HANDBOOK FOR MINNESOTA CITIES

Chapter 17
Liability

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HANDBOOK FOR MINNESOTA CITIES

Chapter 17
Liability

Understand city exposure to lawsuits and the state statutes and judicial decisions that limit liability. Addresses tort liability of cities, officers, and employees; statutory immunities; exceptions and limits to liability; and special causes of action, such as civil rights and antitrust.

RELEVANT LINKS:

I. Lawsuits and liability

Cities deliver a variety of public services to a wide range of individuals and businesses. Cities also engage in many regulatory activities to protect public health and safety. Cities often are parties to court actions because of their wide range of activities and the litigious nature of our society. Lawsuits against cities and city officials are common. Successful lawsuits, however, are rare. A city's liability will decrease if city councils adopt and follow proper procedures, act within the scope of their authority, and promote training and risk-management programs for themselves and for their employees and agents.

II. Tort liability of cities, officers, and employees

Russell v. Men of Devon, 100 Eng. Rep. 359 (1798). *Bailey v. City of New York Reg'l Rail Auth.*, 3 Hill 531 (N.Y. Sup. 1842). *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990).

The exposure of cities to lawsuits has evolved over the years from almost complete protection under the doctrine of sovereign immunity to the current system where—with specific immunities, exceptions, and limits—cities are generally subject to liability for their wrongful acts and omissions (torts) in the same way that private individuals and corporations are liable. A tort is defined as a civil wrong or injury which arises out of a violation of a duty owed to an injured or damaged plaintiff.

Minn. Stat. § 466.02.

Cities are also generally responsible for the torts of their agents when those people are acting within the scope of their authority. It makes no difference whether the tort happened while the city was performing a governmental function (like providing police or fire services) or performing a proprietary function (like providing utility services).

A. Principal-agent relationship

Furnell v. City of St. Paul, 20 Minn. 117, 20 Gil. 101 (Minn. 1874).

To subject a city to legal responsibility for wrongful acts, a relationship of principal and agent must exist between the city and the person who committed the tort. The city is generally responsible for the torts of its agents, including employees, appointed officials, and elected officials.

RELEVANT LINKS:

The city is as responsible for the wrongful acts of its officers as it is for those of its employees if the officers are acting during their city duties.

Minn. Stat. § 466.01. *Shute v. Town of Princeton*, 59 N.W. 1050 (1894). *Thompson v. Bd. of County Comm'rs of Polk County*, 36 N.W. 267 (Minn. 1888). *Sewall v. City of St. Paul*, 20 Minn. 511, 20 Gil. 459 (1874). *Rich v. City of Minneapolis*, 35 N.W.2d. 2 (Minn. 1887).

City agents may violate some duties, such as the duty to keep streets in repair, by a mere failure to act. A city may also be liable in some cases even though some third person, rather than agents of the city itself, took the action. In general, however, if a city contracts for public work and the contractor is independent of city control, the negligent acts of the contractor will not subject the city to liability if the terms of the contract did not contemplate such actions. If, however, the cause of damage is not due to the negligence of the contractor but to the contractor's performance of the work under the requirements of the contract, the city is generally liable for injuries resulting from the work.

B. Rules of negligence

The same rules of negligence law apply to cities and to private individuals and corporations. A city must exercise reasonable care in all circumstances. What is reasonable care depends on the situation, and the amount of care necessary may vary with the circumstances.

McDowell v. Village of Preston, 116 N.W. 470 (Minn. 1908).

If the city is negligent and a damage claim arises, the city is subject to liability only if there is a direct causal connection between the negligent act or omission and the resulting injury. The result must follow in an unbroken sequence from the original wrong. Where several concurring acts or conditions contribute to an accident and one of them is a wrongful act or omission, the courts will likely regard that fact as the proximate cause of the injury if the accident might not have occurred without the wrongful act or omission.

Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979) (distinguished by *Radke v. Cty. of Freeborn*, 694 N.W.2d 788 (Minn. 2005)).
Woehrle v. City of Mankato, 647 N.W.2d 549 (Minn. Ct. App. 2002). *Wilson v. City of Burnsville*, A06-495 (Minn. Ct. App. May 1, 2007) (unpublished opinion).

The city will also only be subject to liability if it owes a duty to the person injured by the city's alleged negligence. The public-duty doctrine may protect the city against certain negligence claims. Under this doctrine, a city does not owe a duty to individual citizens when performing certain municipal functions, but rather, owes a duty to the public as a whole. For example, this doctrine has been applied to municipal activities like building inspections, firefighting, and other services.

Minn. Stat. § 604.01, subd. 1.

Any damages awarded to a plaintiff decrease in proportion to the amount that the plaintiff's negligence contributed to his or her injury. A plaintiff cannot recover if his or her negligence is greater than the negligence of the defendant.

RELEVANT LINKS:

C. Compromise and settlement

Minn. Stat. § 466.08.
A.G. Op. 471a (June 3, 1965).
A.G. Op. 471a (Nov. 19, 1965).
Minn. Stat. § 275.065, subd. 6a(b).).

The city council may compromise, adjust, and settle tort claims for damages against the city. It may, under law or charter requirements, appropriate money for payment of these amounts. When the amount of a settlement exceeds $50,000, the settlement requires district court approval. The court approval provision applies with or without a court action on the claim. Upon approval of the commissioner of the Department of Revenue, a city may impose a levy to pay the amount of a tort-claim settlement as well as a judgment for such a claim.

D. Notice of claim

Minn. Stat. § 466.05.
Glassman v. Miller, 356 N.W.2d 655 (Minn. 1984).

Minnesota law requires a claimant to present the governing body, within 180 days after discovery of the alleged loss or injury, with a notice stating the time, place, and circumstances of the loss or injury and the amount of compensation or other relief demanded. In one case, the Minnesota Supreme Court found the "notice of claim" provision, in effect at the time, violated the equal protection clause of the Constitution.

Under the current statutory language, a notice of claim is still required, but failure to provide the notice will not prevent the claimant from pursuing the suit. The city can use the lack of such notice as a defense, however, if it can show prejudice.

E. Personal liability of city officials and employees

Minn. Stat. § 466.07.

City officers and employees can be sued personally for their activities on behalf of the city. Absent egregious conduct, however, there is rarely ultimate personal financial exposure to officers or employees. This is because under Minnesota law, cities are required to defend and indemnify officers and employees for damages levied or claimed against them. The only exception to this general rule is that there is no duty to defend and indemnify where the acts of officers or employees are found to be outside the scope of their duties, or where the activities constitute malfeasance, willful neglect of duty, or bad faith.

F. Official immunity

Minn. Stat. §§ 466.01-.15.

Section III. C of this chapter discusses *statutory immunity*.

There are two general types of "immunities" cities may use to defend against liability in Minnesota: official immunity, discussed first, and statutory immunity, discussed subsequently.

RELEVANT LINKS:

Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988)(distinguished by *Gleason v. Metropolitan Council Transit Operations* 582 N.W.2d 216, Minn. 1998). *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). *In re Alexandria Accident of Feb. 8, 1994*, 561 N.W.2d 543 (Minn. Ct. App. 1997) (But *cf*. *Shariss v. City of Bloomington*, 852 N.W.2d 278 (Minn. Ct. App. 2014) (*Cf*. *Kariniemi v. City of Rockford*, 863 N.W.2d 430 (Minn. Ct. App. 2015), review granted (Aug. 11, 2015), aff'd, 882 N.W.2d 593 (Minn. 2016). *Kari v. City of Maplewood*, 582 N.W.2d 921 (Minn. Ct. App. 1998) (Dist. by *Mumm v. Mornson*, 708 N.W.2d 475, (Minn. 2006). *Kelly v. City of Minneapolis*, 598 N.W.2d 657 (Minn. Ct. App. 1999).

"Official immunity" is a common law doctrine (developed from court decisions) that protects individual city officers or employees from personal liability for their discretionary actions taken during their official duties as long as their conduct was not malicious. The purpose of official immunity is to protect public officials or employees from the fear of personal liability that might deter independent action and impair effective performance of their duties.

Karinemi v. City of Rockford, 892 N.W.2d 593 (Minn.2016).

A private contractor hired to act as a city employee is eligible for official immunity for the contractor's discretionary acts in that role. For example, a court has held that a private company hired to act as city engineer was entitled to official immunity for its discretionary decisions in that role, including its design of a city's storm-drainage system.

Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988). *Janklow v. Minn. Bd. of Examiners for Nursing Home Adm'rs*, 552 N.W.2d 711 (Minn. 1996). *Rico v. State*, 472 N.W.2d 100 (Minn. 1991) (*Cf*. *Schroeder v. St. Louis Cty*., 708 N.W.2d 497 (Minn. 2006). *Thompson v. City of Minneapolis*, 707 N.W.2d 669 (Minn. 2006). *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006). *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456 (Minn. 2014).

In the absence of malice, the critical issue in a claim of official immunity is whether the public official's conduct is discretionary or ministerial. A discretionary act requires the exercise of individual judgment in carrying out the challenged duties. In contrast, a ministerial act is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Whether discretion was involved and official immunity applies turns on the facts of each case.

Thompson v. City of Minneapolis, 707 N.W.2d 669 (Minn. 2006).

Courts will generally interpret a city's use of mandatory language in a city policy like "shall" and "shall not" as stripping discretion from city employees and officers. The use of mandatory language will make it less likely that official immunity will apply because the conduct at issue will be considered ministerial. If a city wants to guide the exercise of discretion instead of mandating or prohibiting specific conduct, a city should use language that preserves discretion.

RELEVANT LINKS:

For example, a city policy could provide that city employees and officers "should consider the following factors" when determining what action to take.

See *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651 (Minn. 2004) (*Cf. Schroeder v. St. Louis Cty.*, 708 N.W.2d 497 (Minn. 2006; *Kian v. City of Minnetonka*, No. A14-1624, (Minn. Ct. App. June 15, 2015) (unpublished opinion) rev. denied (Aug. 25, 2015).

When a city or one of its employees is sued for damages resulting from the employee's ministerial actions taken to comply with a city policy or protocol, the employee may still be entitled to official immunity if the adoption of the policy or protocol itself was established through the exercise of discretionary judgment that would be protected by official immunity. In this situation, a court would view the challenge to the employee's ministerial conduct as a challenge to the policy itself.

Rico v. State, 472 N.W.2d 100 (Minn. 1991). *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651 (Minn. 2004).

In the context of official immunity, malice means the intentional doing of a wrongful act without legal justification or excuse. The courts have established a high standard for a finding of malice, by requiring the defendant to have reason to know that the challenged conduct is prohibited.

Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992). *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312 (Minn. 1998).

Vicarious official immunity may protect a city from liability when its public officials or employees are entitled to official immunity. The reasoning behind extending immunity to the city is that the threat of liability against the city would influence city officers and employees and hinder them from exercising independent judgment and discretion. Generally, if a court finds that a city officer or employee is entitled to official immunity, the court will also find that the city is entitled to vicarious official immunity.

G. Legislative immunity

Bogan v. Scott-Harris, 118 S. Ct. 966 (1998) (distinguished by *Maitland v. Univ. of Minnesota*, 260 F.3d 959, 963 (8th Cir. 2001) *Green v. City of Coon Rapids*, C7-98-399 (Minn. Ct. App. Sept. 8, 1998) (unpublished opinion) rev. denied, Nov. 17, 1998.

The United States Supreme Court has determined that councilmembers are entitled to absolute immunity for legislative activities like the adoption of ordinances. The purpose of legislative immunity is to allow councilmembers to exercise their legislative discretion without being inhibited by judicial interference or the fear of personal liability. Determining whether a particular act is legitimate legislative activity turns on the nature of the act rather than the motive or intent of the official performing it. Legislative immunity also applies to some types of resolutions enacted by city councils. The Minnesota Supreme Court has determined that members of subordinate governmental bodies like watershed district board members are protected by a qualified legislative immunity (and not absolute legislative immunity) against defamation suits for statements made when they are performing a legislative function. The Minnesota Supreme Court also concludes that a police sergeant's statements made during an employment-related background investigation were not protected by absolute legislative immunity, but instead, were protected by a qualified legislative immunity.

Zutz v. Nelson, 788 N.W.2d 58 (Minn. 2010). *Minke v. City of Minneapolis*, 845 N.W.2d 179 (Minn. 2014).

RELEVANT LINKS:

H. Indemnification requirements

Minn. Stat. § 466.07.
Minn. Stat. § 466.04.

The city or any of its independent boards or commissions must defend and indemnify any employee or officer sued for an alleged act or omission while performing the duties of the position if the individual was not guilty of malfeasance in office, willful neglect of duty, or bad faith. This obligation is generally subject to the maximum tort-liability limits.

Douglas v. City of Minneapolis, 230 N.W.2d 577 (Minn. 1975).

The council has broad discretion in determining whether the officer or employee's actions involved malfeasance, willful and wanton neglect of duty, or bad faith. A court's findings regarding the incident are not binding on the council, at least where the city itself is not a party to the action.

Lindgren v. City of Crystal, 204 N.W.2d 444(Minn. 1973).

The council should state, in writing, the reasons for its decision and should maintain whatever other record might be appropriate if court review of its action occurs. The review of a court is limited to a determination of whether the conclusions of the council were arbitrary, capricious, and unreasonable. The burden of proof rests on those contesting the council's action.

P. L. v. Aubert, 545 N.W.2d 666 (Minn. 1996) But *cf. Doe YZ v. Shattuck–St. Mary's Sch.*,2016 WL 5858641 (D. Minn. Oct. 5, 2016).

A city is not liable for the intentional torts of its employees, even though the acts occurred within work-related limits of time and place, where the acts were unforeseeable and unrelated to the duties of the employee.

Minn. Stat. § 466.01, subd. 6. See LMC information memo, *Employee or Independent Contractor: Legal Implications and Ramifications*.

The indemnification requirement may not cover all people who act on the city's behalf. The law on indemnification refers only to officers and employees. Independent contractors are not generally considered officers or employees. The tests for determining whether someone is an independent contractor or an employee include consideration of factors like the mode of payment; who furnishes material or tools; who has control of the premises where the person works; the right to discharge; and, most importantly, the right to control the means and manner of performance.

There may be some cases where a person would be an "independent contractor" rather than an "employee" under the above test, but could still be an officer for purposes of this statute. For example, this might be true of contract building inspectors.

I. Indemnification limitations

Minn. Stat. § 466.04, subd. 1(a).

The liability of a city officer or employee for an alleged act or omission while performing a job duty cannot exceed the tort-liability limits in state law—$500,000 per individual claim and $1.5 million for all claims arising out of the same occurrence.

RELEVANT LINKS:

Non-tort claims, like breach-of-contract, condemnation, and constitutional claims, and those claims that are based on federal statute, are not subject to these limits.

J. Indemnification for criminal charges

Minn. Stat. § 465.76.

A city may, after consultation with its legal counsel, reimburse any legal cost an employee incurs in defending criminal charges that arose out of the reasonable and lawful performance of duties for the city. If less than a quorum of the governing body is disinterested, a district-court judge must approve the reimbursement.

K. Punitive damages

Minn. Stat. § 466.04.
Minn. Stat. § 549.20.

Molenaar v. United Cattle Co., 553 N.W.2d 424 (Minn. Ct. App. 1996).
Luigino's, Inc. v. Pezrow Companies, 178 F.R.D. 523(D. Minn. 1998).

Punitive damages are damages a court awards as a punishment to deter wanton, reckless, or malicious conduct. Cities are immune from punitive damages for state tort claims. But current statutes and case law do not entirely prohibit punitive damage awards against city officers and employees. Punitive damages are allowed in civil actions. Plus, the law specifically permits punitive damages for "deliberate disregard for the rights or safety of others." Even so, a claim for punitive damages, when a person or entity suffers no more than property loss, cannot be successful as a matter of law.

Minn. Stat. § 466.04. Minn. Stat. § 466.07.

Cities must defend and indemnify an officer or employee for punitive damages if the person is not guilty of malfeasance in office, willful neglect of duty, or bad faith.

III. Statutory immunities, exceptions, and limits to liability

A. Frivolous lawsuits

Minn. Stat. § 549.211.

Attorneys bringing lawsuits against cities that are frivolous or that are presented for any improper purpose, such as to harass or to cause unnecessary delay or to needlessly increase the cost of litigation, are subject to sanctions.

B. Protection from defamation

While members of city councils are generally free to speak their minds at council meetings without being subject to liability for defamation suits for slander (spoken words) or for libel (written words), they do not have an absolute privilege to make derogatory statements about others during council meetings.

RELEVANT LINKS:

They have protection from legal responsibility for words they use on a proper occasion and that are pertinent to any proper inquiry or investigation pending before the council. But they cannot wander from the subject and make unnecessary statements that would hurt the reputation or good name of another individual.

Generally, the following elements are necessary to provide immunity for a councilmember's remarks that would be defamatory if they were made by a private citizen:

- The statements must be made in good faith and without malice.
- The statements must relate to a pending matter within the scope of the council's authority. For example, a resolution making a defamatory charge was not privileged when the city published it in different papers, a publication beyond the city's duty.
- The remarks must occur only on the right occasion or during actual proceedings of the council. A defamatory remark a councilmember makes on the street is not privileged even if it is pertinent to a matter currently before the council.

Wilcox v. Moore, 71 N.W. 917 (Minn. 1897). See also, *Trebby v. Transcript Publ'g Co.*, 74 Minn. 84 N.W. 961 (Minn. 1898).

Jones v. Monico, 150 N.W.2d 213 (Minn. 1967).

Likewise, statements of other public officials made within the scope of their official duties on matters of public interest are also privileged. Therefore, there is immunity against claims of defamation for comments made while performing official functions, which are closely related to official business. The Minnesota Supreme Court has determined that members of subordinate governmental bodies like watershed district board members are protected from defamation suits by a qualified legislative privilege for statements made when they are performing a legislative function. The Minnesota Supreme Court has also concluded that a police sergeant's statements made during an employment-related background investigation are protected from defamation suits by a qualified legislative privilege.

Redwood County Tel. Co. v. Luttman, 567 N.W.2d 717 (Minn. Ct. App. 1997).

Zutz v. Nelson, 788 N.W.2d 58 (Minn. 2010).

Minke v. City of Minneapolis, 845 N.W.2d 179 (Minn. 2014).

C. Statutory immunities and exceptions

Minn. Stat. § 466.03.

The Municipal Tort Claims Act, which generally makes cities liable for their torts, does not apply to several types of claims. Regarding these claims, a city is liable only when a statute provides for liability; otherwise, the city is immune from liability. The many excepted claims include:

- Any claim for injury to or death of any person covered by the Workers' Compensation Act. The court has interpreted this to mean immunity from any claim against the city by any employee—not only an employee of the city—where the employee, at the time of the accident, was covered by the Act.

McCarty v. Village of Nashwauk, 286 Minn. 240, 175 N.W.2d 144 (Minn. 1970).

RELEVANT LINKS:

- Any claim regarding the assessment and collection of taxes. The tax laws or other laws provide remedies in these cases.
- Any claim based on snow or ice conditions on any highway or public sidewalk that does not border a publicly owned building or publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of the city.
- A city that owns or leases a building or parking lot in another city, however, is not immune from a claim based on snow or ice conditions on a public sidewalk abutting its building or parking lot in the other city.
- Any claim based on an act or omission of an officer or employee exercising due care in the execution of a valid or invalid statute, charter, ordinance, resolution, or regulation.
- Any claim for the care or custody of a motor vehicle being driven by, operated by, or in the physical control of a person arrested for an impaired-driving offense.

Minn. Stat. § 466.03, subd. 3.

Minn. Stat. § 466.03, subds. 4(a), 4(b). *Berg v. City of St. Paul*, 414 N.W.2d 204 (Minn. Ct. App. 1987) (distinguished by *Hoff v. Surman*, 883 N.W.2d 631 (Minn. Ct. App. 2016). *In re Heirs of Jones*, 419 N.W.2d 839 (Minn. Ct. App. 1988) distinguished by *Hoff v. Surman*, 883 N.W.2d 631 (Minn. Ct. App. 2016). Minn. Stat. § 466.03, subd. 4(b).Minn. Stat. § 466.03, subd. 5. *Boop v. City of Lino Lakes*, 502 N.W.2d 409 (Minn. Ct. App. 1993).

Minn. Stat. § 466.03, subd. 6a. Minn. Stat. § 169A.48, subd. 2.

- Any claim based on the performance or the failure to perform a discretionary function or duty, whether the officer or employee abused the discretion. In court decisions, this is called "statutory" or "discretionary" immunity, and it is designed to protect the governmental entity from having its legislative or executive policy decisions second-guessed by judges. A duty is considered discretionary if it involves planning-level activities, versus merely "ministerial" or operational-level activities, which are not protected.

Minn. Stat. § 466.03, subd. 6. *Janklow v. Minn. Bd. of Examiners for Nursing Home Adm'rs*, 552 N.W.2d 711 (Minn. 1996). *Watson v. Metro. Transit Comm'n*, 553 N.W.2d 406 (Minn. 1996). *Shariss v. City of Bloomington*, 852 N.W.2d 278 (Minn. Ct. App. 2014). *Nguyen v. Scott County*, 565 N.W.2d 721 (Minn. Ct. App. 1997). *Riedel v. Goodwin*, 574 N.W.2d 753 (Minn. Ct. App. 1998). *Cousin v. Hennepin County Med. Center*, 565 N.W.2d 443 (Minn. Ct. App. 1997).*Gerber v. Neveaux*, 578 N.W.2d 399 (Minn. Ct. App. 1998) *Christensen v. Mower County*, 587 N.W.2d 305 (Minn. Ct. App. 1998) *Fisher v. County of Rock*, 596 N.W.2d 646 (Minn. 1999).

- Any claim arising out of injuries that occur on unimproved property owned by the city. Cities may still be found liable for any injuries that occur because of attachments to the unimproved property except where the city has not placed the attachments on the property. Demolition of old buildings is an improvement as a matter of law; thus, the unimproved-land defense does not apply in these situations.

Minn. Stat. § 466.03, subds. 6b, 13. *Bailv. Hennepin County Reg'l Rail Auth.*, 578 N.W.2d 343 (Minn. 1998).

- Any claim based on a municipality's construction, operation, or maintenance of a water-access site created by the Iron Range Resources and Rehabilitation Board.

Minn. Stat. § 466.03, subd. 6c.

RELEVANT LINKS:

Minn. Stat. § 466.03, subd. 6d.

- Any claim against a municipality based on the failure of a daycare provider to meet the standards needed for a license to operate a daycare facility for children, unless the municipality had actual knowledge of a failure to meet licensing standards that resulted in a dangerous condition. Municipalities are also protected against any claim arising out of a provider's use of a swimming pool located at a family daycare or group family daycare home, unless the municipality had actual knowledge of a provider's failure to meet licensing standards that resulted in a dangerous condition that foreseeably threatened the plaintiff.

Minn. Stat. § 466.03, subd. 6e. *Johnson v. Washington County*, 518 N.W.2d 594 (Minn. 1994). *Sirek v. State*, 496 N.W.2d 807 (Minn. 1993). *Martin v. Spirit Mountain Recreation Area Auth.*, 566 N.W.2d 719 (Minn. 1997). *Merchlewitz v. Midwest 4 Wheel Drive Ass'n, Inc.*, 587 N.W.2d 652 (Minn. Ct. App. 1999). *Lundstrom v. City of Apple Valley*, 587 N.W.2d 517 (Minn. Ct. App. 1998) *Prokop v. Indep. Sch. Dist. #625*, 754 N.W.2d 709 (Minn. Ct. App. 2008).

- Any claim based on the construction, operation, or maintenance of any property the municipality owns or leases for use as a park, open area for recreational purposes, or for recreational services. Another exception is any claim based on the clearing of land, removal of refuse, and creation of trails or paths without artificial surfaces, if the claim arises from a user's loss. This does not limit the liability of a municipality for conduct that would entitle a trespasser to damages against a private person. This section should eliminate many claims against cities concerning park operations. A city is immune from liability under this provision when an artificial condition that is likely to cause death or serious bodily harm is visible and not a hidden danger.

Minn. Stat. § 466.03, subd. 6f.

- With certain exceptions, any claim arising out of use of a city diving board, diving platform, diving raft, waterslide, non-waterslide or dock installation at a city beach or city swimming pool, if the injury occurred when the beach or pool is posted as closed.

Minn. Stat. § 466.03, subd. 7. Minn. Stat. § 541.051. *Fisher v. County of Rock,* 596 N.W.2d 646 (Minn. 1999) (guardrails).

- Any claim for which the city is granted immunity from liability by any other statute. For example, there is a statute that has been used as a defense by local governments, which bars claims arising from defective and unsafe conditions of improvements to real property more than ten years after the substantial completion of the construction.

Minn. Stat. § 466.03, subd. 10.

- Any claim for a loss based on the failure of any person to meet the standards for a license, permit, or other authorization the municipality or its agents issued.

Minn. Stat. § 466.03, subd. 11.

- Any claim for a loss based on the usual care and treatment, or lack of care and treatment, of any person at a municipal hospital or corrections facility where the municipality has made reasonable use of available funds to provide care.

Minn. Stat. § 466.03, subd. 12.

- Any claim for a loss, damage, or destruction of property of a patient or inmate of a municipal institution.

RELEVANT LINKS:

Minn. Stat. § 466.03, subd. 15. Minn. Stat. § 3.736. *Curtis v. Klausler*, 802 N.W.2d 790 (Minn. Ct. App. 2011) (wild-animal immunity).

- Any claim against a municipality, if the same claim would be excluded if brought against the state.

Minn. Stat. § 466.03, subd. 19.

- Any claim based on the acts or omissions of a 911 operator or dispatcher, who is certified in emergency-medical dispatch, acting in good faith in providing pre-arrival medical instructions.

Minn. Stat. § 466.03, subd. 21.

- Any claim based on geographic-information-systems (GIS) data, if the city provides a disclaimer as to the accuracy of the data.

Minn. Stat. § 466.03, subd. 22.
Minn. Stat. § 84.90, subd. 1.
Minn. Stat. § 160.02, subd. 7.

- Any claim for a loss involved in or arising out of the use or operation of a recreational motor vehicle within the right-of-way of a road or highway except that the city is liable for conduct that would entitle a trespasser to damages against a private person.

Minn. Stat. § 466.03, subd. 24.

- Any claim resulting from the use of public safety equipment donated by the city to another municipality, unless the claim is a direct result of fraud or intentional misrepresentation. Public safety equipment means vehicles and equipment used in firefighter, ambulance and emergency medical treatment services, rescue, and hazardous material response.

Minn. Stat. § 466.03, subd. 25.

Minn. Stat. § 471.3459.

- Any tort claim against a municipality resulting from the use of surplus equipment donated by the municipality to a nonprofit organization under state law unless the claim is a direct result of fraud or intentional misrepresentation.

D. Definition of discretionary and ministerial acts

Minn. Stat. § 466.03, subd. 6.

The Municipal Tort Claims Act exempts cities from liability for any claim "based upon the performance or the failure to exercise or perform a discretionary function or duty, whether the discretion is abused." Snow and ice immunity under this act does not apply to claims based solely on allegations of negligent driving. This immunity is generally referred to as "statutory" or "discretionary" immunity. In contrast, there will generally be liability where an officer or employee is performing ministerial acts, which do not require the exercise of judgment or discretion.

Hoff v. Surman, 883 N.W.2d 631 (Minn. Ct. App. 2016).

Courts have distinguished between discretionary and ministerial acts in numerous cases. The difficulty has always been in determining whether acts are discretionary or ministerial in the absence of a court case that directly answers the question.

Angell v. Hennepin County Reg'l Rail Auth., 578 N.W.2d 343 (Minn. 1998).

It seems obvious that the crucial question in any situation or case involving this immunity is determining what constitutes a discretionary function or duty.

RELEVANT LINKS:

(But *cf.* *Magnolia 8 Properties, LLC v. City of Maple Plain*, 893 N.W.2d 658 (Minn. Ct. App. 2017).

Nusbaum v. Blue Earth County, 422 N.W.2d 713 (Minn. 1988).

Generally, discretionary functions are those that take place at the policy or planning level, not at the day-to-day or operational level.

To determine whether a challenged governmental action is entitled to discretionary immunity, courts will generally determine whether the action involves a policy decision with a balancing of political, economic, and social considerations, or, alternatively, whether it involves merely a professional or scientific judgment. If the discretion involves only the application of scientific and technical skills in carrying out established policy, then discretionary immunity generally does not apply. If, however, the discretion involves the evaluation and weighing of social, political, and economic considerations, discretionary immunity generally does apply.

Courts and local officials are comfortable with categorizing the extreme examples of ministerial and discretionary actions. Adopting a budget is a policy-making decision and, thus, clearly discretionary, while the city clerk's statutory duty of signing legal papers on behalf of the city is clearly ministerial. Many actions, however, fall between these extremes.

Hansen v. City of St. Paul, 214 N.W.2d 346 (Minn. 1974*). Nusbaum v. Blue Earth County*, 422 N.W.2d 713 (Minn. 1988). *Chabot v. City of Sauk Rapids*, 422 N.W.2d 708 (Minn. 1988).

The intent of discretionary immunity is to preserve the separation of powers among the branches of government by prohibiting the judicial branch from second-guessing the legislative or executive policy-making activities of local government. For example, a court has found a council's decision as to the timing of capital improvements to its storm-water-drainage system to be entitled to discretionary immunity,

Hennes v. Patterson, 443 N.W.2d 198 (Minn. Ct. App. 1989) distinguished by *Hoff v. Surman*, 883 N.W.2d 631 (Minn. Ct. App. 2016). *Gorecki v. Hennepin County*, 443 N.W.2d 236, (Minn. Ct. App. 1989). *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996).

but another court has found the decision of a county highway employee about where to plow snow was not entitled to discretionary immunity. If the decision under review had been when or where snow would be plowed, however, and that decision was made pursuant to a policy adopted by the governmental unit rather than the line employee, it might have been immunized from potential liability.

Conlin v. City of Saint Paul, 605 N.W.2d 396 (Minn. 2000) (Cf. *Magnolia 8 Properties, LLC v. City of Maple Plain*, 893 N.W.2d 658 (Minn. Ct. App. 2017).

Creating a record showing why the council did or did not undertake an action based on political, budgetary or other policy reasons is one way a city can attempt to limit its liability.

E. Liability limits

Minn. Stat. § 466.04, subd. 1. *Lienhard v. State*, 431 N.W.2d 861 (Minn. 1988). *Lund v. Comm'r of Pub. Safety*, 783 N.W.2d 142, 143 (Minn. 2010).

The liability of a city or one of its officers or employees for a tort arising out of an alleged act or omission occurring in the performance of a work-related duty may not exceed $500,000 for any individual claim, or $1.5 million for all claims arising from the same event. These limitations have been ruled constitutional.

RELEVANT LINKS:

Minn. Stat. § 466.04, subd. 1(a) (4).
Minn. Stat. §§ 115B.01-.15.

Minn. Stat. § 604.02, subd. 1 and 2. Minn. Stat. § 466.04. *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713 (Minn. 2014). *Imlay v. City of Lake Crystal*, 453 N.W.2d 326 (Minn. 1990);

Minn. Stat. § 466.06.
Minn. Stat. § 471.981.

The limits for any claim arising out of the release or threatened release of a hazardous substance are twice of the limits referenced above.

The law also limits a city's liability to its percentage of fault when it is jointly liable with another party. A party who is severally liable under the law cannot be ordered to contribute more than that party's equitable share of the total damages award under the reallocation-of-damages provision. This limitation on joint and several liabilities also applies to dram-shop actions.

A city may waive the tort-liability limits by procuring insurance with higher limits in the policy. (The statutory limits are waived only to the policy limits of the purchased insurance). Other defenses or immunities in the Municipal Tort Claims Act are not waived through the procurement of insurance. Also, self-insuring or participating in a self-insurance pool, such as the League of Minnesota Cities Insurance Trust (LMCIT), does not waive the limits unless explicitly done so, by ordinance or resolution.

Reimer v. City of Crookston, 421 F.3d 673 (8th Cir. 2005) (*Cf* .*Weitgenant v. Patten*, 2014 WL 5489383 at FN 3 (D. Minn. Oct. 30, 2014)
Minn. Stat. § 471.59, subd. 1a.

The U.S. Court of Appeals for the 8th Circuit has ruled that a joint-powers board is not a separate entity under the state tort-liability limits and that all members of the joint-powers board are subject to their respective limits. In 2006, legislation was adopted in response to this case that provides that the members of a joint powers organization are to be treated as a single entity for purposes of tort-liability limits.

IV. Special causes of action

A. Loss of public funds

Bd. of Educ. of Village of Pine Island v. Jewell, 44 Minn. 427, 46 N.W. 914, (Minn. 1890). *Sch. Dist. No. 1, Itasca, Co. v. Aiton*, 173 Minn. 428, 217 N.W. 496 (Minn. 1928). *City of Marshall v. Gregoire*, 193 Minn. 188, 259 N.W. 377 (Minn. 1935).

Public officers are liable for the loss of funds coming into their hands during their public duties. The fact that an officer was not negligent is no defense. In fact, the court has held it is no defense that a treasurer lost funds due to burglary.

Minn. Stat. § 427.01. *City of Ortonville v. Hahn*,232 N.W. 320 (Minn. 1930).

An exception is when councils designate a depository, and city funds are deposited in it. In that case, treasurers are not liable on their bonds for the loss of money through failure, bankruptcy, or default of the bank. This is not true if the loss represents unauthorized deposits more than the maximum the council specified or more than the requisite security coverage, in which case the treasurers and their sureties are liable for the excess.

RELEVANT LINKS:

Village of Hallock v. Pederson, 250 N.W. 4 (Minn. 1933).

To relieve treasurers from liability for losses, they must put deposits in banks the council has designated as depositories. The necessary bond or collateral for uninsured deposits must be furnished in the manner provided by law.

Town of Buyck v. Buyck, 112 Minn. 94, 127 N.W. 452 (Minn. 1910).

The duties of the clerk and treasurer or other officers who must sign order-checks, including the mayor where the charter does not give the mayor veto power over such matters, are ministerial. These officers must sign if the order-check is legal. Determining this fact requires the exercise of reasonable care.

If the order-check is illegal on its face or the officers know it is illegal, they are subject to liability for losses resulting to the city from its payment.

Bd. of Comm'rs of Ramsey County v. Elmund, 94 Minn. 196, 102 N.W. 719 (Minn. 1905).

These officers are not liable, however, for loss resulting from the payment of order-checks that are legal on their face and that could not be determined to be illegal by reasonable diligence. For example, a court has held that a treasurer was not liable for paying warrants on which the payees' signatures were forged when the treasurer had no way of knowing this was the case.

State v. Brattrud, 297 N.W. 713 (Minn. 1941).

Public officers, who in good faith refuse to sign a contract or order-check because they think it is illegal, are not criminally liable under the willful-neglect-of-duty statute if their decisions on legality turn out to be erroneous.

Burns v. Essling, 163 Minn. 57, 203 N.W. 605 (Minn. 1925) (But *cf. Leskinen v. Pucelj*, 262 Minn. 461 (Minn. 1962). See also, *Town of Buyck v. Buyck*, 112 Minn. 94, 127 N.W. 452 (Minn. 1910).

Councilmembers have substantial responsibility with respect to the city funds under their control. When the validity of a claim is in doubt, or the right to make an appropriation is uncertain, or the language of the charter or state law relating to a matter is ambiguous and the council has taken the advice of legal counsel, councilmembers will not generally be personally liable for the restitution of funds that turn out to be illegally appropriated. Where a charter forbids loans of the city's credit and all contributions and donations, however, and the council appropriates money for a prohibited purpose in disregard of the prohibition and without seeking advice of counsel, councilmembers will generally be liable for that amount.

B. The Civil Damages Act (The Dram Shop Act)

Minn. Stat. § 340A.801. *Hahn v. City of Ortonville*, 57 N.W.2d 254 (Minn. 1953). distinguished by *Urban v. Am. Legion Dep't of Minnesota*, 723 N.W.2d 1, (Minn. 2006).

Under the Civil Damages Act, often referred to as the Dram Shop Act, any person who is injured in person, property, or means of support by any intoxicated person or by the intoxication of any person, has a right of action against the person who caused the intoxication of that person by illegally selling alcoholic beverages.

RELEVANT LINKS:

Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961). *Casper v. City of Stacy*, 473 N.W.2d 902 (Minn. Ct. App. 1991).

Jaros v. Warroad Mun. Liquor Store, 227 N.W.2d 376 (Minn. 1975). *Knudsen v. Peickert*, 301 Minn. 287, 221 N.W.2d 785 (Minn. 1974). *Seeley v. Sobczak*, 281 N.W.2d 368 (Minn. 1979).

Filas v. Daher, 300 Minn. 137, 218 N.W.2d 467 (Minn. 1974). *Hollerich v. City of Good Thunder*, 340 N.W.2d 665 (Minn. 1983).

The Dram Shop Act could impose liability on a city operating a liquor store that, by illegally selling or bartering alcoholic beverages, causes a person to be intoxicated.

The seller of intoxicating liquor must determine whether a prospective purchaser shows such loss of control as would make it illegal to give the person more liquor. It may be necessary to engage the person in conversation to determine intoxication; however, the duty of care of the seller is only to notice whether the person is obviously intoxicated.

A seller of intoxicating liquor would be liable for damages resulting from a fight if the seller had sufficient warning of a patron's inclination to fight and to cause trouble. The seller has a duty to refuse admission to a patron possessing known violent or vicious behavior who might endanger other patrons. After-hours sales could also create liability under the Dram Shop Act.

See *Carlson v. Thompson*, 615 N.W.2d 387 (Minn. Ct. App. 2000).

Note that even if a city does not have a municipal liquor store, it could still face liability if the city or the city's fire relief association makes an illegal sale of beer or alcoholic beverages as part of a city celebration or other event. In one Minnesota case, a firefighter's relief association "sold" beer to an intoxicated individual, within the meaning of the Dram Shop Act, when it charged him an admission fee to its dance, sold beer tickets to him, and later provided him alcoholic beverages when he was obviously intoxicated. He drove away in his car and subsequently struck two people, killing one of them and injuring the other. The Court found the fire relief association liable.

C. Civil Rights Act

42 U.S.C. § 1983.

One of the federal civil rights acts going back to post Civil War years has given rise to numerous lawsuits against city officers and employees. The statute, 42 U.S.C. Section 1983, known as "Section 1983," provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory 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."

RELEVANT LINKS:

1. Types of claims

McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill., 373 U.S. 668 (1963).

The rights that Section 1983 protects, that is, the "rights, privileges, or immunities secured by the Constitution and laws," include all the 14th Amendment rights such as due process, privileges and immunities, and equal protection. In enacting the law, Congress meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his or her position. The purposes of the statute are to override certain kinds of state law, to provide a remedy where state law is inadequate, and to provide a remedy in the federal courts supplementary to any remedy of any state.

28 U.S.C. § 1343 (a) (3). *Douglas v. City of Jeannette, Pa.*, 319 U.S. 157 (1943). *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). *Egan v. Aurora, Ill.*, 365 U.S. 514, (1961).

Where there is a cause of action under the Civil Rights Act, federal courts, as well as state courts, have jurisdiction regardless of the amount of money in controversy or lack of diversity of citizenship.

Monell v. Dept. of Social Servs. of the City of New York, 436 U.S. 658(1978). *Owen v. City of Independence, Mo.* 445 U.S. 622(1980). *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247(1981). See also *Heritage Homes of Attleboro, Inc., v. Seekonk Water Dist.*, 670 F.2d 1 (1st Cir. 1982). *Smith v. Wade*, 461 U.S. 30 (1983).

The term "person" in Section 1983 includes a municipal corporation. That section can give rise to a cause of action against the city for wrongful acts of its officers or employees, but only if their action is based on or executes a city policy, ordinance, resolution, decision, or custom of a city. "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.' The policy need not be in writing. If a city council tacitly or suggestively authorized, approved, or encouraged a course of action by its employee, it has promulgated an official policy. Cities are not immune from liability under the section, even where the unconstitutional conduct was in good faith. However, *cities* are immune from liability for punitive damages in these types of lawsuits.

The court may levy punitive damages against *state or local officials* when they act with evil intent, or in reckless or callous indifference to the federally protected rights of individuals.

Gomez v. Toledo, 446 U.S. 635 (1980).

For a Section 1983 case to result in liability, all the proof necessary is that some person (the city or one of its officers or employees) deprived the claimant of a federal right while that person was acting under a state or city law, ordinance, resolution, policy, or custom. Good faith is not a defense.

Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980). *Sample v. City of Woodbury*, 836 F.3d 913 (8th Cir. 2016) (examining *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

A city council when exercising a legislative function by enacting an ordinance is immune from Section 1983 liability, even if the ordinance is unconstitutional. Additionally, prosecutors acting within the scope of their official duties are immune from civil liability.

RELEVANT LINKS:

Stresemann v. Jesson, 868 N.W. 2d 32 (Minn. 2015).

Minn. Stat. § 466.07, subd 2.
Minn. Stat. § 471.44.
Minn. Stat. § 541.05.
Douglas v. City of Minneapolis, 304 Minn. 259, 230 N.W.2d 577 (Minn. 1975). *Berg v. Groschen*, 437 N.W.2d 75 (Minn. Ct. App. 1989). Minn. Stat. § 541.05, subd. 1.

Prosecutorial immunity, however, "does not extend to an investigator whose conduct is not intimately involved with the initiation and maintenance of criminal charges."

The Minnesota Municipal Tort Claims Act authorizes the city to defend actions against its officers, and indemnify them against any tort claim or demand arising out of an alleged official act or omission. The Act also requires the council to defend false-arrest charges and authorizes it to pay any resulting judgment. Because these statutes apply to all actions, they seem to include actions under Section 1983, and courts have applied them in this manner. Minnesota courts have ruled the six-year statute of limitations is the applicable limitations period for Section 1983 claims and constitutional due-process claims.

Martinez v. California, 444 U.S. 277(1980). *Felder v. Casey*, 487 U.S. 131, (1988) (*Cf. Boyd v. BNSF Ry. Co.*, 874 N.W.2d 234 (Minn. 2016). *Howlett v. Rose*, 496 U.S. 356 (1990).

Tort-liability limits and other immunities in Minn. Stat. ch. 466 do not apply to Section 1983 actions However, federal law preempts state substantive law, but not state procedural law.

2. Problem areas

City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989).
See *Barlau v. City of Northfield*, 568 F. Supp. 181 (D. Minn. 1983).

Section 1983 actions have been common in four areas: police misconduct, licensing, zoning, and employment. In police misconduct, liability most often arises when a police officer either intentionally or negligently violates someone's constitutional rights. For example, if police officers routinely conduct searches without warrants and the police chief is aware this activity is occurring, the officers involved, the chief, and the city may all be liable for violation of Section 1983.

Inadequacy of police training may also serve as the basis for a Section 1983 claim if the failure to train results in deliberate indifference to the rights of people with whom police come into contact and the deficiency is closely related to the ultimate injury incurred.

Continental Property Group, Inc. v. City of Minneapolis, No. A10-1072 (Minn. Ct. App. May 3, 2011) (unpublished decision).

Some licenses may establish property interests under the due-process clause of the Constitution. Arbitrary denials and decisions to revoke or not to renew a license may result in liability. Any time a city makes a zoning decision without affording affected property owners due process, liability may also arise.

Finally, there are particular concerns for cities regarding Section 1983 liability in the employment area. Hiring, firing, and promotion procedures that impede or discourage an individual's exercise of constitutionally protected rights may raise concerns about liability.

RELEVANT LINKS:

Examples might include termination of an employee for criticizing the city about a matter of public concern, or any discrimination based on the race or sex of the employee.

D. Antitrust

City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389 (1978) *distinguished by Cedar-Riverside Associates, Inc. v. United States*, 459 F. Supp. 1290 (D. Minn. 1978), aff'd sub nom. *Cedar-Riverside Associates, Inc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979). *Cmty. Communications Co., Inc. v. City of Boulder, Colo.* 455 U.S. 40(1982). *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

Cities may have exposure to antitrust liability under federal law. The intent of these laws is to protect our economic system from the monopolization of businesses and prevent the restraint of trade. For example, a private electric utility unsuccessfully argued that a city violated antitrust laws by operating the city electrical utility.

Minn. Stat. ch. 325D.

It is not clear to what extent the state's antitrust law applies to city action. It is important that cities keep these laws in mind when making decisions about selling, purchasing, contracting, licensing, franchising, and land use. City officials should add antitrust to their mental checklist of considerations before acting and speaking on city business.

E. Right to privacy

Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998).

The right to privacy exists in Minnesota. There are three types of privacy invasions that Minnesota law recognizes. The first is the intentional intrusion (physically or otherwise) upon the solitude or seclusion of someone's private affairs or concerns if the intrusion would be highly offensive to a reasonable person.

The second is the appropriation of an individual's name or likeness by someone else for his or her own use or benefit. The third, and the one of most concern to local governments, is the publication of a matter concerning the private life of another if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public. The Minnesota Government Data Practices Act (MGDPA) classifies much personnel and other information kept by cities as private. The unlawful release of this information may give rise to a claim of a violation of the right to privacy, as well as a claim of a violation of the MGDPA.

RELEVANT LINKS:

Davis v. Hennepin County, 559 N.W.2d 117 (Minn. Ct. App. 1997).

F. Other areas of potential liability

There are other potential sources of municipal liability, including the Minnesota Human Rights Act, state and federal environmental laws, anti-discrimination laws, and anti-conspiracy laws. Municipal liability, or cities being held responsible for injury to people or property, depends on the specific facts of each situation. Best practice suggests working with the city attorney to help allay potential liability.