

Chapter 10

MUNICIPAL TORT LIABILITY AND INSURANCE

Reviewed January 2, 2009

The *Louisiana Constitution* provides that neither the state nor a political subdivision of the state is immune from suit and liability for injury to person or property [Article XII, Section 10]. However, by amendment approved October 21, 1995, the Legislature may, by law, limit or provide for the extent of liability of the state or political subdivisions thereof. This amendment resolved the issue of the constitutionality of several of the statutes discussed herein.

The procedure for suits against the state or political subdivisions is spelled out in R.S. 13:5101-5114. Specifically, no suit against a municipality can be tried by jury unless the municipality enacts an ordinance allowing jury trials [R.S. 13:5105]. There is a \$500,000.00 cap on awards for personal injury or wrongful death (exclusive of medical care and related benefits, loss of earnings, and loss of future earnings; and loss of support and future support in wrongful death cases) contained in R.S. 13:5106(B). However, in 2004, the Louisiana Supreme Court ruled in the **Lockett** case that the statutory cap of \$500,000 for wrongful death suits against political subdivisions applied to each individual plaintiff, and not to each death victim. However, Act No. 1 of the 2005 Regular Session clarified the intent of the legislature by returning the statutory cap to \$500,000 per victim.

Additionally, 13:5106(B)(3) provides that when a court determines that a claimant is entitled to medical care and related benefits (such as surgery) that may be incurred subsequent to judgment, the money shall be placed into a reversionary medical trust. Under that provision, if the claimant does not utilize the money for future medical care, it eventually reverts back to the political subdivision that established the trust.

Pursuant to Section 5 of Acts 1997, No. 518 (R.S. 13:5107(D)), in all suits naming a municipality or a municipal officer or employee, service must be requested within ninety days of the filing of the petition first naming the municipality, officer or employee, or the suit shall be dismissed. Gone are the days when a municipality could be named in a suit only to be served with notice years later when an investigation into the facts was all but impossible.

Another important protection for local governments enacted as a part of the tort reform package during the 1985 legislative session was R.S. 9:2800. This section provides that no person shall have a cause of action based upon Civil Code Article 2317 strict liability -- that is, liability for damages caused by the condition of buildings or things within the care and custody of public bodies -- *unless* the public entity had actual or constructive notice of the defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

(Note: "Strict liability" as a basis for liability for any defendant, public or private, has been virtually eliminated in Louisiana law by Act No. 1, Section 1, of the 1996 First Extraordinary Legislative Session, effective April 16, 1996. As a result, municipalities are no longer strictly liable for things such as sidewalks, streets, public buildings or the operation of public utilities such as sewer or water systems.)

R.S. 9:2798.1, effective November 23, 1995, protects municipalities and municipal officers and employees from liability when exercising, performing, or failing to exercise or perform policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties. However, acts or omissions constituting criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct are not protected. For example, the statute should allow municipal board or council members, acting within the course and scope of their lawful powers and duties, to vote their conscience on controversial issues without the fear of having to face a lawsuit for their decision, even if someone is arguably harmed.

As a result of an insurance crisis in the late 1970s, R.S. 33:1341-1350, known as the Local Governmental Subdivision Self-Insurance Act of 1979, was enacted. Pursuant to this authority, the Louisiana Municipal Association established the Louisiana Municipal Risk Management Agency, an interlocal risk management agency, for the administration of group worker's compensation and public liability self-insurance funds, and the Louisiana Municipal Risk Management Agency II for the administration of a group accident-and-health self-insurance fund.

Currently, many municipalities participate in these programs, which are administered by Risk Management, Inc. (RMI), a wholly-owned subsidiary of the Louisiana Municipal Association. For more information or to obtain a quotation, call the general manager or marketing director of Risk Management, Inc. at (225) 344-5002 or (800) 843-0931.

In addition to insurance products, RMI offers specialized loss-control and safety services as well as training programs for municipal and law enforcement officials and personnel.

With regard to group insurance, municipalities are authorized to make contracts of insurance with any insurance company authorized to do business in this state insuring their employees and officials under policies of group insurance covering hospitalization and retirement, and the municipality may agree to either match the payment of premiums or pay all of the premiums for accident-and-health protection for their employees or their dependents, or both [R.S. 33:5151].

What is risk management? At least one expert describes it as a staff function in place with responsibility for identifying and treating risk or the potential for loss to minimize the financial impact of liability or property loss. Risk management also has been said to be the only staff function in local government that can reduce cost significantly without trimming staff or programs. While there are many different ways to structure risk management in an organization, the following fundamentals can apply to a wide variety of government entities:

- *Risk Identification* -- The continuous process of evaluating the activities of the city for potential accidents and determining the financial impact that could result.
- *Risk Evaluation* -- Analyzing potential financial impact of such accidents by drawing comparisons to similar losses within the organization, as well as with the experiences of other similar entities.
- *Risk Control* -- Eliminating or reducing risk through training, security, fire protection, inspection, emergency planning, staff orientation, and management involvement.
- *Risk Funding* -- Financial planning to assure adequate funding is available to cover losses. This can be reached through a combination of external and internal methods.
- *Administration* -- The creation of the risk management function and responsibility for implementing a risk management program in the organization. Such a program aims to keep management informed of the risk associated with the activities of the city and to provide alternatives and solutions to situations that present potential financial loss to the city. Participating in strategic planning also allows risk managers to anticipate new programs and projects that increase risk.

Benefits of risk management include: more effective use of public funds; decreased costs and increased productivity; reduced losses to the community; identification of exposures which can be covered by using alternatives to insurance; reduced uncertainties which may accompany future projects; monitoring of claims, losses, and insurance policies; and sharpened management skills.