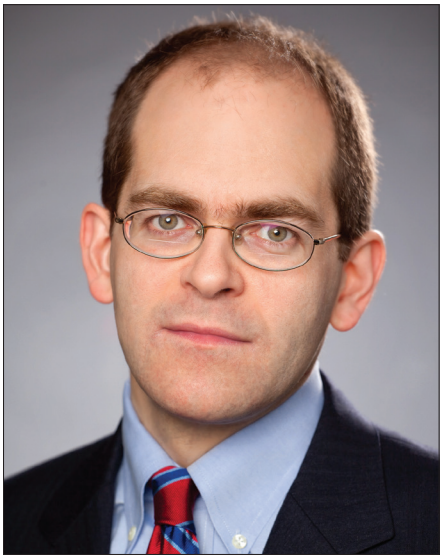
Tuesday, October 29, 2013 • Vol. XXXVI No. 44

PENNSYLVANIA LawWeekly

www.thelegalintelligencer.com An ALM Publication

Rethinking Governmental Immunity in Pennsylvania

Almost everyone would agree that the facts deserved a fair and just remedy. The accident was random. The injuries were horrific. The victim was blameless. But the legal result was harsh — and probably required by existing law.



Clark Hill attorney **Jonathan W. Hugg**

The case was Zauflik v. Pennsbury School District, 72 A.3d 773, 2013 Pa. Commw. LEXIS 233 (Pa. Commw. Ct. 2013), decided by the Commonwealth Court in a reported opinion July 3. The driver of a school bus owned and operated by the school district stepped on the accelerator instead of the brake, went off the road and onto a sidewalk, and ran over 17-year-old high school student Ashley Zauflik, crushing her pelvis and leg and resulting in an above-the-knee amputation. The district admitted liability. The Bucks County jury awarded Zauflik $14 million, including $11.1 million for noneconomic damages. Notably, the school district had at least $11 million in insurance coverage.

However, Zauflik's victory proved fleeting. The trial court molded the verdict to just $500,000—just 3.6 percent of what the jury believed Zauflik was entitled to recover—because of the statutory damages cap imposed by the Political Subdivision Tort Claims Act, known as "governmental immunity." Zauflik appealed on the ground that the reduction was unconstitutional, but a Commonwealth Court panel affirmed, with one judge dissenting. An allocatur petition awaits a decision by the Pennsylvania Supreme Court, probably sometime in 2014.

The Tort Claims Act is a cornerstone of state court litigation with local governments in Pennsylvania. Traditionally, similar to the king of England, municipalities ("local agencies," which range from cities and townships to police departments and community colleges) enjoyed absolute immunity from tort lawsuits. With the passage of the Tort Claims Act in 1978, however, the Pennsylvania Legislature granted a narrow waiver of immunity for "negligent acts" coming within eight specifically enumerated categories relating to: (1) the operation of any motor vehicle in the possession or control of the local agency (such as the school bus that struck Zauflik); (2) the care, custody or control of personal property of others in the possession or control of the local agency; (3) the care, custody or control of real property in possession of the local agency; (4) a dangerous condition of trees, traffic controls and street lighting under the care, custody or control of the local agency; (5) a dangerous condition of utility service facilities owned by the local agency; (6) a dangerous condition of streets owned by or under the jurisdiction of the local agency; (7) a dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency; or (8) the care, custody or control of animals in the possession or control of a local agency.

Courts have rigidly construed the scope of these exceptions and view them as issues of subject-matter jurisdiction that the court can revisit at any time. The Tort Claims Act also explicitly excludes intentional conduct from the definition of negligence, stating, "'negligent acts' shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct."

Even if a plaintiff can prove liability, no matter how egregious the injury, there is the $500,000 damages cap that eliminated 96.4 percent of Zauflik's verdict. This cap is an aggregate limit—no matter the number of plaintiffs, the most a local agency need pay for any one incident is a total of $500,000. The municipality also receives credit for any insurance payments to the plaintiff. Additionally, punitive damages are not available. While the Tort Claims Act changed the common law by permitting lawsuits against local government, the act obviously imposed tremendous obstacles.

Undaunted, Zauflik launched a broadside constitutional attack on the $500,000

continued on page 2

continued from page 1

damages cap, claiming that it violated her state constitutional rights under Article I, Section 11 (open courts), Article III, Section 18 (anti-cap provision), Article V, Section 1 (separation of powers provision), and Article I, Section 6 (right to jury). She also maintained that her federal equal protection and due process rights prevented application of the cap. However, the Commonwealth Court majority rejected each of her arguments in turn, on the ground of stare decisis, because the Pennsylvania Supreme Court had for more than 20 years denied similar challenges.

The Commonwealth Court stressed the overriding purpose of governmental immunity: to shield the public treasury from large, unpredictable and destabilizing damages awards. The existence of the $11 million of insurance was irrelevant to the majority, which sounded apologetic in tone. Meanwhile, the dissent concluded that application of the $500,000 cap deprived Zauflik of her state constitutional rights because it had no reasonable relationship to Zauflik's total damages. The dissent observed that the $500,000 cap had not changed since 1980. (However, an informal calculation shows that $500,000 in 1980 would be worth about $1.4 million today—still only 10 percent of the jury's award to Zauflik.)

If the Pennsylvania Supreme Court follows its own precedent, it is unlikely to grant relief to Zauflik. Her case may be extreme, but it highlights how the Tort Claims Act rations justice, even where a grievously injured plaintiff is without fault and the existence of insurance may diminish the threat that a runaway jury award will rock public finances. In any given situation, no matter the innocence of the plaintiff and the financial resources of the defendant, there is only $500,000 of justice to go around, and even then, only if the government was negligent and the negligence is one of eight special types. In cases with multiple plaintiffs, the cap on damages pits victims against each other, as they compete to show greater individual harm and entitlement to the limited recovery. Moreover, as a practical matter, few cases fall neatly into the eight exceptions to immunity. If a "dangerous condition" is "on" government property (like a slippery banana peel lying on a sidewalk), rather than "of" government property (like a crack in the pavement), there will likely be no liability. The performance of administrative and ministerial acts, which probably includes most of the day-to-day operations of government, clearly falls outside of any exception. If a local government injures a citizen through a negligent bureaucratic error, like a mistake in documentation or a bad judgment call, the Tort Claims Act precludes compensation under state law.

Most troubling of all is that there is absolute governmental immunity for intentional—i.e., non-negligent—misconduct by local government. The Tort Claims Act does not protect individual local officials committing crimes or fraud or acting willfully or with "actual malice." However, even though the local government official acted under color of law, using the power of his or her office and with official sanction, and even though the official intentionally damaged a citizen, the government body itself is unassailable under state law. The only redress is through an onerous federal civil rights lawsuit. The fundamental problem is that the Tort Claims Act undercuts the accountability of local government, and by extension local communities, in the name of insulating their finances. If there is only a limited possibility of liability, and if the ceiling is $500,000, there is little reason to reform bad policies or prevent an employee from abusing his or her office.

Short of the plaintiff's fantasy (and municipal treasurer's nightmare) of abolishing governmental immunity, the possible reforms are similar to those frequently suggested for the tort system. An easy one would be to index the damages cap with inflation, as implied by the dissent in Zauflik. More controversial would be to broaden the number and scope of exceptions to immunity to allow compensation for injuries caused by negligent exercises of municipal discretion, but also to limit or eliminate the role of juries, to create a special court of claims to hear the actions against local government, or to allow municipalities to prove fiscal burden as an affirmative defense. A Pennsylvania civil rights act, mirroring the federal Section 1983 statute and including a similar fee-shifting provision, would make real the frequently overlooked protections afforded by the Pennsylvania Constitution and afford some avenue of redress against intentional violations of state law by local government.

As for Zauflik, giving her access to the school district's $11 million of insurance policies would have been just. In her case, de facto, governmental immunity functioned not to guard the school district's finances, but to save its liability carriers from a huge payout. They were the true beneficiaries of the cap on damages, since they escaped without having to pay beyond $500,000. It is conceivable that payment by the school district's insurers would have caused its future premiums to rise, and in these times of budgetary distress, that is not an insubstantial consideration. Some have even raised the specter of municipalities that, but for governmental immunity, would be uninsurable. Ultimately, however, the result in Zauflik subverted the Tort Claims Act by granting a massive windfall to a private party, with only a theoretical underwriting benefit to the public, all the while leaving a grievously injured young girl with a wholly inadequate remedy.

Jonathan W. Hugg is a Member of Clark Hill Thorp Reed's Litigation Practice Group. He concentrates on commercial and appellate litigation, with an emphasis on financial institution, regulatory enforcement, municipal, and lender liability matters. He has served as special counsel to numerous local agencies and also represents businesses and individuals in disputes with government. **You can contact him at jhugg@clarkhill.com or (215) 640-8547.**

CLARK HILL

www.clarkhill.com