

Municipal Law

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The Interaction of the Tort Immunity And Domestic Violence Acts— Moore and Lacey: Accepting the Exceptions

The law historically has protected governments from tort liability for failures in preventing crime. Recognizing the daunting task of stopping crime in a free but relatively violent society, Illinois courts have relied on common law concepts like the public duty rule and superseding proximate causes to significantly limit those situations where a public entity can be liable to a crime victim for an injury resulting from a criminal act. *See, e.g., Huey v. Town of Cicero*, 41 Ill. 2d 361, 243 N.E.2d 214 (1969); *Marvin v. Chicago Transit Authority*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1st Dist. 1983).

This policy was codified in the Illinois Tort Immunity Act, 745 ILCS 10/1-101 *et seq.* Specifically, Section 4-102 of the Tort Immunity Act immunizes a local public entity’s “failure to establish a police department or to provide police protection service,” and even where police services are provided, liability cannot result from failing to provide adequate police protection or service, or to prevent, detect or solve a crime, or for failing to “identify or apprehend a criminal.” 745 ILCS 10/4-102. Section 4-107 of the Tort Immunity Act provides that “neither a local public entity nor a public employee is liable for an injury caused by the failure to make an arrest or by releasing a person in custody.” 745 ILCS 10/4-107. Sections 4-102 and 4-107 each offer absolute immunity.

Such limitations on tort liability provide public entities with sweeping protection from financial exposure for a major part of police operations. However, the immunities granted in the Tort Immunity Act can be expanded, contracted or modified by other statutes. In recent years we have seen these protections give way to the countervailing policy of protecting domestic violence victims, specifically with passage of the Illinois Domestic Violence Act, 750 ILCS 60/101 *et seq.*

The General Assembly adopted the Domestic Violence Act more than 20 years after the Tort Immunity Act was enacted. The Domestic Violence Act specifically states that it “should be liberally construed and applied to promote its underlying purposes,” which are to recognize (1) domestic violence is a serious crime; (2) the vulnerability of disabled adults; (3) the legal system historically has been ineffective in dealing with family violence and that abusers have escaped prosecution and financial liability in the past; (4) domestic violence victims need the support of diligent enforcement of protective court orders; (5) law enforcement officers need support in providing victims with immediate effective assistance and protection; and (6) an expansion of civil and criminal remedies for victims. 750 ILCS 60/102; *Moore v. Green*, 219 Ill. 2d 470, 848 N.E.2d 1015 (2006).

The Act was passed to protect persons abused by a family or household member; high-risk adults with disabilities who are abused, neglected, or exploited by family or a household member; any minor children or dependent adults in the care of such persons; or any person residing or employed at a private home or public shelter which houses an abused family or household member. 750 ILCS 60/201. The statute “streamlines

procedures that victims of domestic violence must use to obtain orders of protection and pushes petitions for orders of protection to the top of trial court dockets.” *Moore*, 219 Ill. 2d at 481; 750 ILCS 60/201 & 202.

The Domestic Violence Act also imposes a duty on law enforcement officers to “immediately use all reasonable means,” including arresting the abuser to prevent abuse of a protected person, and imposes accountability for failures in doing so. 750 ILCS 60/304(a). An officer who decides not to arrest a person accused of domestic violence must make a written report of the allegation. The officer must also inform the victim of his or her right to request that criminal charges be filed and provide specific times and places for meeting with a prosecutor or a warrant officer to explore pressing charges. 750 ILCS 60/304(b).

In conjunction with the obligations that the Domestic Violence Act places on law enforcement officials, the Act contains its own immunity provision which protects a police officer from liability in fulfilling those obligations, except for willful and wanton conduct. Specifically, the Domestic Violence Act provides that “any act of omission or commission by any law enforcement officer acting in good faith in rendering emergency assistance *or* otherwise enforcing the Act shall not impose civil liability upon the law enforcement officer or his or her supervisor or employer, unless the act is a result of willful and wanton misconduct.” 750 ILCS 60/305 (emphasis added).

In *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324, 659 N.E.2d 1322 (1995), the Illinois Supreme Court departed from the common law and recognized a duty to prevent domestic crimes under the Domestic Violence Act. The court concluded that a domestic violence victim has a right of action against a public entity or law enforcement officer if the victim can show that he or she is a person in need of protection under the Act, the statutory law enforcement duties owed to him or her were breached by the willful and wanton acts or omissions of law enforcement officers, and such conduct proximately caused the plaintiff’s injuries.

In *Moore*, the supreme court confirmed *Calloway* and went on to hold that the limited immunity in Section 305 of the Domestic Violence Act trumped the absolute immunity of Sections 4-102 and 4-107 of the Tort Immunity Act. In *Moore*, the decedent obtained an emergency order of protection against her husband. She called 911 requesting police assistance, informing the 911 operator that her husband was at her house, that he was in violation of a protection order and that he owned a gun. Witnesses saw two police officers arrive, wait briefly in their car at the decedent’s house, and then leave without assisting the caller. Five minutes after the police left the scene the decedent was shot and killed by her husband.

The supreme court explained that Section 305 of the Domestic Violence Act and Sections 4-102 and 4-107 of the Tort Immunity Act all conceptually applied to the facts of the case, recognizing that “the statutes here do not stand in their own spheres, but rather vie for the same sphere.” *Moore*, 219 Ill. 2d at 487. However, because the Domestic Violence Act was to be liberally construed to fulfill its underlying purposes and created specific, separate duties and liabilities for law enforcement officers enforcing the Act, its provisions trumped the more general immunities in the Tort Immunity Act. As a result, the court concluded that when an order of protection is involved, local public entities and their employees are not absolutely immune from liability for their failure to provide adequate police service.

Calloway established that the Domestic Violence Act altered the common law and created a statutory duty to protect domestic violence victims; and *Moore* exempted that obligation from the statutory immunity under the Tort Immunity Act. Nevertheless, neither case explained the parameters of the duty or the extent to which the statutory immunities were overridden. In *Lacey v. Village of Palatine*, Nos. 106353 & 10635 cons., 2009 WL 426520 (Ill. Feb. 20, 2009), the supreme court delivered some much needed guidance on both of these open questions.

The facts alleged in *Lacey* were the following. The family of Mary Lacey sued Chicago, the Village of Palatine, the Village of Glenview, and several police officers, after Mary Lacey and her mother were murdered by Lacey’s ex-boyfriend, Steven Zirko. The plaintiffs alleged that Palatine and Glenview police officers assured Lacey they would protect her and her family after police learned that Zirko had plotted to kill Lacey. Zirko had a long history of abusing Lacey, who had obtained an order of protection against Zirko for herself and her children. According to the family, the officers promised a 24 hour watch over her, but the watch was stopped after only a few weeks. From October 22, 2004 through December 13, 2004, Lacey repeatedly called

the police asking that they arrest Zirko or resume the 24 hour protection they promised. According to the complaint, the police did neither and on December 13, 2004, Zirko murdered Lacey and her mother.

The trial court dismissed the complaint, applying Section 4-102 and Section 4-107 of the Tort Immunity Act. The appellate court reversed. The court found that the absolute immunities of the Tort Immunity Act did not override the limited immunity in the Domestic Violence Act, and that the plaintiffs had sufficiently stated a claim for willful and wanton conduct. The court noted that the claim could turn on whether the defendant police had probable cause to arrest Zirko and whether they failed to conduct a sufficient investigation of Zirko's murder plot. The appellate court also rejected the defendants' argument that the Domestic Violence Act did not apply because at the time of the murder they were investigating a murder plot rather than domestic violence. The court reasoned that the officers' actions in informing Lacey of the plot, meeting with her about it, and promising her protection were consistent with enforcement of the Domestic Violence Act, which included the immediate use of all reasonable means to prevent abuse.

The supreme court reversed, holding that because the officers were not "otherwise enforcing" the Domestic Violence Act, their conduct did not fall within the Act's limited immunity provision. The supreme court explained that because there was no claim that the officers were rendering "emergency assistance," the analysis rested on whether the officers were "otherwise enforcing the Act" during the time that Lacey requested protection. *Lacey*, 2009 WL 426520 at *6.

The Court interpreted the phrase "otherwise enforcing" to mean that "the police are giving effect to some portion of the Act under circumstances that cannot be considered an emergency." *Id.*, 2009 WL 426520 at *7. Looking to the language of Section 2-202 of the Tort Immunity Act, which states that an officer is liable if he commits a willful and wanton act or omission in the execution or enforcement of any law, the supreme court explained that "otherwise enforcing" means a "course of conduct" rather than a single, discrete act. *Id.* The plaintiffs argued that the officers were engaged in an uninterrupted course of enforcing the Act that began the moment the officers were informed of the alleged murder for hire plot and only ended upon Lacey's murder. *Id.*, 2009 WL 426520 at *8. However, using the above definition of "otherwise enforcing," the supreme court held that the officers were not enforcing the Act at all relevant times; and, as a result, the complaint was properly dismissed. *Id.*

In so holding, the supreme court explained that the Act does not impose a "general, open-ended duty to protect victims of domestic violence." *Id.*, 2009 WL 426520 at *8. In contrast to what the appellate court held, the supreme court found the Act was not implicated merely because someone is a protected party under the Act. Because Section 304 of the Domestic Violence Act requires an officer to *immediately* use all reasonable means to prevent further abuse, the Act is implicated when an officer is in close proximity to victims or involves conduct of a limited duration. In other words, the Act "does not contemplate a general ongoing duty to victims of domestic violence." *Id.* at *9.

The supreme court pointed out that Lacey's request to the police to arrest Zirko or resume the 24-hour watch did not trigger the Domestic Violence Act's statutory duty or limited immunity because it did not require a police response, constitute a call for help or an investigation, or report any new information. The supreme court stated that even if the officers were aware of the potential for violence, they should not remain liable for failures in preventing that violence for an indefinite period of time.

The supreme court in *Moore* acknowledged (but rejected) concerns that the "strikingly broad and sweeping duties imposed by the Domestic Violence Act, together with the tragic and sympathetic facts associated with domestic violence cases, lower the gates to a flood of potential litigation and potentially ruinous damage awards." 219 Ill. 2d at 490. The supreme court found this burden on law enforcement somewhat lessened by the "heavy burden" a plaintiff carries in proving willful and wanton conduct for liability to attach under the Act.

Defense counsel can use *Lacey* to support a reasoned position that domestic violence victims need and deserve an aggressive and effective response from law enforcement, but in many situations public entities face severe limitations in their ability to ensure the ongoing or continued safety of domestic violence victims. The

Domestic Violence Act was designed to significantly enhance law enforcement reaction to domestic violence calls, but it was not intended to make public entities insurers for injuries resulting from domestic abuse.

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