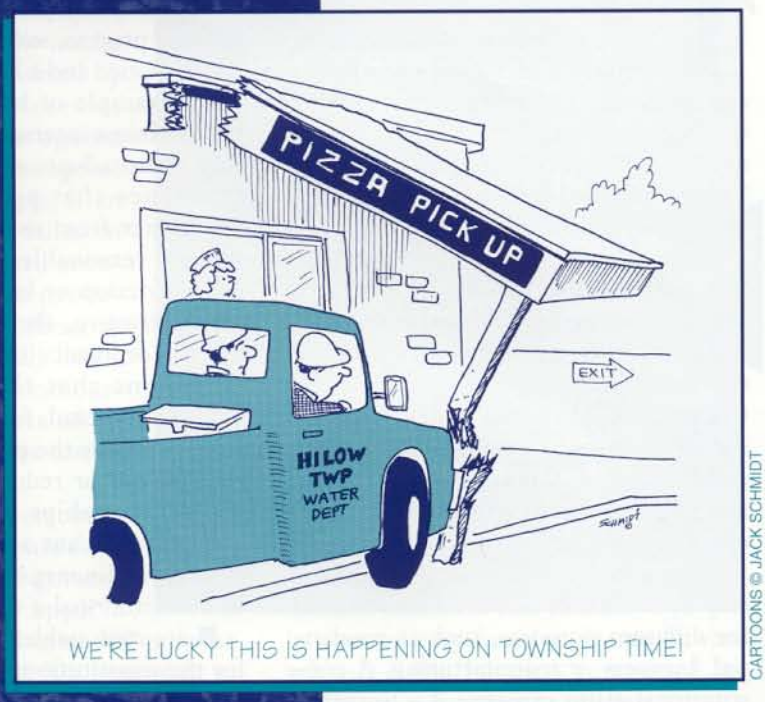
HOW TO

Keep your township out of court



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Every township, from a small rural community to a full-service urban township, faces the risk of liability and lawsuits. Under our system of justice, anyone can sue a township simply by paying a filing fee. Whether the township eventually wins or loses in court or settles out of court, legal expenses and lost time can be costly.

The first axiom I learned about trials as a young lawyer was, "There is never a case so bad you cannot win it, and never a case so good you cannot lose it." It illustrates exactly why townships should avoid getting sued, if possible. The key is to minimize exposure before a claim or incident occurs. However, if an incident does occur, prepare immediately to face the possibility of a lawsuit. Prevention and preparation can reduce the potential for lawsuits or, if litigation does occur, can reduce the risk of adverse results in the courtroom. The purpose of this article is to discuss ways to reduce the risk of townships being sued and held liable if you do end up in court.

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A child on a bike is injured on a sidewalk along a county road in your township. ***Is your township liable?***

Under the township's zoning ordinance, a landowner is unable to develop his property. ***Is your township liable for inadvertently condemning the property?***

The U.S. Environmental Protection Agency requires your township to pay part of the costs for cleanup and closure of the county's landfill. ***Is your township liable?***

The best way to minimize exposure, claims or litigation is to understand when a township can be liable. There are primarily four types of lawsuits filed against townships: constitutional, general tort, breach of contract and civil rights claims.

1. Constitutional claims

Constitutional claims deal with situations involving the rights protected by the state and federal constitutions. Constitutional claims generally arise out of zoning and land use planning or condemnation. Civil rights violations are another form of constitutional claim that will be discussed in Item 4.

Zoning is the partitioning of a township by ordinance into sections reserved for different purposes, such as residential, business or manufacturing. A constitutional claim can arise if a township zoning ordinance is written too vaguely or does not clearly define permissible or impermissible uses of land within a zoning classification. Liability also attaches when a zoning ordinance is overbroad and proscribes constitutionally protected or otherwise lawful land use.

Condemnation occurs when a township converts private land for public use under the right of eminent domain. A constitutional claim can arise if the condemnation results in a "taking," where the landowner's property is taken without due process, such as reasonable and timely notice and a hearing.

An example of how these constitutional claims intersect is when a township board adopts a zoning or building ordinance that precludes a private landowner from using his or her land for any reasonable purpose. If such a use restriction or building ordinance is too restrictive, the courts may throw out the ordinance or, in extreme cases, determine that the township condemned the land, forcing the township to compensate the owner.

To avoid or reduce the risk of such claims, townships must adopt zoning ordinances that are constitutional. Zoning ordinances are more likely to be constitutional if they:

- are reasonable. Generally, the test for the constitutionality of zoning ordinances is their reasonableness as determined by a court based on the circumstances of each specific case;
- are based on a plan substantially related to promoting lawful public interests;
- clearly articulate permissive and prohibitive uses;
- are uniform for each class of land, buildings, dwellings and structures;
- are applied in a nondiscriminatory manner, and
- are adopted in compliance with due process requirements.

Reasonable restrictions are lawful if they are based on different conditions within a zone. Similarly, variances can be granted where unique practical difficulties or unnecessary hardship exist due to conditions specific to the land in question.

The good news for townships is that zoning ordinances are presumed to be reasonable and constitutional. Thus, the burden is on the person challenging a zoning ordinance to demonstrate that it is arbitrary, capricious and unreasonable. Further, a zoning plan adopted in compliance with statutory requirements is evidence of the reasonableness of a zoning ordinance.

Another step a township can take to avoid zoning liability is to adopt a master plan or be a "planned community." Failure to adopt a master plan does not by itself invalidate a zoning ordinance. However, courts make every effort to preserve a master plan when it is developed in good faith and is reasonable as a whole, with regard to the needs of the local and general community. A master plan should be carefully prepared, well-reasoned, flexible and properly adopted. It should be implemented in a consistent manner after reasonable notice is given. Consult land and community development experts to assist you in following proper statutory procedures.

"A leased golf cart was defective and caused serious injury to a patron, who filed a product liability lawsuit against the city."

WILL WE GET A REFUND FOR THE LAST NINE HOLES?

Finally, if a township board or commission is unsure of a proposed position on a planning or zoning question, adjourn or table the issue until the necessary formal opinions and information from the township lawyer, engineer or consultant are obtained.

2. Tort claims

Tort claims are the most common area of litigation for townships. A tort is a private or civil wrong or injury, other than a breach of contract, that the court will remedy with an action for damages. Examples of torts include automobile accidents, defective bridges, sidewalks and bike paths for townships, wrongful arrest and detention, libel and slander (defamation), assault and battery, medical malpractice and product liability.

How can a township be liable under product liability? Recently, I consulted a city that owned a golf course and leased golf carts. A leased golf cart was defective and caused serious injury to a patron, who in turn filed a product liability lawsuit against the city.

A township's liability for torts arises from injuries to persons or property caused by the actions or inactions of its employees, elected officials and volunteers. The good news for townships is that they may be able to rely on the affirmative defense of governmental immunity in a tort action for monetary damages.

Governmental immunity is statutory in Michigan. MCL 691.1407 provides that, except as otherwise provided in that act, all governmental agencies shall be immune from tort liability in all cases in which the governmental agency is engaged in the exercise or discharge of a governmental function. The doctrine of governmental immunity removes liability from a township, in some circumstances, even when the township or its agents have wronged or injured someone. The defense is also available to any officer, employee, volunteer and board, council or commission member acting within the scope of his or her office or employment.

There are three circumstances a township must consider to determine if governmental immunity applies to its potential tort liability for the acts of its agents.

■ *Are the township's agents acting within the scope of their authority?* A township will generally not be liable for torts committed by its officials, volunteers or other agents if the agents acted outside their scope of authority. For example, if an official or volunteer failed to comply with established township administrative procedures or policy, the official or volunteer is individually liable. The township is not vicariously liable for the torts of its employees or agents under this circumstance.

The other two circumstances townships must consider to determine if governmental immunity applies involve the type and intended purpose of a township activity. It is important to note that both of the following circumstances also require that the township's agents, officials or volunteers act within the scope of their authority and are not grossly negligent.

■ *Is the township engaged in a "governmental function?"* If a township is engaged in a governmental function, the township itself probably will be immune from liability except for statutorily created exceptions. A governmental function is an activity expressly or impliedly mandated or authorized by a constitution, statute, local charter, ordinance or other law. Today, it is difficult to identify an activity that does not fall within this definition. The leased golf cart is probably a good example.

To determine if an activity is a governmental function, the courts focus on the function, not the specific conduct involved at the time of the tort. Each activity must be addressed on a case-by-case or fact-specific basis.

Examples of governmental functions include police, fire and emergency medical services; enforcing a zoning ordinance; building inspection; tax collecting; assessing; maintaining and improving roads; providing utility services or a water or sewer supply system, and operating parks and recreational facilities or parking structures.

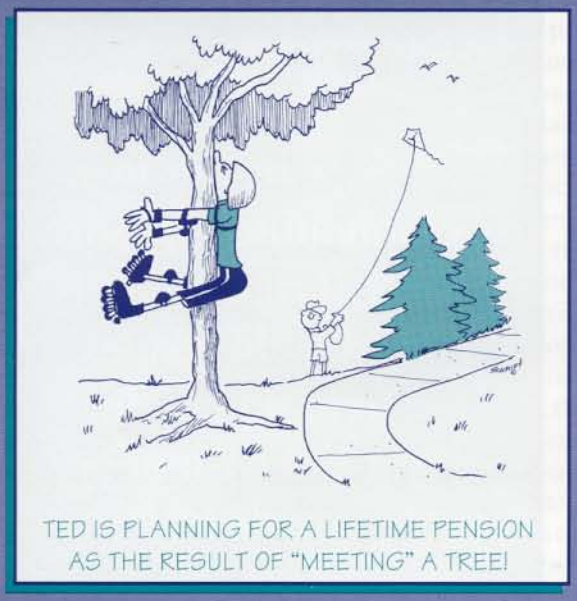
■ *Is the township engaged in a "proprietary function?"* If a township is engaged in a proprietary function, it may be vicariously liable for torts committed by its agents, volunteers or officials.

> **"The key to eliminating exposure to civil rights claims is the old adage, 'Treat others the way you wish to be treated.'"**

A proprietary function is any activity conducted primarily for the purpose of producing a pecuniary profit for a township, excluding any activity normally supported by taxes or fees. Proprietary functions typically involve a township competing with the private sector, as when a township operates an outdoor rollerblading rink in a township park and charges admission and rents in-line skates. If someone was injured while rollerblading, the township may be liable.

Pursuing an activity despite consistent financial losses is some evidence that a township's purpose is not to make a profit, and therefore, the activity is more likely a governmental function. An example would be operating an EMS unit. However, this evidence is not conclusive. Likewise, evidence that an activity produces a consistent profit is not conclusive either. Thus, whether the activity actually generates a profit is not the controlling factor. Rather, the existence of a profit is relevant in determining governmental intent.

It is important to examine where the funds generated are deposited and the manner in which they are spent. If the funds are used to finance a township's unrelated function, a township may be said to be engaging in a proprietary function, but if the funds are used to run the activity, such as to pay ►



maintenance costs, it could indicate that the primary purpose of the activity is governmental in nature.

For instance, I once represented a city that had an EMS service and charged a fee for the service. The EMS technicians responded to an emergency call for a possible broken neck. As they were carrying the injured plaintiff on a back board, they dropped him. He was paralyzed from the waist down. I was able to defeat the proprietary function argument raised by the plaintiff because the city council had adopted a formal policy to charge only for the EMS technicians' cost and not the equipment. In addition to the fact that an EMS service could clearly be a governmental function, the city was not charging for all the costs involved in the EMS service, so it could not be labeled a proprietary function. With the city council's minutes in hand, the court ruled in the city's favor.

To avoid liability, a township can charge fees, but the fees should not have a profit motive. It is permissible to recover a portion of the overall costs of the service. As in the EMS example, profit should not be a primary motive for engaging in an activity.

There are a number of exceptions to governmental immunity where a township will be held liable, including negligent operation of a motor vehicle, defective public buildings, malpractice at a municipally owned or operated hospital, intentional torts and nuisances. Another important exception to governmental immunity for governmental functions is the recent court rulings stipulating that a township **can** be liable for bike paths and sidewalks adjacent to roads under the control of other governmental agencies.

Some of the exceptions are self-explanatory, such as when a township will be liable for bodily injury or property damage resulting from the negligent operation by its agent of a township- owned motor vehicle. However, a township's liability for defective public buildings requires explanation. Generally, a township will be liable where the defect results from the building's permanent structure or physical integrity, which is open to the public and contains a dangerous condition for which the agency has actual or constructive notice. Constructive notice is conclusively presumed if the condition existed for more than 90 days. Liability attaches if the township fails to remedy the situation within a reasonable amount of time.

Townships should also be aware that a township official, volunteer or employee has only qualified immunity under federal law. Qualified immunity means that an official, volunteer or employee can be sued under certain circumstances. Specifically, officials, volunteers or employees may be sued if they knew or reasonably should have known that their action would violate constitutional rights, or if they took the action with malicious intent to cause a deprivation of constitutional rights. However, these persons may not be liable under federal civil rights laws if the court determines they acted in good faith and without malice.

Avoiding liability is difficult where a clearly established exception to governmental immunity is applicable. However, if the previous suggestions are followed, risks can normally be minimized.

3. Contract liability

Contracts are another area of potential liability for townships. The best example of this type of liability is where a township fails to pay a contractor for supplies or building an addition to the township hall. A township can reduce its liability under contracts, beyond the agreed-upon goods or services for a specified price, by ensuring that:

- The contract clearly specifies what is being purchased or what services are being provided;
- The terms and conditions of performance, including dates and price, are not left to judicial interpretation;
- The township documents and preserves reports of meetings, discussions and telephone conversations with the supplier(s), and
- Any changes to the contract are done in writing, not verbally.

4. Civil rights liability

The last primary area of potential liability for townships is civil rights claims, which are another type of constitutional claim. Civil rights claims generally involve discriminatory activities. It is important to note that governmental immunity does not provide a defense for a township that engages in discrimination. What constitutes discrimination is usually defined by federal or state statutes. These include prohibitions against treating one person or group differently than another person or group because of race, religion, creed, national origin, sex or handicap. Under Michigan law, discrimination based on weight or height is also prohibited.

Civil rights are guaranteed at the federal level in various provisions of Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act, which prohibits discrimination because of a disability.

In Michigan, two of the most important statutes governing civil rights are the Michigan Handicappers Civil Rights Act, which prohibits discrimination because of a handicap and requires accommodation of a handicapped person unless it would cause a township undue hardship, and the Elliott-Larsen Civil Rights Act, which prohibits discrimination in employment, housing and other real estate, the full and equal utilization

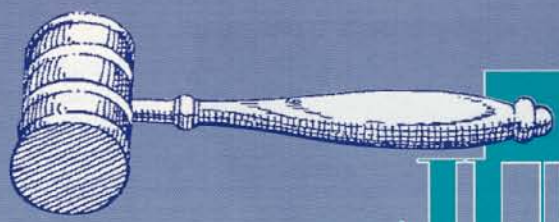
of public accommodations, public service and educational facilities because of religion, race, color, national origin, age, sex, height, weight or marital status. This act is more comprehensive and prohibits more specific types of discrimination than the federal Title VII.

Civil rights liability can also be based on a denial of substantive or procedural due process. The denial of *substantive* due process is taking or limiting a person's rights or property without compensation. Condemnation is an excellent example. A governmental agency cannot take private land without paying for it.

Procedural due process requires that governmental agencies provide a meaningful hearing to a person who is going to have his or her rights limited. For example, a hearing must be held to discontinue a person's liquor license. If a suspected criminal is arrested, he or she must have an arraignment and/or a preliminary examination to be held in jail before trial.

A growing concern in the area of civil rights claims is irrational, abusive or discriminatory behavior by public officials, especially police officers. The nationally publicized Rodney King and Malice Green cases are prime examples. This type of conduct should not be tolerated by an employer and can only be prevented by training, proper supervision, and clear and unambiguous rules regarding acceptable and unacceptable conduct. Where there is concern about an officer's attitude, psychological testing can be used to prevent problems, preferably before hiring.

In simplest terms, the key to eliminating exposure to civil rights claims is the old adage, "Treat others the way you wish to be treated." Make it clear to employees and volunteers that discrimination will not be tolerated. It is appropriate for the township to incorporate standards of conduct in its personnel policy, in addition to complying with federal and state law. Develop an internal procedure for notifying employees and volunteers involved in discrimination that their behavior is reproachable and must be modified to continue their association with the township. Most importantly, enforce your anti-discrimination policy by taking appropriate actions when a township body or agent does something discriminatory. This can include dismissal, reprimand, warnings or the like. Failing to respond to incidents of discrimination can result in a finding by a federal or state court that the township approves or condones discrimination and thus is liable.❖



YOU be the JUDGE

A little problem can rapidly become a big problem if the township does not seriously consider its risk of liability. These hypothetical cases are offered as examples of how prevention can help reduce the township's liability.

Case 1

Focus on Employment—A long-time patrol officer in a township police department has a good record, but has repeatedly been passed over for promotion to sergeant. The police chief indicated that the officer's record is not good enough to warrant promotion. The officer, who is of Native American descent, claims he is being discriminated against.

What went wrong? The real reason the township has not promoted the officer is his argumentative personality, which has resulted in serious disagreements and personality clashes with other officers, including the police chief. However, by not documenting and dealing directly with that problem, the township has made itself vulnerable to a civil rights claim.

What can be done?

- Don't lie about why a person or employee is not being hired or promoted. The township should document the reasons why this officer was denied the promotion and why the person who was hired for the position was selected.
- Have written personnel policies that outline standards of conduct and disciplinary procedures. The officer's behavior should be documented, and he should be notified his behavior is unacceptable and given the opportunity to correct the problem. The township should document these steps and the result.

Case 2

Focus on Personal Injury—A six-year-old boy is riding his bicycle on a bike path along a county road in the township. The path is crumbling at the edges, and the child is injured when his wheel is caught in a crack and he is thrown from the bike. The parents threaten to sue the township for personal injury.

What went wrong? Pursuant to recent court rulings, townships are liable for defective sidewalks and bike paths adjacent to roads under the control of other governmental agencies. In addition, under Michigan law, a condition on a road, sidewalk or bike path that is observable for more than 30 days or a condition in a building that is observable for more than 90 days creates an irrecusable presumption that the township was aware of the danger and had an opportunity to correct or modify the condition. Michigan law also stipulates that a child under seven-years-old cannot be liable for comparative negligence and cannot be expected to know that a damaged bike path might be dangerous.

What can be done?

- The township should evaluate the nature of the child's injuries and assess the extent of the township's liability. Based on that assessment, the township should try to obtain a reasonable settlement with the family.
- The bike path should be repaired immediately.
- Township officials, employees and volunteers should be trained to observe and report all problems or possibly dangerous conditions.
- Regular repairs and maintenance should be done on sidewalks and bike paths, either by the township or the property owner on notice from the township.❖