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Immunity Expanded In Suits Against Municipalities

Justices rule against plaintiffs hurt at school, transfer station, soccer field

By BRENDEN P. LEYDON

The Supreme Court decided many interesting cases regarding tort and insurance issues this year. Three cases dealing with municipal immunity from liability illustrate how challenging it can be to prevail in such a case.

In *Cotto v. Board of Education*, 294 Conn. 265 (2009), the plaintiff was a youth director of an organization that ran a summer youth program at a public school in New Haven. One day during the program, he went into one of the bathrooms in the school where he slipped and fell on water and urine that were on the floor, sustaining significant injuries. The plaintiff brought a personal injury claim against the board of education and prevailed at trial. The defendants appealed, claiming governmental immunity precluded any recovery by the injured plaintiff. The Court held in favor of the defendants on appeal, reversing the judgment for the plaintiff and directing judgment for the defendants.

The Court explained that there are three exceptions for municipal immunity for the performance of discretionary acts. First, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm; second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.

The plaintiff was pursuing the first exception, commonly called the identifiable person-imminent harm exception. In the case of *Burns v. Board of Education*, 228 Conn. 640, 645 (1994), the Court had allowed a fall down claim by a child who fell on ice during school hours, holding that an identifiable class of people can qualify under this exception. However, this holding was limited in the *Cotto* decision, which held it did not apply because the youth director was a not a school student required to be there, and thus the harm was not imminent enough given that anyone who may have used that bathroom could have fallen at any time.

Pyrrhic Victory

In *Grady v. Somers,* 294 Conn. 324 (2009), the plaintiff was a town resident injured as a result of a slip and fall at the town transfer station. The plaintiff, relying on *Burns v. Board of Education,* sought to qualify under the identifiable class of persons argument, as a paid permit holder for the transfer station. The trial court granted summary judgment, holding that the identifiable person-imminent harm exception did not apply to an action brought directly against a municipality.

On appeal, the Supreme Court reversed that aspect of the decision, holding that the identifiable person-imminent harm exception does apply to a direct claim against a municipality, overruling language to the contrary in a prior case.

However, that turned out to be a Pyrrhic victory for the plaintiff as Court rejected the application of the identifiable person-imminent harm exception to his claim, again limiting the *Burns* decision to its facts and suggesting that identifiable classes of persons outside of public school children would be unlikely to be recognized. Thus, the granting of summary judgment was affirmed.


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In *Picco v. Voluntown,* 295 Conn. 141 (2010), the plaintiff was seriously injured when a tree limb fell on her at a soccer game. The tree in question allegedly has a history of failure, and contained numerous structural defects, including bark inclusions, trunk cracks and major decay. The plaintiff sought to pursue the town under a nuisance theory, seeking to prevail under language in the case of *Keeney v. Old Saybrook,* 237 Conn. 135, 166 (1996), which allowed a nuisance claim under certain environmental statutes against a town "for a public nuisance that it intentionally creates through its prolonged and deliberate failure to act to abate that nuisance." The Court held that that doctrine did not apply in a claim for personal injuries, which required an affirmative, positive action on the part of the municipality for liability to attach, thus affirming judgment for the defendant.

The doctrine of discretionary act immu-

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nity for municipal employees is premised upon a rationale that "a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society." *Grady,* supra at 338. As more fully explained in that ruling, "discretionary act immunity reflects a value judgment that-despite injury to a member of the public-the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury."

It has never been clear to me why this rationale is rational. All private individuals are charged with the duty of using reasonable care not to cause foreseeable death or injury to others through unreasonable actions or omissions, which seems to be a fairly sound rule to have everyone live by. I am not particularly comforted by the knowledge that municipal employees are "unhampered" by that rule, and thus given the discretion to unreasonably cause death and injury so long as they don't step over certain narrowly construed exceptions. Having said that, the trend in the case law seems to be to expand the scope of immunity and narrow the scope of the exceptions. Thus, practitioners bringing any such case should be pre-pared to show clearly that they fall under a well established exception. ■