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MOTOR VEHICLE ACCIDENTS, GOVERNMENTAL IMMUNITIES, TORT CAPS, OH MY!

IT'S ALL RELATIVE: HOMEOWNERS AND AUTO POLICIES AND CHILDREN (OF ALL AGES)

USE OF EXPERT WITNESSES IN MOTOR VEHICLE ACCIDENT CASES

MEET MDLA'S NEWEST COMMITTEE: WOMEN IN THE LAW

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MOTOR VEHICLE ACCIDENTS, GOVERNMENTAL IMMUNITIES, TORT CAPS, OH MY!

By Tessa McEllistrem, Marcus Jardine, and Jessica Schwie of Jardine, Logan, & O'Brien, PLLP in collaboration with Jack Hennen of Provo-Peterson & Associates, P.A.

When handling a motor vehicle accident in which a government entity is a party or where conditions maintained by a government entity are alleged to have caused the accident (e.g. traffic signs, lack of guardrails), savvy litigators should be prepared to address certain unique legal issues early on. Minnesota, through legislation and case law, provides its government entities with certain protections from liability. It is important that attorneys representing both plaintiffs and non-government co-defendants understand governmental immunity. If any immunity applies, claims against the government entity and its employees are often dismissed. A non-governmental co-defendant, as the only remaining defendant, may then become the target defendant. In this article, we summarize the immunity defenses and nuances that most commonly arise in the context of motor vehicle accidents.

As a bit of background: The State of Minnesota, counties, towns, municipalities, and schools are immune from (entitled to dismissal of) various types of claims.[1] Minnesota statutes provide an itemized list of claims from which government entities are immune. *Minn. Stat. §§ 3.736, 466.04.* In addition, Minnesota common law recognizes several immunity defenses that are not otherwise provided for by statute. In some cases, a government entity that is not immune from a claim may still be protected by a cap or limit on liability. *Minn. Stat. §§ 3.736, subd. 4, 466.04*.

The rationale for protecting government entities from liability is generally based upon the following concepts:

1. Government entities are charged with making decisions for the public good that involve weighing multiple factors that often have both negative and positive outcomes,

2. The judicial branch, through the medium of lawsuits, should not second-guess the policy balancing decisions of government entities,

3. An award obtained against a government entity is paid out of public funds that are funded by the taxpayer,

4. Public funds are better protected, and it is a better use of public funds, if a few individuals suffer as opposed to the public in general, and

5. Government agents will perform their duties more effectively if not hampered by fear of tort liability.

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1 *Minn. Stat. § 3.732 defines the state entities that are entitled to statutory protections, and Minn. Stat. § 466.01 defines the local government entities that are entitled to such protections.*

Tessa McEllistrem is a senior associate with Jardine, Logan & O'Brien, P.L.L.P. She practices in the areas of Motor Vehicle Liability, Employment Law and Government Liability.

Jessica Schwie is a partner with Jardine, Logan & O'Brien, P.L.L.P. and chair of the firm's Appellate Law group. She joined the firm in 2001 and practices principally in the areas of Government Liability Defense and Employment Law.

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Nusbaum v. Blue Earth County, 422 N.W.2d 713, 718 (Minn. 1988); *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988); *Wilson v. Ramacher*, 352 N.W.2d 389, 393 (Minn. 1984); *see generally*, Restatement (Second) Torts § 895B.

The question of whether immunity applies is a legal question to be decided by the district court *prior to* arbitration on the merits under the Minnesota No-Fault Automobile Insurance Act, *Minn. Stat. §§ 65B.41-71* (2012) ("No-Fault Act"). *Fernow v. Gould*, 835 N.W.2d 8 (Minn. 2013).

I. STATUTORY IMMUNITIES

Minnesota Statutes section 466.03 provides immunity from suits arising out of (1) the assessment and collection of taxes, (2) snow and ice, (3) acts or omissions pursuant to statutory mandates, (4) discretionary acts, (5) unimproved property, and (6) the use of recreational equipment. Minn. Stat. § 3.736 provides for immunity from losses (1) caused by wild animals, (2) the use of recreational areas, and (3) torts occurring at the Minnesota Zoo. These examples are not a complete list of all immunities afforded by statute. Relevant statutes and case law should be consulted each time a new claim is considered to determine possible immunities and how they would apply. In the context of motor vehicle accidents, the following provisions are the most applicable: (1) snow and ice immunity, (2) wild animal immunity, and (3) discretionary immunity.

A. Snow and Ice Immunity

Municipalities are "subject to liability for [their] torts and those of [their] officers, employees and agents acting within the scope of their employment or duties …" Minn. Stat. § 466.02. However, municipalities are not liable for "[a]ny claim based on snow or ice conditions on any highway or public sidewalk that does not abut a publicly owned building or publicly owned parking lot, except when the condition is affirmatively caused by the negligent acts of the municipality." Minn. Stat. § 466.03, subd. 4(a). A similar immunity is afforded to the State. Minn. Stat. § 3.736, subd. 1, 3(d). The statutory definition of "highway" includes township roads, city streets and alleyways, county roads, state highways and interstate highways. Minn. Stat. §§ 160.02; 161.16.

B. Wild Animal Immunity

Minnesota statutes also provide a lesser-known immunity that can become relevant in motor vehicle accidents, wild animal immunity. By statute, governmental entities and their employees cannot be held liable for a "loss caused by wild animals in their natural state." Minn. Stat. §§ 3.736, subd. 3(e), 466.03, subd. 15. Wild animal immunity was at issue in *Curtis v. Klausler*, in which a city employee was driving a city vehicle when it was struck by a deer that had entered the highway. *Id.*, 802 N.W.2d 790 (Minn. Ct. App. 2011). The employee then lost control of the vehicle and crashed into another car whose driver later sued the city. The court held, however, that the personal injury claims against the city and its driver were barred by statutory wild animal immunity.

C. Statutory Discretionary Immunity

State agencies and municipalities are immune from tort claims challenging a discretionary decision, act, or failure to act. Minn. Stat. §§ 3.736, 466.03, subd. 6. In determining whether statutory discretionary immunity applies:

> A two-step analysis guides [Minnesota courts] in determining whether a municipality is entitled to statutory immunity. First, [the court] must identify the challenged governmental conduct. Next, [the court must] determine whether the challenged conduct involves planning-level or operational decisions.

Magnolia 8 Properties, LLC v. City of Maple Plain, 893 N.W.2d 658, 662–63 (Minn. Ct. App. 2017) (citations omitted). Therefore, the first step in handling any claim is to identify what conduct is alleged to have been negligent—driving by a government employee? Failure to repair potholes? Placement of warning signs? Use of guardrails? Once the negligent conduct (aka the challenged conduct or condition) is identified, the court moves on to the next step of the analysis — did the alleged negligent conduct arise out of a planning-level decision-making process? If so, the negligence claim may be barred.

Planning-level or policy-making decisions are typically those decisions made by elected officials and department heads that involve the balancing of public policy objectives, including social, economic, financial, and political factors. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988) (citation omitted). Planning-level conduct includes actions such as the deployment of police forces and placing warning signs on certain roads. *Watson by Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 413 (Minn. 1996) (citations omitted).

On the other hand, statutory discretionary immunity does not apply to decisions made at the operational level. *Magnolia 8*, 893 N.W.2d at 662–63; *see also Gerber v. Neveaux*, 578 N.W.2d 399, 403 (Minn. Ct. App. 1998). The rationale for limiting statutory immunity to planning-level conduct is "[r]ooted in the doctrine of separation of powers"—the goal is to "prevent courts from second-guessing" legislative activities. *Gerber*, 578 N.W.2d at 403.

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The following are examples of decisions protected by statutory discretionary immunity:

- The timing of traffic control signals. *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996).
- Where, and when, to mow along roadways. *Riedel v. Goodwin*, 574 N.W.2d 753 (Minn. 1998)
- Where, and when, to trim trees. *Soltis-McNeal v. Erickson*, 1999 WL 1138524 (Minn. Ct. App. Dec. 14, 1999).

II. COMMON LAW IMMUNITY

In addition to the statutory immunities discussed above, certain immunities have been created in case law and continue to be recognized in common law. Common law immunity defenses can include, but are not limited, to: sovereign immunity, legislative immunity, qualified immunity, prosecutorial and/or quasi-judicial immunity, and official immunity. In the context of motor vehicle accidents, the most applicable immunities have tended to be official immunity (applicable only to state tort claims) and qualified immunity (applicable only to federal claims).

A. Official Immunity

Common law official immunity "involves the kind of discretion which is exercised on an operational rather than a policy-making level," meaning that it protects the discretionary decisions of individual public officials, such as teachers, police officers, or engineers. *S.W. v. Spring Lake Park Sch. Dist. # 15*, 580 N.W.2d 19, 23 (Minn. 1998); *accord Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). In defining acts protected by official immunity, courts have distinguished between discretionary duties (protected) and ministerial duties (not protected). A discretionary decision for purposes of official immunity is "one involving more individual professional judgment than necessarily reflects the professional goals and factors of a situation." *Wiederhold v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). A duty is ministerial, on the other hand, "when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts." *Rico*, 472 N.W.2d at 107. Whether discretion was involved, and official immunity applies, turns on the facts of each case.

Even if the challenged decision is deemed discretionary, official immunity will not be granted if the public official acted with malice. *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998); *McDonough v. City of Rosemount*, 503 N.W.2d 493, 497 (Minn. Ct. App. 1993). Malice is defined as "the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Id*. (citing *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991)).

The types of decisions that can be protected by common law official immunity include:

- A traffic engineer's decision as to where to locate sign at an intersection. *Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269 (Minn. Ct. App. 1996); *Counter v. Faith Lutheran Church*, 1998 WL 219778 (Minn. App. May 5, 1998).
- The decision not to install a guardrail on roadways and bridges. *Haggerty v. Pawlyshyn*, 1999 WL 43338 (Minn. Ct. App. Feb. 2, 1999); *Bartman v. City of Worthington*, 2011 WL 1642626 (Minn. Ct. App. May 3, 2011).
- A road grader's decision to grade against traffic. *Schroeder v. St. Louis County*, 708 N.W.2d 497 (Minn. 2006).
- Removal of debris. *Yennie v. Thompson*, 2010 WL 5293813 (Minn. Ct. App. Dec. 28, 2010).

The following are examples of decisions that were determined to be ministerial, and therefore, not protected by immunity:

- A road grader's decision to grade after dusk without lights. *Schroeder v. St. Louis County*, 708 N.W.2d 497 (Minn. 2006).
- The decision to turn on lights and siren. *Xia Yang v. Scott*, 2008 WL 4007401 (Minn. Ct. App. Sept. 2, 2008).

B. Vicarious Official Immunity

Although official immunity serves to protect individual employees, it can, in many cases, protect the government entity from liability by means of vicarious official immunity. *See e.g. Anderson v. Anoka Hennepin Sch. Dist. No. 11*, 678 N.W.2d 651 (Minn. 2004); *Olson v. Ramsey*, 509 N.W.2d 368, 372 (Minn. 1993). The rationale for extending the immunity of a public official to his/her employer is that if it is not extended, the government entity will establish policies inhibiting the exercise of discretion in a manner that is a disservice to the public as a whole. *Ireland v. Crow's Nest Yachts, Inc.*, 1996 WL 422477, at *5 (Minn. Ct. App. July 30, 1996)(citing *Pletan v. Gaines*, 494 N.W.2d 42 (Minn. 1992)).

Whether to apply vicarious official immunity is a policy question. *Motl ex rel. Motl v. Powder Ridge Ski Area*, 2012 WL 426602, at *2 (Minn. Ct. App. Feb. 13, 2012) (quoting *Anderson*, 678 N.W.2d at 663–64). While vicarious official immunity is typically granted, there are exceptions. *See, e.g., S.W. v. Spring Lake Park School District. No. 16*, 592 N.W.2d 870 (Minn. Ct. App. 1999), *aff'd without opinion*, 606

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N.W.2d 61 (Minn. 2000). In that case, a student was raped by a visitor, who had been seen but not stopped, by school personnel. Given the facts of the case, the court held that granting immunity to the school would have the effect of rewarding the school for its failure to adopt a security policy, which would be contrary to the public policy of encouraging schools to protect children in their charge.

C. Qualified Immunity

"Qualified immunity is a federal law doctrine that has been applied by courts in the context of federal civil rights cases arising under 42 U.S.C. § 1983." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 569 n.4 (Minn. 1994). The doctrine of qualified immunity "shields government officials from civil liability if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mumm v. Mornson*, 708 N.W.2d 475, 483–84 (Minn. 2006) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). In the context of motor vehicle accidents, this immunity generally is available only for injuries resulting from police pursuits.

There are two steps to establishing qualified immunity. Under the first step, "the Court determines whether the facts alleged are adequate to show a constitutional violation." *Mumm, 708 N.W.2d at 483.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Next, "the Court decides whether the law regarding the right allegedly violated 'was clearly established.'" *Id.* (citing *Saucier*, 533 U.S. at 201). Whether the law regarding the right was clearly established is a legal question to be decided by the court. *Mumm, 708 N.W.2d at 483*.

III. EXEMPLARY CASES

As set forth above, key to any immunity case is to identify the challenged conduct in dispute. In the following, we highlight the key or instructive cases by type of challenged condition or conduct.

Snow and Ice Cases

1. In re Alexandria Acc. of Feb. 8, 1994, 561 N.W.2d 543 (Minn. Ct. App. 1997)

A MnDOT snowplow operator started plowing I-94 at 25 m.p.h. A van, traveling at 65 m.p.h., encountered white-out conditions generated by the plow. The van struck the snowplow, forcing the van to spin onto the roadway, where it was in turn struck by a bus. Seven passengers in the van were killed. *Id. at 545.*

Statutory discretionary immunity protected MnDOT and the plow driver in several respects. First, statutory discretionary immunity protected MnDOT's decision not to place a new lighting system on the plow involved in the accident because it was a decision based on cost. Second, although plaintiffs claimed it negligent scheduling to have the old snow plows without new lights on the interstate, the court concluded that this was simply a prioritizing decision protected by statutory discretionary immunity. Third, responding to the claim that the state negligently trained/supervised the snow plow operator, the court noted that training decisions were sufficiently policy-based so as to be protected by immunity. *Id. at 547-48.*

Common law official immunity also protected MnDOT and the plow driver. Deciding to drive at 25 m.p.h. and choosing to plow snow in a manner that could cause a whiteout, were deemed protected discretionary decisions. The plaintiffs also claimed the plow driver didn't follow the MnDOT manual, but the court noted the manual only consisted of recommendations; moreover, there was no evidence that the driver violated any policies in the manual. Because of this, the state also enjoyed vicarious official immunity. *Id. at 548-49*. Finally, statutory snow and ice immunity protected MnDOT and the plow driver because the damages arose from "the natural consequences of snow plowing." *Id. at 549.*

2. Igou v. Garden City Twp., 2016 WL 7337143 (Minn. Ct. App. Dec. 19, 2016)

A township employee was having difficulty sanding the road. He recruited a passerby to help by getting in the back of his truck. The truck started to slide backwards, the passerby jumped off the truck, and sustained injuries. The passerby then sued the employee and township, which in turn asserted official immunity (for the employee), vicarious official immunity (for the township), and snow and ice immunity (for both). *Id. at *1.*

First, the court determined that the conduct at issue was the employee's decision to recruit the passerby and to drive with him in the back of the truck. The court then determined that the conduct was discretionary, not ministerial. The court also noted that recruiting a passerby to help, and having him stand in the back of the truck, did not violate any policy and was consistent with how the township had historically removed snow. Moreover, the employee had no malice in asking the passerby to help. The court did not reach the issue of snow and ice immunity because of the protection offered by official and vicarious immunity. *Id. at *2-3.*

Traffic Control Cases

1. Statz v. State, 2016 WL 2946170 (Minn. Ct. App. May 23, 2016), *review denied* (Aug. 9, 2016)

A fatal accident occurred at an intersection. One road (County Road 27) initially had stop signs, but the other (Old 14) did not. To facilitate construction of an overpass, traffic

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signals were installed. After construction was completed, MnDOT converted the intersection to an all-way stop.

Initially there were advance warnings, but they were removed after a few months. After the state learned that drivers were ignoring the stop signs, a MnDOT traffic engineer decided to remove the two stop signs on Old 14. *Id. at *1.* However, he did not remove the 24-inch-wide stop bars on the road because he "knew that the stop-bars could not be immediately and simultaneously removed because of the lack of proper equipment, resources, and personnel." *Id.* Three days after the signs were removed, a collision occurred.

The initial question in the case was whether common law official immunity applied to the engineer, and whether the engineer's actions "were discretionary decisions or ministerial duties." *Id. at *3.* A guidebook provided examples of warning signs the engineer could have used, such as "CROSS TRAFFIC DOES NOT STOP." *Id. at *4.* But it was left to the discretion of the engineer to determine which warning to use, or whether to use one at all. *Id.* With regard to road markings, the guidebook said they should be removed "as soon as practical," *Id.* which was also ultimately an engineering judgment. The court, thus, concluded that all of the engineer's decisions relating to removal of the stop signs were discretionary and granted official immunity and vicarious official immunity. *Id. at *4-5.*

2. *Zaske ex rel. Bratsch v. Lee*, 651 N.W.2d 527 (Minn. App. 2002)

An unidentified driver hit a stop sign and then used a hacksaw to cut the sign down to free his vehicle. Nobody reported the damage. *Id. at 529.* Four days later, the stop sign had not been replaced, and another accident occurred, causing injuries. *Id. at 530.* The county was sued for alleged negligence in "failing to detect and replace the missing stop sign." *Id.*

Six patrol deputies worked during the four-day period—two said they didn't travel through the intersection in question, and four didn't believe they did. The plaintiff claimed that the county was on constructive notice, but the court rejected this argument because it amounted to a challenge to the county's policy for inspecting roads for problems with traffic control devices. *Id. at 531-33.* Moreover, the court granted statutory discretionary immunity based on the county's "policy for detecting problems with traffic signs," which was based on "a balancing of budgetary, safety, and personnel considerations." *Id. at 533.*

Cases Involving Government-Owned Vehicles

1. Schroeder v. St. Louis Cty., 708 N.W.2d 497 (Minn. 2006)

Entering the hours of dusk, a county grader made a third pass on a two-mile stretch of road. Instead of driving all the way back to the starting point to make a third pass in the same direction as traffic, he decided to drive against traffic (i.e. the wrong way on the road). The grader insisted that this was a common practice in the county. While grading against traffic, he observed a car approaching about half a mile away that was not slowing down. He stopped the grader, but the car collided with the grader head-on and the driver of the car was killed. The grader driver insisted that he had his lights on (it was after sunset), but eyewitness testimony suggested he did not. *Id. at 501-02.*

A couple of years before the accident, an attorney for the county had indicated that he thought the practice was "life threatening and in clear violation of Minnesota law." *Id. at 502.* A memo from a county maintenance engineer, however, declared the practice of grading against traffic acceptable. *Id.* The district road superintendents then conferred and decided that grading against traffic was necessary given the county's budget, staffing, equipment, the extra work that would be required, and the nature of the work. *Id. at 503.*

The county was granted statutory discretionary immunity for its decision to allow graders to grade against traffic because that decision was made "on a planning level and was of a policy-making nature." *Id. at 505.* The driver was also entitled to official immunity against the negligent driving claim because he exercised his discretion to in fact grade against traffic on this particular occasion. *Id. at 505-06.*

However, when it came to the claim that the grader driver was negligent in failing to activate his headlights, he was not entitled to immunity. Activating headlights when it gets dark is considered a simple ministerial decision. Therefore, the negligent failure to activate headlights claim was permitted to go forward. *Id. at 507-08.*

1. *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006)

A police officer responded to a 911 call about a suicidal woman who was visiting her therapist. Upon the officer's arrival, the therapist recommended she be transported to the hospital. However, the woman did not agree and took off in her car with the officer following in pursuit, eventually leading onto I-94. The officer's sergeant told the officer to call off the chase, but his lieutenant told him to monitor the woman with his siren off, which he did. Other officers later joined with their lights and sirens on. With the pursuit now on Nicollet Avenue, one of the officers performed a maneuver to stop the woman that caused both vehicles to go off to the right side, where the woman's car struck and killed a man standing on the sidewalk. *Id. at 479-80.*

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The woman sued the city of Minneapolis and the officer in a third party complaint for negligence, and for violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. On the Fourth Amendment claim, the court first reasoned that using deadly force to seize a suspect is only permitted to prevent escape and if the suspect poses a significant threat to officers or others. The court determined that the woman adequately asserted a claim of unreasonable excessive force. *Id. at 481-83.*

The next step was to determine whether it should have been clear to reasonable officers that they did not have probable cause to believe the woman posed a significant threat. The court noted that "where a 'general constitutional rule' applies with 'obvious clarity' to a particular situation, the law is considered to be clearly established, even without case law concerning a factually identical situation." *Id. at 486.* The court reasoned that the woman hadn't struck anyone and on video appeared to be actively avoiding collisions. The court, thus, held that the officers were not entitled to qualified immunity on the Fourth amendment claim. *Id.*

In addition to allowing the constitutional claims to proceed, the court also allowed state tort law claims to proceed. Official immunity was denied because the officers had violated a mandatory policy to discontinue a pursuit under the circumstances present. By violating a policy of their employer, the officers decisions were no longer protected discretionary decisions. *Id. at 490-93.*

IV. TORT CAPS

Finally, even when liability is imposed against a government entity, the amount of recoverable damages may be limited. First, punitive damage awards against a government entity are not available. Second, a government entity's total liability exposure will generally not exceed $500,000 for any individual claim, or $1,500,000 for all claims arising from the same incident. Minn. Stat. §§ 3.736, subd. 4; 466.04. The constitutionality and applicability of caps has been consistently upheld. *See McCarty v City of Minneapolis*, 654 NW.2d 353 (Minn. Ct. App. 2002); *In Re Maria Avenue Natural Gas Explosion*, 1999 WL 417345 (Minn. Ct. App. June 22, 1999).

Statutory caps may be waived if liability insurance in excess of the statutory cap is purchased and the caps are not preserved in the coverage documents. *City of Red Wing v. Ellsworth Cmty. Sch. Dist.*, 617 N.W.2d 602, 607-08 (Minn. Ct. App. 2000) (*citing Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989)). In these circumstances, the new limit for recovery is the total amount of liability coverage under the policy. Accordingly, when evaluating a claim involving a government entity, the initial investigation should involve not only the evaluation of possible immunity defenses, but also estimated damages, the potential for application of tort caps, and the possible existence of any insurance coverage resulting in waiver of the caps.