ARTICLE 12

Civil Liability of the Local Government and Its Officials and Employees

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ISBN 978-1-56011-590-0. This article was last updated in 2006.

THE EXPENSE AND the trouble of lawsuits are unavoidable costs of doing a local government's business. If a city or county runs a law enforcement department, a fire department, a park, or any other public service long enough, someone will cause damage to something or somebody. Indeed, even without any legitimate basis, a local government and its employees may still be made the defendants to a civil lawsuit. The challenge for public servants is therefore not the impossible task of eliminating lawsuits. Rather, the challenge is the difficult task of providing local services while minimizing the cost and the disruption that lawsuits bring. The first step in accomplishing that task is learning the basic legal principles that control the liability of local governments and their public servants. This article uses the term *public servants* to refer to all the people who do the local government's work, including elected members of the governing board and members of appointed boards and staff. At times, however, it distinguishes *employees* from *officials*, and *elected officials* from *other municipal workers*. In these cases the meanings of the terms used should be clear from the context.

This article deals with two basic areas of liability: tort liability under North Carolina law and liability under federal law for violations of the Civil Rights Act of 1871[1] (often called Section 1983, which refers to its location in the United States Code).[2] These two kinds of claims are the most common ones brought against public servants and their employers. As covered in this article, the state and federal rules governing these claims determine whether a local government and its public servants may be required to pay damages to someone harmed by official action. Some overlap between the two sets of rules means that certain official actions may violate both of them and make the local government and its public servants potentially liable under state and federal law. (However, the person who brings the lawsuit may be compensated only once for the injuries.)

The discussion that follows is an introduction to a complex subject. The many twists and turns in this area of the law cannot be and are not fully described here. Furthermore, this is a particularly dynamic area of law. In 2006, cases pending before the North Carolina courts, and the recent replacement of two justices of the United States Supreme Court, may mean important changes in the law described herein. Finally, there is a universe of both state and federal claims that this article cannot begin to address: environmental claims, tax claims, a variety of other civil rights claims, and contract claims, to mention a few. These rules may also create liability for local governments and their public servants.

Tort Liability under North Carolina Law

Tort law serves to protect a person's interest in his or her bodily security, tangible property, financial resources, or reputation. Unlike contract law, in which the appropriate standard of conduct is set by specific promises made between two parties, in tort law the defendant is being held to a standard of conduct (or duty) that is imposed by law. To succeed in the lawsuit, the plaintiff must demonstrate that the defendant violated that duty and that the violation caused an injury.

Compensation is the primary concern of tort law. This area of law is premised on the belief that individuals who are harmed through no fault of their own should not be required to bear the loss; instead, the person whose wrongful act caused the harm must pay to restore the injured party to where they were before the harm. Another purpose of tort law is to deter people from engaging in conduct likely to cause personal injury or property damage. Tort law assumes that people will be more careful in conducting their day-to-day activities if they have to pay for any harm that results.

In considering how the law of torts affects the liability of local governments and their public servants, it is important to understand the types of civil wrongs that may be remedied by an award of damages in a civil tort lawsuit: intentional torts, negligence, and nuisances.[3]

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1. 42 U.S.C. § 1983 (1988).

2. The question of what law applies to a particular claim is largely independent of the court in which the lawsuit is brought. State courts handle some claims brought under federal law, including Section 1983 claims, and federal courts handle some claims brought under state law. *See* Howlett v. Rose, 496 U.S. 356 (1990); 28 U.S.C. § 1332(a)(1) (1988).

3. A number of the court decisions used to illustrate principles in this article involve lawsuits against counties rather than cities. These illustrations are relevant because the same rules of civil liability generally control the outcome of lawsuits against the two types of government units.

Intentional Torts

Intentional torts are deliberate wrongful acts that cause personal injury or property damage. These acts give rise to civil liability for damages unless a special privilege or defense applies. For the plaintiff to succeed in demonstrating liability, he or she only has to show that the person causing the injury deliberately engaged in the wrongful act. The definition does not require that the plaintiff also show that the offending person intended the consequences of the act, including the particular damages caused. For example, someone may have intended to hit another person. Even though they may not have intended to cause serious injury to the person, if such injury occurs, they may be liable for an intentional tort.

There exists a common misperception that local governments may not be held liable for the intentional torts of their public servants. The various bases for local government liability are discussed later in this article. As the examples below illustrate, however, local governments may be held liable for intentional torts.

Battery

The intentional touching or striking of another person without either that person's consent or a legally recognized authorization is the intentional tort of *battery*. In an illustrative case an elderly man named Munick tried to pay his water bill with cash that included a wrapped roll of fifty pennies.[4] The water department manager became outraged, threw the pennies to the floor, and ordered Munick to pick them up. When he did not respond, the manager locked the office door, slapped him in the face, pulled him into a back room, and then beat and choked him. The state supreme court found that Munick could recover damages for a battery because the attack was unprovoked and without legal excuse.

Striking another person without consent is not always a battery. For example, a law enforcement officer may use reasonable force to effect a legal arrest [G.S. 15A-401(d)(1)]. Therefore an officer who uses such force and strikes a suspect to prevent an escape does not commit a civil battery unless more force is employed than is reasonably necessary to make the arrest. If excess force is used, the officer may be sued in state court for the intentional tort of battery and be required to pay damages.[5] Absent the defenses discussed in the section on local government liability, the local government that employs the officer may also be held liable under state tort law.

Assault

An assault is legally defined as the placing of another person in reasonable apprehension of immediate harm or offensive contact.[6] In order to constitute an assault there must be an "overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another. . . ."[7] So for example, an outraged municipal employee who approaches a customer with fists clenched and shouting angry threats has committed an assault if the customer perceives the threat to be serious and is reasonably fearful.

False Imprisonment

False imprisonment is restraining the movement of another without that person's permission or without a legally recognized authorization. In one case of false imprisonment, an inmate was kept in the county jail beyond the court-ordered release date.[8] The county was held liable. In another case a mayor was found liable for false imprisonment for ordering a police officer to arrest and detain a man for thirty to forty minutes without legal justification.[9]

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4. Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921).

5. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954). In *Houston v. DeHerrodora*, 192 N.C. 749, 136 S.E. 6 (1926), for example, police officers who chased the plaintiff in their car and fired twenty shots at him before identifying themselves as police officers were held liable for battery and required to pay $2,000 in damages.

6. *See* W. Page Keeton et al., Prosser and Keaton on the Law of Torts sec. 10, at 43.

7. *See* Dickens v. Puryear, 302 N.C. 437, 445, 276 S.E.2d 325, 331 (1981).

8. *See* Williams v. State, 168 N.Y.S.2d 163 (Ct. Cl. 1957) (awarding damages for false imprisonment to prison inmate who had been detained for one and one-half years after his maximum sentence expired).

9. Blackwood v. Cates, 297 N.C. 163, 254 S.E.2d 7 (1979); *see also* Hoffman v. Clinic Hosp., 213 N.C. 669, 197 S.E. 161 (1938) (per curiam).

Defamation

Defamation is written or oral communication that injures a third party's reputation. Defamation in writing is called *libel*; oral defamation is called *slander*. Defamatory remarks might include accusations that a person is a criminal, statements that injure someone in his or her occupation, and claims that an individual has an offensive disease. For example, it would be defamation for a city emergency medical services worker to spread a false rumor that a particular person has a sexually transmitted disease. Defamation could also be established if the city manager falsely told a local newspaper that an employee had been dismissed for stealing.[10]

A public servant who is sued for making a public statement that harms someone's reputation has two defenses. First, the truth of a statement is an absolute defense to liability for damages in a defamation lawsuit. Second, a person may avoid liability for a false statement by showing that it was made under circumstances that gave rise to a *qualified privilege*.[11] A qualified privilege exists when (1) the person who makes a statement has a valid interest in making it or a legal duty to make it and (2) the person makes a statement to someone with a corresponding interest or duty. Public servants with a qualified privilege to make a particular statement will not be held liable for defamation unless they act with malice in making it.

Negligence

Negligence involves the body of law that covers unintentional torts. This body of law imposes a duty on all people, including public servants, to use reasonable care in conducting their daily affairs. If they fail to use reasonable care and their conduct causes personal injury or property damage that was a predictable result of the lack of care, the person harmed is entitled to compensation. The main exception to this rule permits a person who is sued for negligence to invoke the defense of *contributory negligence*—a legal rule that bars recovery by any individual whose own negligence, however slight, contributes to his or her injury.

Negligence may occur in an infinite variety of situations. Whether particular conduct is negligent cannot be determined in the abstract; the jury must decide in each specific case whether the defendant acted as a reasonably prudent person would have under the same circumstances. However, some examples may help illustrate the operation of these rules. In one case, two local government employees drove a truck that spewed a thick insecticide fog along a road.[12] The fog totally blocked the view of approaching traffic. No warning signs were displayed to give oncoming vehicles notice of the hazard. A man rounded a curve into the fog and slowed his truck, but he was blinded by the fog and sideswiped a car that had pulled off the road to wait for the fog to clear. The North Carolina Supreme Court held that a jury could find that the two employees were negligent—had not exercised reasonable care under the circumstances—in creating a hazardous condition likely to cause injury to highway travelers.

In another case a county jailer took custody of a sick and helpless man who had been arrested and placed him in a cell with another man who was violently insane.[13] During the night the latter used a leg torn from a table in the cell to beat the helpless inmate, and he died the next morning. The state supreme court ruled that a jury could find that the jailer had failed to act reasonably—in other words, that he was negligent—in placing a helpless individual in the same cell with a violent one.

In still another case an employee was cutting grass in a rocky area of a government-owned park, using a ten-year-old mower without a front guard.[14] The mower threw out a rock that hit a man and fractured his skull. The park superintendent testified that he had seen rocks thrown from beneath the mower thousands of times. The North Carolina

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10. *See* Jones v. Brinkley, 174 N.C. 23, 93 S.E. 372 (1917).

11. *See* Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Towne v. Cope, 32 N.C. App. 660, 233 S.E.2d 624 (1977). In some instances, state statutes expressly extend this qualified privilege to designated public servants. For example, the 1987 General Assembly created a privilege for written communications made by members of nursing home advisory committees. *See* G.S. 131E-128(i).

12. Moore v. Town of Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959).

13. Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940).

14. Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957).

Supreme Court found that it was not reasonable under the circumstances—in other words, that it was negligent—for the local government to allow operation of the mower without a guard because it should have anticipated that eventually someone would be injured.

Nuisance and Inverse Condemnation

A local government that engages in an activity that substantially and unreasonably interferes with the use and the enjoyment of someone's land commits a tort called *nuisance* and may be required to pay for damage to another's land caused by a nuisance even if the damage comes about through the performance of a governmental function. For example, in one case a city's sewage treatment plant smelled so badly that the value of the plaintiff's nearby home was permanently reduced.[15] The state supreme court held that the plaintiff was entitled to recover damages from the city to compensate him for the reduction in value.

A local government may also be liable for lowering someone's land values under federal and state constitutional provisions that prevent government from taking a person's private property without just compensation. If a local government's activities permanently and substantially reduce the value of land, a court may say that the locality has in effect taken the property and must pay compensation to the property owner.[16]

This kind of taking is sometimes called *inverse condemnation* to distinguish it from condemnation or outright appropriation of land for public use. As an example of this approach, the state supreme court has ruled that inverse condemnation, not nuisance, provides the sole remedy available to a landowner for interference with his property by aircraft overflights involving a city-owned airport.[17]

Liability of the Local Government for State Law Torts

Scope of Employment

A local government is not liable for the torts of its employees if the harm occurs while they are acting outside the scope of their employment, meaning in furtherance of the local government's business. Determining what is inside and what is outside the scope of employment is sometimes difficult. In one case, for example, Black Mountain was sued when a boy died after falling from a town truck negligently driven by a town golf course employee.[18] The accident occurred while the employee drove the truck on a personal pleasure trip down a public road against the explicit orders of his supervisor. The North Carolina Supreme Court held that the town was not responsible for his negligence because at the time of the accident, he was acting outside the scope of his employment.[19]

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15. Glace v. Town of Pilot Mountain, 265 N.C. 181, 143 S.E.2d 78 (1965).

16. *See* Gray v. City of High Point, 203 N.C. 756, 166 S.E. 911 (1932); *cf.* Williams v. Town of Greenville, 130 N.C. 93, 40 S.E. 977 (1902).

17. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982). A related rule provides that a city does not enjoy governmental immunity if it undertakes to abate a nuisance on private property and the property owner can later prove that a nuisance did not in fact exist. *See* Rhyne v. Town of Mount Holly, 251 N.C. 521, 112 S.E.2d 40 (1960) (holding that city may be required to pay for trees wrongfully cut down by city workers enforcing local ordinance requiring landowners to cut weeds and brush twice a year).

18. Rogers v. Town of Black Mountain, 224 N.C. 119, 29 S.E.2d 203 (1944).

19. *See also* Lertz v. Hughes Bros., 208 N.C. 490, 181 S.E. 345 (1935), in which the employer was held liable for an automobile accident that occurred when an employee took a joy ride in the course of running an errand for an employer; Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921).

Another case took a broader view of the scope of employment. A city sanitation worker beat a woman who argued with him about his work. The court stated that an act could be within the scope of employment "even if it is contrary to the employer's express instructions, when the act is done in the furtherance of the employer's business and in the discharge of the duties of employment."[20] Even though the sanitation worker's conduct was an intentional tort and a crime, the court left it up to the jury to decide whether or not he was acting within the scope of his employment.

Liability of the Local Government

The existence of governmental immunity results in the law treating public employers very differently from the way private employers are treated. Private employers must pay damages for any harm caused by the negligence of their employees who are acting within the scope of their employment (see the discussion concerning "Scope of Employment," later in this article). However, a North Carolina local government's liability for the torts of its public servants depends on whether the employee was engaged in a governmental or proprietary activity. The distinction is an important one because a local government is not liable for the torts of an employee who harms someone while carrying out a governmental function; however, it is liable if the employee commits a tort while engaged in a proprietary activity. This is because the doctrine of governmental immunity protects local governments from liability for injuries caused while engaged in governmental functions.

Governmental immunity is granted to cities and counties by the State of North Carolina and is derived from the doctrine of sovereign immunity, which is inherited from the British system and means "the king can do no wrong." Sovereign immunity protects the State of North Carolina from paying damages for torts committed by state employees and officers. The state grants governmental immunity, a limited form of sovereign immunity, to cities, counties, and other municipal corporations, such as boards of education. Cities and counties may give up their protection under governmental immunity by getting liability insurance coverage for governmental activities.[21]

Courts have defined governmental activities as:

> Any activity . . . which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than to itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.[22]

Unfortunately this distinction between governmental and proprietary activities is difficult to apply and often results in arbitrary characterizations of a local government's activities. The absence of a precise standard makes it difficult to predict whether a local government will be liable for the torts of an employee who is engaged in a particular activity.

However, the North Carolina courts rely heavily on earlier cases and certain public policies when making the distinction between governmental and proprietary. Some of the factors courts have considered in determining whether an activity is governmental or proprietary include:

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20. Edwards v. Akion, 52 N.C. App. 688, 693, 279 S.E.2d 894, 897, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981) (per curiam).

21. G.S. 153A-435(a) (counties) and G.S. 160A-485(a) (cities). Not all municipal corporations are authorized to waive immunity through the purchase of insurance. Water and sewer districts, for example, are special-purpose municipal corporations that cannot waive immunity by purchasing insurance. *See* Thrash v. City of Asheville, 95 N.C. App. 457, 470, 383 S.E.2d 657, 665 (1989), *rev'd on other grounds*, 327 N.C. 251, 393 S.E.2d 842 (1990).

22. Millar v. Town of Wilson, 222 N.C. 340, 23 S.E.2d 42 (1942).

- **Who traditionally performs the function?** Activities historically performed by governments but not ordinarily engaged in by private corporations have been held by the courts to be governmental activities.[23] Examples of activities that governments traditionally perform include the operation of traffic lights,[24] driving a police car,[25] use of a police or fire alarm,[26] zoning enforcement,[27] storm drain maintenance,[28] furnishing water to firefighters,[29] condemnation of property,[30] franchise granting,[31] and administration of sanitation programs.[32] These have all been held to be governmental activities.

  Where the activity is one not traditionally performed only by cities and counties, courts have not allowed local governments to claim the protections of governmental immunity. For example, a young woman died when the doctors in a public hospital negligently gave her a transfusion with the wrong type of blood. The North Carolina Supreme Court held that operating a public hospital was a proprietary function because its operation was not a service traditionally performed only by local governments. As a result, the woman's survivors could recover damages from the hospital for the negligent acts of its employees.[33]
- **Is a fee charged for the service?** Collecting user fees is a popular method of paying for a number of local functions, but it can have the unfortunate side effect of increasing a local government's potential liability. Local government activity is more likely to be deemed to be proprietary if it involves a monetary charge of some sort.[34] Examples of proprietary activities include maintenance by fee of a landfill,[35] water distribution for profit,[36] distribution of electricity for profit,[37] and operation of an airport[38] or a municipal golf course.[39]

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23. Sides v. Cabarrus Mem'l Hosp., Inc., 287 N.C. 14, 29, 213 S.E.2d 297, 303 (1975).

24. *See* Hamilton v. Hamlet, 238 N.C. 741, 78 S.E.2d 770 (1953) (holding that operation and maintenance of traffic lights is a governmental function, thereby relieving the city of liability).

25. *See* Lewis v. Hunter, 212 N.C. 504, 193 S.E. 814 (1937) (holding that use of police car for public safety is governmental function).

26. *See* Cathey v. City of Charlotte, 197 N.C. 309, 148 S.E. 426 (1929) (holding municipality not liable to employee injured while attempting to remove wires for police alarm in the course of job).

27. *See* Orange County v. Heath, 14 N.C. App. 44, 187 S.E.2d 345, *aff'd*, 282 N.C. 292, 192 S.E.2d 308 (1972).

28. *See* Stone v. City of Fayetteville, 3 N.C. App. 261, 164 S.E.2d 542 (1968).

29. *See* Howland v. Asheville, 174 N.C. 749, 94 S.E. 524 (1917).

30. Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967).

31. Denning v. Goldsboro Gas Co., 246 N.C. 541, 98 S.E.2d 910 (1957).

32. James v. City of Charlotte, 183 N.C. 630, 112 S.E.2d 423 (1900); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972).

33. Sides v. Cabarrus Memorial Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); *see also* Casey v. Wake County, 45 N.C. App. 522, 263 S.E.2d 360, *disc. review denied*, 300 N.C 371, 267 S.E.2d 673 (1980) (holding that provision of birth control in county family planning clinic is governmental function).

34. *See, e.g.,* Sides v. Cabarrus Mem'l Hosp., Inc., 287 N.C. 14, 213 S.E.2d 297 (1975).

35. *See Koontz*, 280 N.C. 513, 186 S.E.2d 897.

36. *See* Foust v. Durham, 239 N.C. 306, 79 S.E.2d 519 (1954).

37. *See* Rice v. Lumberton, 235 N.C. 227, 69 S.E.2d 543 (1952).

38. *See* Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).

39. *See* Lowe v. Gastonia, 211 N.C. 564, 191 S.E. 7 (1937).

The fact that a fee is charged does not necessarily mean that the activity is proprietary. Services that are truly governmental in nature are not made proprietary merely because a local government charges a fee for the service.[40] However, if the local government is making a profit on the activity, the court will consider such profit strong evidence that the activity is proprietary.[41]

The following cases illustrate the courts' approach to local government activities involving a fee. In one case a woman was seriously injured when she was struck by a garbage truck negligently operated by an employee of the sanitation department of a city.[42] The court held that garbage collection was a governmental function and that the plaintiff therefore could not recover damages from the city. The fee charged for waste disposal did not make garbage collection a proprietary function because it covered only actual expenses.

- **Who is the primary beneficiary—citizens of the community or of the entire state?** Some local government functions are done primarily for the benefit of the local government's residents. Others function more broadly to protect the health and welfare interests of the state. When a local government engages in an activity for the benefit of its residents, courts are more likely to find that the local government is acting within its proprietary nature.[43]

  For example, in 1909 the North Carolina Supreme Court ruled that maintaining a free public sewer was a governmental function and therefore the City of Asheville was not liable for causing cases of typhoid fever by negligently discharging sewage into a creek.[44] In 1980 the North Carolina Court of Appeals followed that rule when it decided that the City of Lenoir was not liable for sewage backing up into a resident's home.[45] In both cases, the court was sensitive to the public health benefits of having municipal sewage systems. It is important to note, however, charging a fee for residential and commercial sewer service, as is common practice, almost certainly makes this activity proprietary.

Operations with Both Proprietary and Governmental Elements

When an injury results from an activity that combines both governmental and proprietary functions, North Carolina courts sometimes isolate the particular part of the activity that caused the plaintiff's injury to determine whether governmental immunity applies to that part of the activity. So, to use a public works department as an example, supplying water to fight fires is distinguished as a governmental function, whereas selling available water to the public for consumption is isolated as a proprietary activity.

Waiver of Governmental Immunity by the Purchase of Insurance

The General Assembly has authorized cities and counties to waive the defense of governmental immunity by purchasing liability insurance (G.S. 153-435; 160A-485). Local governments may be inclined to waive this defense for several reasons. First, as just illustrated, for many activities it is difficult to be certain in advance that governmental immunity will protect the local government from liability. Second, by purchasing liability insurance, a local government provides a remedy for citizens who otherwise could not be compensated for injuries caused by the negligence of the local government's employees in performing governmental activities. Third, the defense of governmental immunity is limited to tort claims. It does not extend to claims for violations of constitutional rights or federal or state statutes.

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40. *See* Casey v. Wake County, 45 N.C. App. 522, 263 S.E.2d 360, *review denied*, 300 N.C. 371, 267 S.E.2d 673 (1980).

41. *See* Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231, *review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990); Waters v. Biesecker, 60 N.C. App. 253, 255, 298 S.E.2d 746, 747, *aff'd* 309 N.C. 165, 305 S.E.2d 539 (1983) ("[a]lthough the term 'proprietary' denotes a profit motive, profit motive is not essential to the determination that a function by a governmental body is proprietary").

42. James v. City of Charlotte, 183 N.C. 630, 112 S.E. 423 (1922). *See* Broome v. City of Charlotte, 208 N.C. 729, 182 S. E. 325 (1935).

43. *See* Britt v. City of Wilmington, 236 N.C. 446, 73 S.E.2d 289 (1952).

44. Metz v. City of Asheville, 150 N.C. 748, 64 S.E. 881 (1909).

45. Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980). *But cf.* Williams v. Town of Greenville, 130 N.C. 93, 40 S.E. 977 (1902) (holding city liable for tort of trespass when water backing up at clogged culvert causes property damage).

The statutes under which the North Carolina General Assembly authorizes local governments to waive governmental immunity through the purchase of insurance make it clear that the local government's governing body—the board of county commissioners or city council—has full discretion in determining the specific torts to which the insurance policy applies and the officials or employees who will be covered under it. The governing body may decide not to purchase insurance at all.

If the local governing body purchases insurance, a person who sues the local government may not recover more than the policy amount for his or her injuries. This is true even if the person's damages far exceed the policy limits. For example, if the policy is limited to $25,000 per occurrence, even if the plaintiff's injuries are $57,000, the plaintiff may only recover to the extent of the policy limits. Indeed, the waiver statute specifically provides that if a jury returns a verdict in excess of the insurance limits, the judge must reduce the award to the maximum limits of the policy before entering the judgment on the court docket. In other words, governmental immunity is waived only to the extent of insurance coverage. Similarly when a local government's insurance policy involves a deductible, the local government retains governmental immunity for damages that fall within the amount of the deductible.[46]

What Constitutes Insurance?

There are three basic ways that a local government can waive its governmental immunity through insurance coverage. First, insurance includes liability coverage provided by companies licensed to execute insurance in the state. Second, participation in a local government risk pool is considered to be the equivalent of purchasing insurance. Third, a local government may explicitly set aside a sum to cover claims against it.

Local government risk pools are defined in G.S. 58-23 as agreements between two or more local governments either to jointly purchase insurance or to pool resources to pay claims for property losses or liability. This is different from self-insurance, wherein the local government does not pool resources with another entity. If a local government sets aside a self-insurance reserve, the court will find that it has waived its immunity if the governing board adopted a specific resolution indicating that the creation of the reserve to be the same as the purchase of insurance. Adoption of the resolution waives the city's or county's governmental immunity only to the extent specified in the board's resolution, but in no event can a plaintiff recover an amount greater than the funds available in the funded reserve for the payment of claims.

The Doctrine of Discretionary Immunity

The *doctrine of discretionary immunity* provides that North Carolina courts will not review decisions that have been left by law to the discretion of a local legislative body. Although this type of immunity is sometimes characterized as one of the governmental functions within the broader doctrine of governmental immunity,[47] it is more appropriately discussed separately as a special category of immunity.

The power of cities and counties to enact ordinances offers a good example of how courts apply the discretionary immunity doctrine. A court will not substitute its judgment for that of a local governing body by imposing liability on the unit for the exercise or the nonexercise of the unit's ordinance-making power. For example, Charlotte's board of aldermen once temporarily suspended an ordinance against the use of fireworks inside the local government limits. A man's building was destroyed when fireworks landed on the roof and caught fire. He sued the city to recover damages, alleging that the board's negligence in suspending the ordinance caused his loss. The state supreme court denied recovery against the city on the grounds that a local government was not liable for the exercise or the nonexercise of a discretionary power, such as the power to enact ordinances.[48]

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46. *See* Jones v. Kearns, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246, *review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995) (plaintiffs may be required to submit statement of damages indicating that damages exceeded deductible).

47. *See*, *e.g.*, Blackwelder v. Concord, 205 N.C. 792, 795, 172 S.E. 392, 393 (1934) ("[t]he exercise of discretionary or legislative power is a governmental function, and for injury resulting from the negligent exercise of such power a municipality is exempt from liability").

48. Hill v. Board of Aldermen, 72 N.C. 55 (1875); *see* Moye v. McLawhorn, 208 N.C. 812, 182 S.E. 493 (1935).

The Public Duty Doctrine

The *public duty doctrine* holds that certain local government activities do not create liability to individual members of the public. Under the public duty doctrine, there are circumstances in which a unit of local government has no legal duty to protect an individual citizen from harm caused by a third person. Although the government may undertake a duty to protect the public at large, that duty does not extend to any specific individual.

There are two exceptions to the public duty doctrine. First, a *special duty* to a specific person can arise in certain circumstances, usually as a result of contact between a unit of local government and the specific person.[49] In most cases the contact involves a promise to protect a specific individual, the failure to protect that individual, and the individual's reliance on the promise of protection to the individual's detriment.[50]

The first exception to the public duty doctrine occurs when the local government makes an actual promise to the plaintiff to create a special duty. General words of comfort and assurance are not sufficient[51] and simply providing public safety controls to a particular area or neighborhood does not create a special duty.[52]

The second exception to the public duty doctrine applies when a *special relationship* exists between the government and the plaintiff. The most often cited example is the relationship between the police and a witness or informant who has aided the police.[53]

The North Carolina Supreme Court has held that the public duty doctrine, as it applies to local governments, is limited to "law enforcement departments when they are exercising their general duty to protect the public."[54] Individual victims of crime are not entitled to recover damages for the failure of law enforcement officers to prevent the crime from happening. The duty to prevent crime extends to the public generally and cannot be enforced by individuals against a city.

Before the supreme court's limiting pronouncement in 2003, the public duty doctrine had been made available by the lower courts in cases involving building inspection,[55] safety inspection,[56] planning,[57] taxicab permitting,[58] animal control,[59] fire protection,[60] and police protection.[61] With the supreme court's more recent limitation of the doctrine, these cases are no longer good law.

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49. *Id*. at 371, 410 S.E.2d at 902.

50. *See id.*; *also see* Coleman v. Cooper, 89 N.C. App. 188, 193–94, 366 S.E.2d 2, 6, *review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988); note that the public duty doctrine applies to bar claims of gross negligence. Hedrick v. Rains, 121 N.C. App. 466, 466 S.E.2d 281, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996).

51. *See* Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990), *aff'd in part, rev'd in part, and remanded*, 330 N.C. 363, 410 S.E.2d 897 (1991).

52. *See* Prevette v. Forsyth County, 110 N.C. App. 754, 431 S.E.2d 216, *review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993).

53. *See Braswell*, 330 N.C. at 371, 410 S.E.2d at 902.

54. Lovelace v. City of Shelby, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000), *reh'g denied,* 352 N.C. 157, 344 S.E.2d 225 (2000); *see* Thompson v. Waters, 351 N.C. 462, 465, 526 S.E. 2d 650, 652 (2000).

55. *See Lynn*, 98 N.C. App. at 78, 389 S.E.2d at 612; Sinning v. Clark, 119 N.C. App. 515, 459 S.E.2d 71 (1995).

56. Stone v. North Carolina Dep't of Labor, 347 N.C. 473 (1998); Hunt v. North Carolina Dep't of Labor 348 N.C. 192 (1998).

57. Derwort v. Polk County, 129 N.C. App. 789, 501 S.E.2d 379 (1998).

58. Clark v. Red Bird Cab Co., 114 N.C. App. 400, 442 S.E.2d 75, *review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

59. *See* Prevette v. Forsyth County, 110 N.C. App. 754, 757–58, 431 S.E.2d 216, 218, *review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993).

60. *See, e.g.*, Davis v. Messer, 119 N.C. App. 44, 457 S.E.2d 902 (1995).

61. *See* Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990), *aff'd in part, rev'd in part, and remanded*, 330 N.C. 363, 410 S.E.2d 897 (1991); Stafford v. Barker, 129 N.C. App. 576, 502 S.E.2d 1, *review denied*, 348 N.C. 695, 511 S.E.2d

Liability of Public Servants

A local government does its work through the actions of its elected officials, appointed officials, and employees, and just as the local government may be held responsible for those actions, so may the public servants themselves. A public servant may be sued for negligence in an official capacity, that is, as the representative of the local government, and also in a personal or individual capacity. Damages awarded in personal capacity suits would, in the absence of insurance coverage or a local government policy to the contrary, be paid from the public servant's personal assets rather than from the local government's funds.

A legal action brought against a public servant in his or her *official capacity* is in all respects other than name an action against the public entity for which he or she works,[62] and thus the same defenses and immunities available to the entity are available to him or her. On the other hand, an action against a public servant in his or her *individual capacity* represents an allegation by the plaintiff that the defendant is personally liable to the plaintiff. Immunities separate and distinct from those available to the entity often insulate public servants from liability for acts within the scope of their duties.

In ascertaining the capacity in which the plaintiff seeks to sue the defendant, the court typically looks first to the caption of the complaint. If the capacity is unclear from the caption, the court will look to the allegations of the complaint and then to the course of the proceedings. Absent some clear indication in the allegations or the procedural history of the case, the court will not presume that the plaintiff is trying to impose personal liability on the public servant. Instead the presumption will operate in favor of finding only official-capacity liability.

The immunities that may protect a public servant sued in an individual capacity reflect a balancing of the need to protect particular persons involved in certain functions of government from suit with the need to compensate injured plaintiffs and to hold individuals accountable for their wrongdoing. For example, all public servants are liable for damages caused by their intentional torts.[63] For example, both the highest-ranking local government official and the lowest-ranking employee are personally liable for damages if they assault someone.[64] No public policy interests are served by granting public servants immunity from liability for damages for intentional wrongful acts.

On the other hand, there are legitimate policy reasons for granting certain public officials immunity from liability for harm caused by their negligence. The main public policy concern is that those whose duties involve the exercise of discretion might be hesitant to take necessary official actions if they could be held personally liable for harm caused by their simple negligence. The result of this reluctance to act would be a less efficient government. The law of personal liability reflects this concern about exercise of discretion: whether public servants may be held liable for the consequences of their negligent acts depends entirely on the nature of their responsibilities.

As a result of the delicate balancing of interests, the extent of immunity available to public servants who are sued in their individual capacities depends on the particular function of government to be affected. Some immunities are *absolute* and protect "even conduct which is corrupt, malicious or intended to do injury."[65] Others are *qualified* and will protect only public servants who act reasonably and in good faith.

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650 (1998); Humphries v. North Carolina Dep't of Correction, 124 N.C. App. 545, 479 S.E.2d 27 (1996); Lynch v. North Carolina Dep't of Justice, 93 N.C. App. 57, 376 S.E.2d 247 (1989); Martin v. Mondie, 94 N.C. App. 750, 381 S.E.2d 481 (1989).

62. *See* Dickens v. Thorne, 110 N.C. App. 39, 45, 429 S.E.2d 176, 180 (1993), *citing* Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, *review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993).

63. One exception to this rule concerns the intentional tort of defamation. As discussed earlier, public servants with a qualified privilege to make a particular statement will not be held liable for defamation unless they act with malice.

64. *See* Blackwood v. Cates, 297 N.C. 163, 254 S.E.2d 7 (1979) (holding mayor personally liable for intentional tort of false imprisonment).

65. Jacobs v. Sherard, 36 N.C. App. 60, 64, 243 S.E.2d 184, 188, *review denied,* 295 N.C. 466, 246 S.E.2d 12 (1978), *citing* Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230, *review denied*, 285 N.C. 589, 205 S.E.2d 722 (1974).

Absolute Immunities

Legislative Immunity

Legislative immunity protects local legislators and those executives acting in a quasi-legislative function from personal liability for injuries caused by their acts. This type of immunity applies even if the plaintiff can prove that the defendant acted with bad faith.

Legislative immunity under state law was not recognized by the North Carolina Court of Appeals until 1996 in *Vereen v. Holden*.[66] Prior to that case, trial courts routinely applied the doctrine looking to federal decisions for guidance. The court of appeals confirmed in *Vereen* that the parameters of legislative immunity are the same under both state and federal law. Legislative immunity applies if (1) the defendant was acting in a legislative capacity at the time of the alleged incident and (2) the defendant's acts were not illegal.[67]

Judicial Immunity

Judges and prosecutors are protected from civil liability for errors committed in the discharge of their judicial duties.[68] Members of local quasi-judicial boards, such as the planning board or board of adjustment, also have judicial immunity when acting in their quasi-judicial capacity. As in the case of legislative immunity, state courts often look to federal law for guidance in their determination of whether a public servant is acting in a *judicial* or *quasi-judicial capacity.*

Qualified Immunities

Public Official Immunity, Generally

Public official immunity protects those public servants who are deemed to be public officers from liability for negligent activity unless they act with *malice*, for *corrupt reasons*, or *outside the scope of* his or her *official duties*.[69] A public employee, on the other hand, is not protected under public official immunity. Therefore, public employees may be held personally liable for injuries caused by their negligence during the course of performing their duties.[70]

Defining Public Officers

The significant difference between the liability exposure of public officers and that of public employees means that the distinction between the two is an important one. In *Pigott v. City of Wilmington*[71] the North Carolina Court of Appeals held that a public official was someone whose position was created by legislation, who normally took an oath of office, who performed legally imposed duties, and who exercised a certain amount of discretion. The court

66. 121 N.C. App. 779, 468 S.E.2d 471 (1996).

67. *Id*. at 782, 468 S.E.2d at 473, *citing* Scott v. Greenville County, 716 F.2d 1409, 1422 (4th Cir. 1983).

68. *See* Fugual Springs v. Rowland, 239 N.C. 299, 300, 79 S.E.2d 774, 776 (1954) (judges); Sharp v. Gulley, 120 N.C. App. 878, 880, 463 S.E.2d 577, 577 (1995) (court-appointed referee); *Jacobs*, 36 N.C. App. at 64, 243 S.E.2d at 188, *citing Foust*, 21 N.C. App. 268, 204 S.E.2d 230, *review denied*, 285 N.C. 589, 205 S.E.2d 722 (1974) (prosecutor); Greer v. Skyway Broadcasting Co., 256 N.C. 382, 124 S.E.2d 98 (1962) (does not apply to law enforcement officers).

69. *Id*., *citing* Wiggins v. City of Monroe, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985) *cert. denied*, 320 N.C. 178, 358 S.E.2d 72 (1987).

70. Harwood v. Johnson, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988), *aff'd in part, rev'd in part on other grounds,* 326 N.C. 231, 388 S.E.2d 439 (1990).

71. 50 N.C. App. 401, 273 S.E.2d 752, *disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981); *see also* State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965); Wiggins v. City of Monroe, 73 N.C. App. 44, 326 S.E.2d 39 (1985).

directed that all these factors be taken into account in deciding whether someone was a public official. Since *Pigott*, however, the court of appeals has emphasized one factor—whether the position was created by statute—almost to the exclusion of all others.[72]

Based on one or some combination of those four factors, North Carolina courts have held the following public servants to be *public officers*:[73] the county director of social services[74] and some social workers.[75] Other public officers include: notaries,[76] school trustees and park commissioners,[77] school district superintendents and principals,[78] coroners,[79] forensic pathologists,[80] the state banking commissioner,[81] the commissioner of motor vehicles, the director of the county health department,[82] the chief building inspector,[83] a chief of police and police officers,[84] and elected officials.[85]

Defining Public Employees

Public employee positions are those in which the court believes the person acts mostly at the direction of others and has duties that are more administrative than discretionary in nature. The basis for failing to cover these public servants under public official immunity lies in the assumption that such employees have clearer, simpler responsibilities than policy-making officials have and therefore are less likely to be made hesitant to act by fear that they might be held liable for possible negligence. Courts have held the following positions to be public employees: police department personnel who operate radios,[86] Public Works Commission employees who sweep and clean the streets,[87] social workers, and teachers.[88]

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72. *See* Hare v. Butler, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990); Harwood v. Johnson, 92 N.C. App. 306, 310–11, 374 S.E.2d 401, 404 (1988), *aff'd in part, rev'd in part*, 326 N.C. 231, 388 S.E.2d 439 (1990); *see also* EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992).

73. Thompson Cadillac-Olds v. Silk Hope Automobile, Inc., 87 N.C. App. 467, 361 S.E.2d 418 (1987), *review denied*, 321 N.C. 480, 364 S.E.2d 672 (1988).

74. Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231, *review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

75. Hobb v. North Carolina Dep't of Human Resources, 135 N.C. App. 412, 520 S.E.2d 595 (1999).

76. McGee v. Eubanks, 77 N.C. App. 369, 335 S.E.2d 178 (1985), *review denied*, 315 N.C. 589, 341 S.E.2d 27 (1986).

77. Smith v. Hefner, 235 N.C. App. 1, 68 S.E.2d 783 (1952).

78. Gunter v. Anders, 114 N.C. App. 61, 67, 441 S.E.2d 167, 171 (1994), *review denied*, 339 N.C. 611, 454 S.E.2d 250 (1995).

79. Gilikin v. United States Fid. & Guar. Co., 254 N.C. 247, 118 S.E.2d 606 (1961).

80. Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771 *review denied*, 335 N.C. 171, 436 S.E.2d 371 (1993).

81. Sansom v. Johnson, 39 N.C. App. 682, 251 S.E.2d 629 (1979).

82. EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), *overruled by* Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

83. Pigott v. City of Wilmington, 50 N.C. App. 401, 273 S.E.2d 752, *review denied,* 303 N.C. 181, 280 S.E.2d 453 (1981).

84. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

85. Town of Old Fort v. Harmon, 219 N.C. 241, 13 S.E.2d 423 (1941).

86. *Id*.

87. Miller v. Jones, 224 N.C. 783, 32 S.E.2d 594 (1944).

88. Daniel v. City of Morganton, 125 N.C. App. 47, 479 S.E.2d 263 (1997).

In a case that provides an example of the operation of this rule,[89] government employees negligently drove a street sweeper past the open doors of a store and blew dirt into it. Much of the merchandise was ruined. The state supreme court held that the operators of the sweeper could be required to pay for damage caused by their negligence, giving the following explanation:

> [A] mere employee doing a mechanical job . . . must exercise some sort of judgment in plying his shovel or driving his truck—but he is in no sense invested with a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character. . . . The mere fact that a person charged with negligence is an employee of others to whom immunity from liability is extended on grounds of public policy does not thereby excuse him from liability for negligence in the manner in which his duties are performed, or for performing a lawful act in an unlawful manner.[90]

Similarly, in another case the state supreme court held that a county jailer could be required to pay damages to an inmate whose thumb he negligently caught in a cell door.[91] City employees are most often held responsible for negligence in the operation of city vehicles and other equipment.

Liability under Federal Law

Section 1983 of the Civil Rights Act of 1871 authorizes a person to sue and recover damages against a local government or its governing board members, officials, and employees for violating one of the person's federal constitutional or statutory rights, when the violation is caused by official conduct. The provision remained dormant until 1961 when the Supreme Court held in *Monroe v. Pape*[92] that conduct by police officers, even when it violated state law, could be the basis of an action under Section 1983. By providing a remedy under federal law for the violation of rights that are protected by a federal statute or the U.S. Constitution, Section 1983 creates a framework of liability that is separate from that of state tort law. It is now clear that Section 1983 may allow for a finding of liability in some cases in which there is none under state law and, in other cases, an official action may violate both sets of liability rules and expose the public servant and the local government to liability under state and federal law.

Section 1983 serves many of the same functions as state liability rules. Compensation of victims is an example: a person who violates someone's federal rights may be required to compensate the injured party, just as an individual who commits a civil wrong under state law may be required to do. In addition, the federal rules, like the state rules, are designed to deter local government public servants from violating someone's legal rights. In analyzing how the federal liability rules affect the civil liability of cities and their public servants, one must first examine the type of official conduct that can give rise to liability under Section 1983.

Violation of Constitutional Rights

Section 1983 permits a person to sue and recover damages if the local government or any of its public servants violate his or her federal constitutional rights. Several common constitutional violations are violations of the First Amendment rights of free speech and free political affiliation, violation of the Fourth Amendment right of freedom from unreasonable searches and seizures, and violation of the Fourteenth Amendment right of due process.

89. Miller v. Jones, 224 N.C. 783, 32 S.E.2d 594 (1945).

90. *Id*. at 787, 32 S.E.2d at 597.

91. Davis v. Moore, 215 N.C. 449, 2 S.E.2d 366 (1939).

92. 365 U.S. 167 (1961).

First Amendment Rights of Free Speech and Political Affiliation

The Constitution's First Amendment protects everyone's freedom of speech. A public servant violates this protection if, for example, he or she prevents a person from holding a nonobscene protest sign at a political rally.[93] The free speech right also protects public employees who speak out on matters of public concern.[94] A local government employee may sue under Section 1983 if, for example, he or she is fired or disciplined for writing a letter to the newspaper about the misuse of local government funds.[95]

The same principle also prohibits firing or otherwise punishing most local government employees because of their political party affiliation.[96] Grounds for a Section 1983 lawsuit may exist if, for example, the party controlling the governing board decided to dismiss the public works director because the director was a member of the other party.[97]

Fourth Amendment Rights of Freedom from Unreasonable Searches and Seizures

The Fourth Amendment to the U.S. Constitution guarantees everyone's right to be free from unreasonable searches and seizures. This right is violated if a law enforcement officer arrests (an arrest being one kind of seizure) someone without a solid basis, called "probable cause," for believing that the person committed a crime. An officer may also violate Fourth Amendment rights by searching a person or a person's property without a search warrant. In one case, for example, the plaintiff alleged that a law enforcement officer had violated his constitutional rights when the officer broke into his home unannounced, searched the entire house without a warrant, shot and killed the family dog, arrested the owner, and pushed him out into public with a gun pointed at his head. The federal district court held that the plaintiff could recover damages under Section 1983 for this violation of the Fourth Amendment.[98]

Fourteenth Amendment Right of Due Process

The Fourteenth Amendment to the Constitution provides that no person may be deprived of life, liberty, or property without *due process of law.* For the most part, due process concerns itself with the procedures that the government must follow before depriving someone of life, liberty, or property. The complicated rules for criminal trials are one example of due process.

In other contexts the due process clause requires that those who are to be deprived of liberty or property receive prior notice of the reasons for the deprivation and an opportunity for a hearing to consider those reasons. *Property* and *liberty* are defined broadly for purposes of this guarantee. For example, under the personnel ordinances of some cities and counties, employees may not be fired without good cause.[99] Such an ordinance gives them a "property" interest in their jobs,[100] and the local government must give them a hearing on the grounds for discharge before they may be fired.[101]

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93. Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

94. *See* Stephen Allred, *Employment Law: A Guide for North Carolina Public Employers* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1992), 190–203.

95. *See*, *e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968).

96. Rutan v. Republican Party, 497 U.S. 62 (1990).

97. *See* Allred, *Employment Law*, 204–8.

98. Ellis v. City of Chicago, 478 F. Supp. 333 (N.D. Ill. 1979).

99. *See* Allred, *Employment Law*, 31.

100. Board of Regents v. Roth, 408 U.S. 564 (1972).

101. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bishop v. Wood, 426 U.S. 341 (1976). *See* Allred, *Employment Law*, 225–30.

Due process also protects persons from arbitrary actions by the government. For example, a developer was permitted to sue under Section 1983 for violations of due process when a local governing board intervened to prevent the routine issuance of a building permit to which he was entitled under state law.[102] Section 1983 may impose liability when a plaintiff can prove that the local government took away a liberty or property interest created by state or local law, through arbitrary or capricious conduct or an abuse of discretion.[103]

Violation of Statutory Rights

Most claims under Section 1983 involve the Constitution. However, it is helpful to note that, under a limited number of federal statutes, Section 1983 also authorizes a person to sue for and recover damages.[104] Typically, those statutes create rights but do not themselves offer any remedy for the violation of those rights. In one case, for example, the Supreme Court held that an error in billing low-income housing tenants for utilities might violate the Housing Act of 1937 and result in a recovery of damages under Section 1983.[105] There are no remedial provisions in the Housing Act of 1937. Thus, without Section 1983, the tenants would have been left with no recourse for the violation. In another case a man alleged that social service workers improperly reduced his Aid to Families with Dependent Children benefits because they misinterpreted the Social Security Act. The United States Supreme Court held that he could sue for damages in federal court under Section 1983.[106]

Liability of the Local Government

The rules that govern a local government's liability under federal law for violating federal constitutional or statutory rights differ from those that govern a local government's tort liability under state law. State tort law holds a local government liable for any actions of its employees within the scope of their employment whenever they are carrying out functions for which the local government does not have governmental immunity. In contrast, a local government may be required to pay money damages in a lawsuit brought under Section 1983 if the violation of federal rights is caused by the local government's official policy,[107] regardless of whether the local government would enjoy governmental immunity under state law.

What does it mean to say that a violation of federal rights is caused by a local government's official policy? A local government may, for example, be held liable if someone's federal rights are violated by the implementation of an ordinance, a regulation, or a decision officially adopted by the local government's governing board.[108] Thus a local government might be held liable if the council were to enact an arbitrary zoning ordinance in violation of federally protected constitutional property rights.

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102. Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983).

103. *Id.* at 1419.

104. There are two exceptions to the use of a Section 1983 lawsuit to remedy alleged violations of federal statutes by municipal public servants. First, a lawsuit under Section 1983 is not possible if the federal statute allegedly violated provides an exclusive remedy for its own enforcement. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). Second, no Section 1983 lawsuit is permitted if the federal statute allegedly violated does not create an enforceable right. Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981).

105. Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418 (1987).

106. Maine v. Thiboutot, 448 U.S. 1 (1980).

107. Monell v. Department of Social Serv., 436 U.S. 658 (1978). An extensive discussion of the principles of municipal liability under *Monell* and subsequent Supreme Court decisions appears in Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), *cert. denied sub nom.* City of Fayetteville v. Spell, 484 U.S. 1027 (1988).

108. *See*, *e.g.*, Matthias v. Bingley, 906 F.2d 1047, *modified*, 915 F.2d 946 (5th Cir. 1990) (per curiam).

Acts less formal than passing an ordinance can also establish official policy, such as adopting personnel policies, passing formal resolutions of the governing board giving support to particular persons or conduct, or issuing instructions to the local government manager.[109] In addition, a governing board's failure to act can establish official policy.[110] The most common lawsuit of this kind involves governing boards that are alleged to have failed to control persistent, widespread customs of police misconduct.

A local government may also be required to pay damages under Section 1983 if someone's federal rights are violated by a local government board or a public servant given decision-making authority under state or local law in the area involved,[111] or if the governing body delegates its authority to another board or public servant.

An isolated act of a public servant who has no authority to make policy for the local government does not establish official policy, and the local government is not liable for that act.[112] For example, a local government is not liable under Section 1983 every time a law enforcement officer makes an illegal arrest or conducts a warrantless search in violation of someone's Fourth Amendment rights. To recover damages from the local government, the person arrested or searched would have to prove that the arrest or the search represented the official policy of the local government. In essence, a plaintiff must establish fault on the part of the local government in order to recover from the entity.

Liability of Public Servants

Public servants may also be sued individually in a Section 1983 lawsuit if they violate someone's federal rights. In some cases, however, they may be entitled to the protection of either absolute or qualified immunity from personal liability for damages. (In contrast, the local government is never entitled to immunity from liability for damages in a Section 1983 lawsuit if its official policy caused the violation of someone's federal rights.)[113]

Liability of Governing Board Member

Members of local legislative bodies are absolutely immune from personal liability for damages if the body's legislative acts violate someone's federal rights.[114] This absolute immunity means that local government governing board members may never be required to pay damages for acts taken within the scope of their legislative duties. In contrast, they may be held personally liable for acts taken within the scope of their administrative duties, although qualified immunity may sometimes protect them (see the following discussion under "Liability of Other Public Servants").

The legal distinction between an administrative and a legislative act is difficult to draw, but an example may help illustrate it.[115] Because passing an ordinance is a legislative action, local government council members are absolutely immune from personal liability if the council enacts a personnel ordinance that lists Republican political-party affiliation by a local government employee as cause for dismissal, even though it interferes with an employee's First Amendment right to affiliate freely with any political party. However, enforcing a personnel ordinance is an administrative action, and council members who vote to dismiss an employee under an unconstitutional ordinance are individually

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109. *See* S. Nahmod, *Civil Rights and Civil Liberties Litigation*, 3d ed., vol. 1 (Colorado Springs: Shepard's/McGraw-Hill, 1991), 429–30.

110. *See* Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).

111. Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991).

112. As noted earlier, a city may be held liable under state law for torts committed by its employees solely because it is the employer, without regard to whether or not the employees were carrying out official city policy. In fact, under state law the city may be liable even if the employee is acting contrary to official policy. Edwards v. Akion, 52 N.C. App. 688, 693, 279 S.E.2d 894, 897, *aff'd*, 304 N.C. 585, 284 S.E.2d 518 (1981) (per curiam).

113. Owen v. City of Independence, 445 U.S. 622 (1980).

114. Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980).

115. On the legislative-administrative distinction, *see* Scott v. Greenville County, 716 F.2d 1409, 1422–23 (4th Cir. 1983).

liable for that action.[116] These two examples make clear that how a local government conducts its business makes a difference in its liability exposure. For example, in a case before the United States Supreme Court, a local government outside of North Carolina eliminated the position of an employee as part of its budgetary process. The facts were uncontroverted that the governing board was attempting to fire this employee. However, because they used a legitimate legislative activity to accomplish the purpose, the court held that the individual members of the board could not be held personally liable.

Liability of Other Public Servants

A public servant who is not a member of a governing board and who violates someone's federal rights while performing his or her official duties (and city governing board members who are performing administrative tasks) are entitled to qualified immunity from personal liability.[117] Such immunity is necessary to ensure that public servants will make decisions without fear of personal liability for honest mistakes in judgment. The qualified immunity defense provides that a public servant may not be held personally liable in a Section 1983 lawsuit unless his or her conduct violates clearly established statutory or constitutional rights about which a reasonable person in similar circumstances would have known.[118] In other words, public servants are shielded from Section 1983 liability if they could reasonably have thought that their conduct was lawful. The qualified immunity defense protects public servants if the law governing their conduct is unclear at the time they act, even if a court later declares their conduct unconstitutional.

For example, a local government manager has dismissed an employee. The personnel ordinance provides that employees may be dismissed only for cause (that is, for a good reason). The manager gave the dismissed employee neither a reason for the action nor a hearing to challenge it. A year before the dismissal the United States Supreme Court held that public employees who might be dismissed only for cause had a property interest in their job and had to be granted a due process hearing before they might be dismissed. When the employee brings a Section 1983 lawsuit against the manager on the basis of not receiving due process, the manager claims entitlement to qualified immunity from liability for damages on the basis of never hearing about the Supreme Court decision. The manager loses the argument because a reasonable person under the circumstances would have known about the constitutional requirement of a hearing. Although qualified immunity offers complete protection to public servants who violate someone's constitutional rights, it protects them only if they could not reasonably have predicted that their conduct was unlawful.

Insurance against Civil Liability

One prudent way to protect the local government treasury and municipal public servants from potentially crippling state or federal damage awards, and from the huge expenses that can result from defending a lawsuit, is to purchase liability insurance. The General Assembly has authorized counties and cities to purchase insurance to protect themselves and any of their officers, agents, or employees from civil liability for damages (G.S. 160A-485). The governing board has absolute discretion in deciding which liabilities and which public servants, if any, will be covered by this insurance. However, if the governing board so chooses, insurance coverage may extend to claims of both state and federal liability. The coverage may also cover both the entity and its public servants sued in their individual capacities.

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116. *See*, *e.g.*, Gross v. Winter, 876 F.2d 165 (D.C. Cir. 1989).

117. *See* Wood v. Strickland, 420 U.S. 308 (1975). Absolute immunity is available to local government employees under narrow circumstances. An example is law enforcement officers who testify in criminal trials. *See* Briscoe v. LaHue, 460 U.S. 325 (1983).

118. Anderson v. Creighton, 483 U.S. 635 (1987). In *Anderson* the Supreme Court stated that qualified immunity protected public servants from Section 1983 liability "so long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* at 638.

Defense of Employees and Payment of Judgments

Provision of Defense

Each local government is authorized, but not required, to provide for the defense of any civil or criminal action brought against current or former public servants in state or federal court on account of alleged acts or omissions committed in the scope and the course of their employment (G.S. 153A-97; 160A-167). A local government may provide a defense through the local government attorney or a private attorney. Also, as discussed earlier, the local government may purchase liability insurance that requires the insurer to defend lawsuits brought against certain public servants. Whether to provide a defense at all is of course the local government council's decision.

Payment of Judgments

Each local government is also authorized, but not required, to pay all or part of any settlements or judgments in lawsuits against public servants for acts committed in the scope and the course of their employment (G.S. 160A-167). No statutory limit is placed on the amount of money that a local government may appropriate to pay a settlement or a judgment. However, funds may not be appropriated to pay a public servant's settlement or judgment if the governing board finds that the individual acted or failed to act because of fraud, corruption, or malice.

The local government must meet certain procedural requirements before it may pay a public servant's settlement or judgment. (No such requirements need be met before providing for the defense.) First, notice of a claim or litigation must be given to the local government before a settlement is reached or a judgment is entered, if it is to pay the settlement or the judgment. Also, before the settlement or the entry of a judgment, the local government council must adopt a set of uniform standards under which claims against public servants will be paid. These standards must be available for public inspection.

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This article is a revision and update of the chapters "Civil Liability of the City and City Officials" by Michael R. Smith and Jeffery Koeze in the first and second editions of *Municipal Government in North Carolina* and "Civil Liability of the County and County Officials," by Jeffery Koeze and Anita R. Brown-Graham. The author gratefully acknowledges her indebtedness to the previous authors.