



PENNSYLVANIA

Borough News

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EMERGENCY PLANNING & CRISIS RESPONSE

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NIMS Compliance Critical for Local Governments



Law Enforcement Liability & Governmental Immunity

By David R. Leng, CPCU, Executive Vice President, Duncan Financial Group

With protests, riots, violence, looting, and general unrest having gripped parts of the nation and state over the past few months, it is a good time for borough officials to reflect on the history of law enforcement liability and governmental immunity.

History

The Governmental Immunity Act, frequently referred to as the Political Subdivision Tort Claims Act, comes from “sovereign immunity,” which means literally that the king can do no wrong. This was a concept in English law. The idea hung around for a long time in England and was expanded to mean that subjects could not sue the king and evolved into residents not being able to sue the government.

This concept was brought to America, and over time, sovereign immunity came to mean that individuals could not sue the government for anything, period.

During the 1960s and 1970s, this concept started to erode. The courts found exception after exception until finally the concept of sovereign immunity was nearly abolished.

Wild West Era

In Pennsylvania, the concept of sovereign immunity for local municipalities was abolished in 1976 by the PA Supreme Court in the case of *Avala v. Philadelphia Board of Public Education*. The decision made it clear that municipalities would be treated like everybody else.

The problem was that this ruling did not include protection for public tax monies, which are collected and used for the public good. After this case, those funds could be used to pay off judgments without limitations.

In addition to the cost to taxpayers, insurance became extremely difficult, if not impossible, for municipalities to obtain during this era, and insurance costs were exorbitant as a result of there being no sovereign immunity.

The legislature looked at the situation and decided statutes had to be passed in order to protect public monies and to allow for an orderly insurance market with respect to municipalities.

Sovereign and Governmental Immunity Acts

The legislature developed two statutes.

The Sovereign Immunity Act addressed governmental immunity for the state and agencies such as PA Department of Transportation (PennDOT). It also passed the Governmental Immunity Act, which is sometimes referred to as the Pennsylvania Political Subdivision Tort Claims Act.

Similar federal statute says, “You could sue the government for everything except...” followed by a list of exceptions. In PA, the statute says, “You can’t sue local subdivisions for anything except...” The nine municipal exceptions are:

1. Vehicles in the possession or control of the local agency.
2. Personal property of others in a municipality’s care, custody, or control.
3. Real property in the possession of the municipality.
4. Trees, traffic controls, and street lighting under the care, custody, or control of the municipality.

5. Utilities (steam, water, gas, electric) owned by the municipality.
6. Streets owned by the municipality.
7. Sidewalks within rights of way of streets owned by the municipality.
8. Animals in the possession or control of the municipality (not wild animals).
9. Sexual abuse (damage limitation does not apply).

The liability caps are also a difference among the federal government and PA's state and local governments.

If a lawsuit is filed against the U.S. government or PennDOT, for example, the plaintiff could only recover \$250,000. However, in an identical lawsuit against a local borough, \$500,000 can be awarded.

As many may know, insurance liability policies go beyond the \$500,000 cap for a local municipality.

First, the \$500,000 is a soft cap. While judgments themselves are limited to \$500,000, costs of any applicable attorneys' fees, plus pre-judgment interest, are added to the \$500,000.

In some insurance policies, defense costs are covered within the policy's limit. This leads to

less money being available to cover the judgment. In addition, once the defense costs exceed the policy limits, the insurance company is no longer required to defend the borough.

With defense costs that can total hundreds of thousands of dollars, it is imperative to have sufficient insurance.

Municipalities that do not have coverage for the event leading to the lawsuit also do not have defense costs covered.

Payment of any judgment under the act, where the municipality is self-insured or not fully covered by insurance, a tax levy can be used to pay the judgment, or the court can order it be paid over a period of time of not more than 10 years.

Only tort, or civil, suits are subject to the limit. Federal causes of actions are not subject to the act's limitations, including cases regarding civil rights, employment discrimination, or pollution cleanup.

Citizens have been able to hold local officials liable for violating their civil rights since the 1870s when Congress passed laws that were meant to protect Black Americans in the post-Civil War South.

Nearly 100 years later in the 1960s, the U.S. Supreme Court

created qualified immunity, which protects public servants from high-stakes lawsuits. This immunity applies to all public servants, such as police. The doctrine maintains a delicate balancing act, giving government officials the benefit of the doubt when handling their complicated but necessary work.

Under qualified immunity, public workers cannot be in legal jeopardy for their actions unless "every reasonable official" would know that their conduct was violating a "clearly established" constitutional right, or if the official was "plainly incompetent."

Qualified immunity prevents police officers from going through a civil trial, let alone paying damages, if a court agrees they qualify for the immunity. It's another policy that keeps police conduct private, since the public can't see the documents, testimony, and other information that could come to light in a civil liability trial.

Subsequent rulings have expanded this provision, so that, in practice, qualified immunity makes it difficult for use-of-force lawsuits. In order to succeed, these suits must prove qualified immunity does not apply in order to successfully sue a police officer.

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Because of this, legal costs can soar in the hundreds of thousands of dollars to keep a lawsuit from being able to breach qualified immunity.

However, in a recent PA case, the family of Antwon Rose Jr. sued the East Pittsburgh Borough, Allegheny County, for his death in 2018 and was able to prove qualified immunity did not apply leading to a \$2 million award.

With the recent movement for police “reform,” there will be a push to have the doctrine of qualified immunity altered or removed, which may lead to the return of something like the 1970s “Wild West” with regards to lawsuit activity. All things considered, boroughs must have both insurance coverage and ample limits for the best protection.



About the author: David R. Leng, CPCU, CIC, CBWA, CRM, CWCA, is author of the

#1 Best Selling Amazon Business Book *The 10 Laws of Insurance Attraction*, as well as *Stop Being Frustrated & Overcharged* (by your workers' compensation program). He is also executive vice president of the Duncan Financial Group in Irwin, Pa., which is a member of Keystone. Leng is also an instructor for the Institute of WorkComp Professionals. He can be contacted at dleng@duncangrp.com. For more information, visit www.StopBeingFrustrated.com.

About Keystone: Keystone has been the endorsed insurance provider to PSAB members since 2002. As the recommended insurance provider, PSAB members have

access to an exclusive insurance program including loss control and risk management consultation and opportunities to share in a safety dividend.

Keystone formed in 1983 when four independent insurance agencies teamed up to pool their experience and expertise. Today, Keystone has grown to almost 300 independent agency partners. In Pennsylvania, Keystone has 57 partner agencies with more than 80 locations in or around borough communities in PA.

Keystone provides its agents with a community of like-minded agencies, industry expertise, and access to specialized products for their clients. Keystone is ranked number three on Insurance Journal's 2019 list of Top 20 Agency Partnerships.

For more information, email programs@keystoneinsgrp.com. 

PSAB EVENTS CALENDAR ONLINE

PSAB's website, boroughs.org, hosts an Events Calendar to serve as a one-stop location for important events, training, deadlines, and other important items of information.

All PSAB webinars and classroom trainings, grant deadlines, reporting deadlines, or other items of interest – such as the deadline to sign up for the COSTARS salt contract or the deadline for filing statements of financial interest – are on the calendar. When applicable, a link to the online resource will be available.

The calendar is located on the homepage of the website. You can also view and print the full calendar.

You can also save an event to your own calendar.