district, could not maintain action against district on theories of negligence or failure to supervise)

# Examples of 3-108 Immunity (Cont'd)

- ***Flores v. Palmer Marketing., Inc.***, 361 Ill. App. 3d 172, 836 N.E.2d 792 (1st Dist. 2005) (Park district was immune from third-party claims for contribution for failure to supervise a park district volunteer who caused injury to a park district employee while sliding down inflatable water slide manufactured by third-party plaintiff, as to negligence claim of injured park district employee against owner and manufacturer of slide; slide was located on park district property and was being used for recreational purposes)

- ***Lorenc v. Forest Preserve District of Will County***, 2016 IL App (3d) 150424, 59 N.E.3d 899 (3d Dist. 2016) (County forest preserve district's alleged conduct of placing trail sentinels along path of bicycle riding event conducted by preserve district, to monitor path and notify participants of upcoming changes in path, if proven, did not rise to level of willful and wanton conduct as would defeat preserve district's immunity defense under Section 3-108 to wrongful death claim; trail sentinel's alleged negligent act of suddenly stepping into path to warn bicyclist of upcoming bridge, thereby causing bicyclist to crash, at best amounted to inadvertence or negligence)

# Immunity for Claims Arising from Hazardous Recreational Activity

Section 3-109 of the Tort Immunity Act provides:

a) Neither a local public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

b) As used in this Section, "hazardous recreational activity" means a recreational activity conducted on property of a local public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator.

"Hazardous recreational activity" also means:

1) Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.

2) Diving at any place or from any structure where diving is prohibited and reasonable warning as to the specific dangers present has been given.

3) Animal racing, archery, bicycle racing or jumping, off-trail bicycling, boat racing, cross-country and downhill skiing, sledding, tobogganing, participating in an equine activity as defined in the Equine Activity Liability Act,[1] hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging where the person or persons furnished their own rope, water skiing, white water rafting, and wind surfing. 745 ILCS 10/3-109.

# Immunity for Claims Arising from Injuries Related to Bodies of Water

Section 3-109 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable for any injury occurring on, in, or adjacent to any waterway, lake, pond, river or stream not owned, supervised, maintained, operated, managed or controlled by the local public entity. 745 ILCS 10/3-110.

- ***McCoy v. Illinois International Port District***, 334 Ill. App. 3d 462 (1st Dist. 2002) (where port district maintained a seawall adjacent to the Calumet River, but did not own, supervise, maintain, operate, manage or control the river itself, the port district was absolutely immune from liability pursuant to section 3-110 for a drowning which took place in the Calumet River).

# Strategies for Avoiding Premises Liability

- Routine inspections
- Preventative maintenance/actions
- Conspicuous warnings
- Create and maintain records
- Early investigation of incidents/claims

# How to Investigate an Incident

- Notify the entity's insurer and/or legal counsel
- Take photographs
- Take measurements/make diagrams
- Interview witnesses
- Meet with employees involved
- Collect/record all media reports
- Obtain any police reports, dispatch/police/fire audio recordings
- Direct any incident report prepared to the entity's insurer and/or legal counsel
  - Note: Internal incident reports are often discoverable
- Formulate a public relations plan, if necessary
- Meet with entity personnel to discuss current practices and how these practices comply with existing rules and ordinances
- Avoid spoliation by retaining all evidence