



Ready for the Defense

Will the real definition of ‘wilful and wanton conduct’ please stand up?

For those of us “young enough” to remember the old TV show “To Tell the Truth,” there were “two pretenders” and the “real person,” all claiming to be a certain person. At the end of questioning by the panel of expert celebrity guessers, the moderator always looked at the three persons claiming to be the “real person” and said: “Will the real John Jones (or whoever) please stand up?”

As we discussed in our September column, there are two definitions of “wilful and wanton conduct”: (1) the common law or case law definition; and (2) the Tort Immunity Act definition. This has, not unexpectedly, created confusion for judges deciding cases, attorneys presenting and defending against cases, and local public entities in determining whether or not liability exists when claims are presented or lawsuits filed.

This conflict between the common law and Tort Immunity Act definitions of “wilful and wanton conduct” was noted and discussed by the Supreme Court recently in *Murray v. Chicago Youth Center*, No. 99457 (S.Ct., filed 7/5/06) (2006 WL 1822656 (Ill.)).

The Common Law Definition Of “Wilful & Wanton Conduct”

The common law definition of “wilful and wanton conduct” is as follows:

A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. (*Ziarko*, 161 Ill.2d at 273, 641 N.E.2d at 405; *American National Bank*, 192 Ill.2d at 285, 735 N.E.2d at 557).

This definition is somewhat difficult to understand and, more importantly, to apply to the facts of a certain claim or lawsuit because it defines “wilful and wanton conduct” as being “intentional” conduct or

“reckless” conduct or “failure to exercise ordinary care” conduct.

It has been held that the distinction between “wilful and wanton conduct” and “negligent conduct” is not necessarily a great one such that knowledge of impending danger and a “failure to exercise ordinary care to prevent it” can be “wilful and wanton conduct.” (*Kirwan v. Lincolnshire-Riverwoods Fire Protection District*, 349 Ill.App.3d 150, 811 N.E.2d 1259 (2d Dist. 2004) (Under EMS Act and common law definition of “wilful and wanton conduct,” paramedics knowing of plaintiff’s allergic reaction to walnuts and danger of anaphylactic shock could be guilty of “wilful and wanton conduct” for failure to use ordinary care and administer epinephrine)).

This mixing and matching of “wilful and wanton conduct” with “negligent conduct” (“failure to use ordinary care”) where a clear distinction is necessary creates often incomprehensible confusion when clarity is a necessity. The Tort Immunity Act, in several areas, grants local public entities immunities from “negligence,” but not from “wilful and wanton conduct.” Hence, the definitions of “negligence” and “wilful and wanton conduct” must be clear, precise and unequivocal.

For example, the following sections of the Tort Immunity Act grant immunity from negligence, but not wilful and wanton conduct:

- (1) § 2-202, execution or enforcement of law immunity. (745 ILCS 10/2-202).
- (2) § 3-106, recreational property immunity. (745 ILCS 10/3-106).
- (3) § 3-108(a), providing supervision on or the use of public property immunity. (745 ILCS 10/3-108(a)).
- (4) § 3-109(c)(2), hazardous recreational property immunity. (745 ILCS 10/3-109(c)(2)).
- (5) § 5-103(b), fire fighting immunity. (745 ILCS 5/103(b)).

The Tort Immunity Act Definition Of “Wilful & Wanton Conduct”

In order to assure that the meaning of “wilful and wanton conduct” would and could be clearly under-

stood and applied, the legislature chose to define it in the Tort Immunity Act.

The Tort Immunity Act definition of “wilful and wanton conduct” reads as follows:

1-210. Wilful And Wanton Conduct

§ 1-210. “Wilful and wanton conduct” as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. (745 ILCS 10/1-210).

The Supreme Court has reiterated the general rule for interpreting the meaning of a statute — such as § 1-210, definition of “wilful and wanton conduct,” in the Tort Immunity Act in the case of *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago*, 213 Ill.2d 1, 820 N.E.2d 401 (2004). The Court stated the test:

The cardinal rule of statutory interpretation, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. ... The starting point is always the language of the statute, which is the best indication of the intent of the drafters. ... When this language is unambiguous, the law is to be enforced as enacted by the legislature. (213 Ill.2d at 7, 820 N.E.2d at 405).

The Tort Immunity Act definition of “wilful and wanton conduct” specifies three types of action requiring conscious intentional or deliberate conduct from which injury is almost certain to follow:

- (1) a course of action which shows actual or deliberate intention to harm; or
- (2) a course of action which shows an utter indifference to the safety of plaintiff; or
- (3) a course of action which shows conscious disregard for the safety of plaintiff.

When the words in this definition are given their normal, usual, customary and commonly-accepted meanings, the conduct constituting “wilful and wanton conduct” must be done consciously (not inadvertently) and it must be done deliberately and intentionally (not thoughtlessly or unintentionally).

For example, seeking to determine the meaning of “utter indifference” and “conscious disregard” as normally and customarily understood, reference to dictionaries is helpful. Such reference reveals the following:

- (1) “utter indifference” — “utter” means, “entire, complete, absolute and total” disregard. (Black’s Law Dictionary, p. 1716 (Revised 4th Edition 1968)).

- (2) “conscious disregard” — “conscious” means, “deliberate, intentional, a conscious effort” (Random House Webster’s College Dictionary, p. 289 (1992)).
- (3) “disregard” — “disregard” means “take no notice of, ignore” (Black’s Law Dictionary, p. 558 (Revised 4th Edition 1968)).

The Tort Immunity Act omits the “reckless” language and the “negligence” language (“failure to exercise ordinary care”) found in the common law definition of “wilful and wanton conduct.”

The Murray Definition Of “Wilful & Wanton Conduct”

Clarifying the definition of “wilful and wanton conduct” in the Tort Immunity Act and distinguishing it from the common law definition, the Supreme Court in *Murray v. Chicago Youth Center*, defined Tort Immunity Act “wilful and wanton conduct” as follows:

In the case at bar, we must interpret section 1-210 of the Act. We conclude, as we did in *Burke*, that in the context of Tort Immunity cases, ‘willful and wanton’ connotes ‘quasi-intentional’ conduct. In other words, it does not encompass “‘mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency’” but, rather, “‘requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.’” *Burke*, 148 Ill. 2d at 449, quoting Restatement (Second) of Torts § 500, Comment g, at 590 (1965). (*Murray*, Slip Opinion at p. 18) (WL 1822656 at pp. 12-13).

Why Immunity Is Necessary For Local Government

The need for immunity protection for local government, in some areas of providing governmental services and governmental facilities, but not all, and the need for clear, specific and unequivocal immunity provision, was well-explained by the California Law Revision Commission when California enacted its Tort Immunity Act, upon which Illinois’ Tort Immunity Act was patterned:

Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not

quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision-making has been allocated among three branches of government — legislative, executive and judicial — and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages. ... (4 Cal. Law Revision Comm'n., Reports, Recommendations & Studies 801-

1611 (1963) at 810; Baum, *Tort Liability of Local Governments & Their Employees: An Introduction to the Illinois Immunity Act*, 1966 Ill. Law Forum 981, 987).

Conclusion

The Supreme Court has granted rehearing in the *Murray* case and, therefore, this issue remains unresolved and troublesome. While it is easy to say the distinction between “negligence” and “wilful and wanton conduct” should be clear, specific and unambiguous, it is not an easy task to accomplish.

Tire Chains
1-800-435-3450



Galva Iron & Metal Co.

ROADRUNNER RD-970

Developed After Hours of Design & Testing

- Heavy Duty Construction / 4000 lbs
- Heavy Duty Dual 15" Wheels w/ 6 Bolt High Speed Hubs
- Adjustable Hammer / Clevis Hitch
- 7 Blades for Maximum Cutting & Leveling
- All Pivot Points Designed with Grease Fittings
- Safety Lighting & Reflectors Standard
- Longer Hitch Length for Tractor w/Duals
- Easy Operating Self Leveling Design
- Fully Adjustable Including Tailboard
- 9' Cutting Width/Other Widths Available
- 13" Clearance for Material / Sod Flow
- 14" of Transport Height
- Several Option Available
- Stocking all Replacement Parts
- Module Design / Easy Assembly
- Unit Shipped Assembled / or Unassembled
- 1 Year Manufacturer's Warranty on Workmanship

Rental Units

- 9' RD-970 Road Drag
- 5' 3pt Shoulder Disc
- 7 yd JD Dirt Scraper
- 15' Bush Hog Batwing Mower
- 5' Land Pride Side Arm Mower

DAILY/WEEKLY/MONTHLY RATES

Several
3pt Hitch Models
Available



Patent Pending

GAYER
Equipment, Inc.
BUY • SELL • TRADE SALES • SERVICE
OLNEY, IL • 618-385-2525

Financing Available - Leasing Available
Trades Considered - Call for Pricing