

## Governmental Immunity May Be the End to a Plaintiff's Medical Malpractice Case

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Those filing medical malpractice actions in Illinois may not know that public hospitals and medical professionals are afforded immunity from tort liability in many circumstances. The Local Governmental and Governmental Employees Tort Immunity Act (hereinafter “the Act”) was enacted in Illinois as a means to protect local governmental agencies and public employees from liability for negligence committed during the exercise of their duties. See *745 ILCS 10/1-101* et seq. Article VI of the Illinois Tort Immunity Act specifically addresses certain immunities which apply to medical, hospital and public health activities. However, it is important to note that there are instances where the Illinois courts have made distinctions as to when this immunity will apply.

Section 6-105 of the Act provides immunity for “injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others.” *745 ILCS 10/6-105*. Of note, this immunity also applies to willful and wanton conduct. In the case of *Grandalski v. Lyons Township High School Dist. 204*, the court held that a school district was immune for alleged negligence of a teacher and school nurse in providing medical care for a student. 711 N.E.2d 372 (1st Dist. 1999). However, an Illinois court held that immunity did not apply to a school counselor’s failure to inform the mother of a student of that student’s suicide intentions. See *Grant v. Board of Trustees of Valley View School District*, 286 N.E.2d 705 (3rd Dist. 1997), appeal denied 684 N.E.2d 1335. Interestingly, the immunity would have applied had the plaintiff alleged failure to examine or diagnose the student.

Section 6-106(a) of the Act provides immunity for injury caused by diagnosing or failing to diagnose a person afflicted with mental or physical illness or addiction. In the matter of *McQueen v. Shelby*, 730 F.Supp. 1449 (C.D. Ill.1990), the court held that if a mental health organization was considered to be a public entity under the Act, the organization and its employees would be shielded from liability under the immunity afforded for failing to diagnose a jail inmate’s mental problems which led to the suicide of the inmate. However, Section 6-106(c) provides that public employees *who have undertaken to prescribe treatment* for mental, physical or addiction are liable for an injury proximately caused by the employee’s negligence or wrongful acts. *745 ILCS 10/6-106(c)*. Thus, the immunity from medical malpractice liability applies to public hospitals and employees if they fail to diagnose a condition present or fail to treat a patient. However, once there is an undertaking to prescribe for a

mental or physical illness, the immunity does not apply to negligent acts or omissions.

In the case of *Hemminger v. Nehring*, 2010 WL 1509345, No. 3-08-0751 (Ill. App. 3d Dist. Apr. 8, 2010), an Illinois medical malpractice claim involving a failure to diagnose cancer was barred by the Illinois Appellate Court under the Act. Defendants in that matter were CGH Medical Center Auxiliary, d/b/a CGH Medical Center, a municipal entity, and a doctor and cytotechnician, employees of CGH. The plaintiff's complaint alleged that the defendant's employee was negligent when she failed to correctly interpret the decedent's Pap smear, which showed that the decedent had cervical cancer. Plaintiff further argued that Pap smears are screening devices, and are not intended to diagnose cancer. See *Hemminger*, 2010 WL 1509345 at \*2. The defendants filed motions for summary judgment and argued that they were immune from any liability or negligence under the Tort Immunity Act. Plaintiff argued that immunity did not apply, as the complaint did not allege failure to make an adequate examination or failure to diagnose the cancer. The trial court granted the defendants' motions and plaintiff then appealed to the Illinois Appellate Court. The Illinois Appellate Court upheld the trial court's decision and ruled that the defendants were acting in the scope of their employment when reviewing plaintiff's Pap smear and could not be held liable for any failure to diagnose the decedent's cancer. The court found that the defendants performed a Pap smear to help diagnose the patient's condition, clearly part of the diagnostic process and specifically the conduct that sections 6-105 and 6-106 of the Tort Immunity Act immunize. See *Hemminger*, 2010 WL 1509345 at \*6.

Clearly, the immunities afforded to certain hospitals and medical professionals in Illinois are a useful defense in many actions arising out of alleged medical malpractice. In cases of medical malpractice where plaintiff's theory of liability is often based upon a doctor's failure to correctly diagnose the medical condition of the patient and thus failure to provide appropriate medical care to treat the patient, if the action involved a public hospital, clinic or doctor, the Illinois courts may well determine that no such cause of action exists.

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