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MALONEY v. ELMHURST PARK DISTRICT: PARK DISTRICT TORT IMMUNITY IN ILLINOIS — THE FUNCTIONAL DILEMMA

INTRODUCTION

Only five years after the Illinois Supreme Court in *Harvey v. Clyde Park District* declared section 12.1-1 of the Chicago Park District Code as special legislation and therefore unconstitutional,[1] section 3-106 of the 1965 Local Governmental and Governmental Employees Tort Immunity Act was held constitutional in *Maloney v. Elmhurst Park District.*[2] The court in *Maloney* distinguished the *Harvey* case and ruled that a provision which is based on the function of the local governmental entity creates neither an arbitrary nor capricious secondary classification of persons.[3]

Part I of this article is an historical analysis of the *Harvey* decision: its application of the special legislation clause in the 1870 Illinois Constitution and the functional guideline described by that court. Included in part I is a discussion of the principle applications of the *Harvey* decision prior to *Maloney.* Part II is concerned with: 1) an analysis of the *Maloney* decision as it follows the *Harvey* test, and 2) an analysis of the functional test as applied to section 3-106. Finally, part III recognizes the recent advancements made in the area of park district tort immunity.

I. HISTORY

HARVEY, SPECIAL LEGISLATION AND THE FUNCTIONAL APPROACH

The case of *Harvey v. Clyde Park District* was the first major judicial attack against local government immunity in the wake of the *Molitor* decision.[4] The *Harvey* application of section 22 of article IV of the 1870 Illinois Constitution prohibiting special legislation not only operated to strike down section 12.1-1 of the Park District Code, but provided a guideline for future attacks against special laws which arbitrarily classified plaintiffs or defendants.[5]

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[1] 32 Ill. 2d 60, 203 N.E.2d 573 (1964).
[2] 47 Ill. 2d 367, 265 N.E.2d 654 (1970).
[3] *Id.* at 370, 265 N.E.2d at 655.
[4] Molitor v. Kaneland Community School District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). This landmark decision abolishing school district immunity was the major reason for the General Assembly's subsequent enactment of a variety of tort immunity legislation. The legislation soon became the subject of repeated judicial attack under section 22 of article IV of the 1870 Illinois Constitution.
[5] Harvey v. Clyde Park District, 32 Ill. 2d 60, 67, 203 N.E.2d 573, 577 (1964).

In *Harvey*, an action was instituted on behalf of William Harvey, a minor, to recover damages for injuries alleged to have been caused by the negligence of the defendant, Clyde Park District, in maintaining its playground facilities.[6] The defendant moved to dismiss the complaint upon the ground that it was immune from liability by reason of section 12.1-1 of the Park District Code which provided:

> Any park district shall not be liable for any injuries to person or property, or for the death of any person heretofore or hereafter caused by or resulting from the negligence of its agents, servants, officers or employees in the operation or maintenance of any property, equipment or facility under the jurisdiction, control or custody of the park district or otherwise by the acts or conduct of such agents, servants, officers or employees.[7]

The defendant's motion to dismiss the complaint was sustained, and the plaintiff brought a direct appeal to the Supreme Court of Illinois contending that such provision was violative of article IV, section 22 of the 1870 Illinois Constitution[8] and so extended a "special or exclusive privilege" to such park district. The determinative question of law was whether the provision was rational in that it created neither an arbitrary nor capricious classification.[9]

In referring to article IV, section 22, the court said, "This provision prevents the enlargement of the rights of one or more persons in discrimination against the rights of others."[10] *Harvey* pursued to emphasize the fortuitive nature of the principle situation and its amenability to that which arose in *Grasse v. Dealers Transport Co.*[11] Relying on *Grasse*, the court acknowledged that

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[6] *Id.* at 60, 203 N.E.2d at 573.

[7] ILL. REV. STAT. ch. 105, §12.1-1 (repealed 1967).

[8] ILL. CONST. art. IV, §22 (1870) provided:

> The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . [g]ranting to any corporation, association or individual any exclusive privilege, immunity or franchise whatsoever.

[9] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 64, 203 N.E.2d 573, 575 (1964).

[10] *Id.* at 65, 203 N.E.2d at 575.

[11] 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied*, 344 U.S. 837 (1952).

> The situation in this case is not unlike that which was before this court in *Grasse v. Dealer's Transport Co.* Section 29 of the Workmen's Compensation Act allowed a common law action by an employee who was injured by the negligence of a third party who was not bound by the act, but prohibited such an action by an employee who was injured by the negligence of a third party who was bound by the act. The distinction between the two types of defendants was held insufficient to afford a *rational* basis of classification from the point of view of the injured person. The court said: "All employees entitled to compensation for injuries sustained in the course of their employment and caused by third persons are not treated alike. Those injured by third party tortfeasors bound by the act are not entitled to common law damages from such persons, whereas those injured by third party tortfeasors not bound by the act are allowed to institute actions for damages. Both

the determination as to whether a statute was special legislation did not merely depend upon the classification of governmental units. The court stated therein:

> For more is involved here than just the classification of governmental units. Those persons who are injured by the negligence of particular governmental units are also classified, and section 22 of article IV prohibits the granting of special or exclusive privileges to individuals.[12]

Seemingly, the *Harvey* court understood that if it was to be assumed that some distinction between persons could be made, even to intimate that the rights of one individual or class should be differentiated from the rights of another without a rational reason would reduce equal protection to a mere frivolity.

Harvey recognized that the essence of article IV, section 22 was the necessary differentiation between reasonable and arbitrary classifications. The court gave the following representative example of the question presented:

> If the child involved in the present case had been injured on a slide negligently maintained in a park operated by a city or village there is no legislative impediment to full recovery. If the child had been injured on a slide negligently maintained by a school district, or by the sovereign State, limited recovery is permitted. But if the child had been injured on a slide negligently maintained by a forest preserve district, or, as was actually the case, by a park district, the legislature has barred recovery. *In this pattern there is no discernible relationship to the realities of life.* We hold, therefore, that the statute relied upon by the defendant is arbitrary and unconstitutionally discriminates against the plaintiff.[13]

Thus, the court advanced the argument that would be used in subsequent cases concerning the constitutionality of the various immunity acts. That is, if the statute either discriminates against a class of plaintiffs by failing to provide for similar

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classes of injured employees may be entitled to compensation from their own employers, so the amount of compensation, if any, received by the injured employee is not the basis for differentiation between the classes. Nor is there any basis for differentiation from the nature of the injuries sustained, or from the activity of the employee at the time of the injury, or from any other factor ordinarily related to an injured party's right to recover damages. The sole basis for differentiation, as far as the injured employee is concerned, is a fortuitous circumstance —whether the third party tortfeasor happens to be under the act.

It is readily apparent that there is no rational difference between an employee injured in the course of his employment by a motorbus, and one injured by a farmer's truck. Each may sustain the same injuries, and be entitled to the same amount of compensation from their employers; neither had any control over the circumstances of their injuries, or the status of the party who hit them, yet in one case the statute authorizes the employee to recover damages from the third party, and in the other case the employee must be content with the amount of compensation he may be entitled to receive from his employer.

[12] Harvey v. Clyde Park District, 32 Ill. 2d 60, 65, 203 N.E.2d 573, 576 (1964).

[13] *Id.* at 67, 203 N.E.2d at 577. (Emphasis added.)

recovery to such persons in like circumstances, or if the statute classifies governmental entities performing the same governmental function, then the statute is unconstitutional as special legislation.

More importantly, the *Harvey* court did not stop at striking down section 12.1-1, but rather concluded the opinion with an amplification of the significance of its decision by providing a guideline whereby future similar legislation could be general, uniform in application and reasonable in classification. The court stated:

> From this decision it does not follow that no valid classifications for purposes of municipal tort liability are possible. On the contrary it is feasible, and it may be thought desirable, to classify in terms of types of muncipal function, instead of classifying among different governmental agencies that perform the same function.[14]

In this obiter dicta, the court *suggested* that the statutory differentiation should be based on governmental function rather than on the nature of the public entity performing the function as was the prior statutory pattern.[15] Since the function of the park district was to provide recreational facilities, all other local governmental entities providing the same function should enjoy the identical statutory assurance of tort immunity. Thus, the *Harvey* decision served two vital purposes: first, it analyzed and applied section 22, and secondly, it expressed how such future legislation could be reasonable if defined functionally.

PRINCIPAL APPLICATIONS OF HARVEY PRIOR TO MALONEY[16]

The court in *Lorton v. Brown County Community Unit School District*[17] extended *Harvey* by specifying that any statute which applied to a procedural right granted to some plaintiffs but not to others, under substantially like circumstances, should be held unconstitutional as violative of article IV, section 22.

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[14] *Id.*

[15] For example, school districts and non-profit private schools were afforded a liability ceiling of $10,000 and were further protected by a one year statute of limitations provision and a six-month notice of suit provision. ILL. REV. STAT. ch. 122, §821-31 (1963). Forest preserve districts had no liability for negligence at all. ILL. REV. STAT. ch. 57½, §3(a) (1963). A maximum liability of $10,000 was established for county superintendents of highways. ILL. REV. STAT. ch. 121, §381-87 (1963). Park districts and counties had general immunity from negligence actions. ILL. REV. STAT. ch. 105, §12.1-1 (1963). ILL. REV. STAT. ch. 34, §301.1 (1963).

[16] *See, Expanding Application of the Special Legislation Clause of the Illinois Constitution*, 3 JOHN MAR. J. PRAC. & PRO. 96 (1969). The author reviews the recent cases applying section 22. *Id.* at 104.

[17] 35 Ill. 2d 362, 220 N.E.2d 161 (1966).

The plaintiff, a private kindergarten teacher who had received injuries due to the alleged negligence of the school district, failed to give timely notice of injury required by the Illinois statute.[18]

As in *Harvey*, the determinative question was whether the statute created either a reasonable or arbitrary classification upon persons similarly situated.[19] Relying on *Harvey* in its supporting reasoning, the *Lorton* court adopted and applied a justifying, yet similar, analogy as that used in *Harvey* stating:

> We believe the rationale of *Harvey* is controlling here, for if plaintiff's injury had occurred upon the property of a county, township, or drainage district, her cause of action would not have been barred by failure to file written notice within six months of the injury. If, however, the injury had occurred upon the property of a city or village, public or private school, as was actually the case, or the Metropolitan Transit Authority, the failure to file written notice within six months from the date of injury would wholly bar her from recovery. As in *Harvey*, there is in this pattern "*no discernible relationship to the realities of life.*"[20]

It is pertinent to note the use of the statement "*no discernible relationship to the realities of life*" quoted from *Harvey*.[21] Although no precise definition is given, it would seem that it is a conclusory statement in regard to the rational — arbitrary dichotomy. That is, a statute which creates a class by arbitrarily legislating for the benefit of another is unreasonable and has no discernible relationship to the realities of life since members of the former class may have as much a prospective chance of being affected by the statute as those of the latter.

Moreover, the *Lorton* court did not hold the notice provision unconstitutional simply because there was a classification. Mere classification will not result in a statute being declared special legislation unless such a classification is not made in proper regard to the purpose of the statute. A provision which classifies one group of persons is constitutional as a general law if the reason for the classification lies within the purpose and

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[18] ILL. REV. STAT. ch. 122 §§823-24 (1963).

[19] Lorton v. Brown County Community School Dist., 35 Ill. 2d 362, 366, 220 N.E.2d 161, 163 (1966). The court stated:

> The courts of this state must be open to all those similarly situated upon the same conditions and where procedures are provided which are applicable to some and not applicable to others under substantially like circumstances and there are no discernible logical reasons apparent for the variations, they must fall as violative of section 22 of article IV of the Illinois Constitution.

[20] *Id.* at 365-366, 220 N.E.2d at 163. (Emphasis added.)

[21] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 67, 203 N.E.2d 573, 577 (1964).

purview of the statute.[22] But, here, the court found that there was no rational distinction between the purpose of the legislation and the persons so classified.

The effect of *Harvey* was soon felt again in *Hutchings v. Kraject.*[23] The court declared a 1961 amendment to the Counties Act immunizing counties from liability for personal injuries, property damage and death caused by the negligence of their agents as a violation of article IV, section 22, and therefore unconstitutional.[24] The plaintiff filed a negligence action against the county of Richland alleging that a surgical sponge was left in the plaintiff's chest following an operation in the Richland Memorial Hospital maintained and operated by the county. The plaintiff relied on *Harvey* in her attack on the amendment.[25]

The court first answered the plaintiff's contentions by reiterating the general principles of legislative power in regard to classification. Although not necessary to the disposition of the case, the court stated:

> The legislature has a wide range of discretion in making classifications, that one questioning its judgment has the burden of showing it to be clearly erroneous or its discretion arbitrarily abused, and that the legislature is not required to be scientific or logical in its classification if the legislation operates equally on all persons in the class to which it applies even though another class is not treated the same.[26]

In this judicial dictum, the court is saying what *Lorton* implicitly said; that mere classification is not per se special legislation

[22] *See* Kales, *Special Legislation as Defined in the Illinois Cases,* 1 ILL. L. REV. 63 (1906), in which this proposition is discussed. Kales extracted three principles concerning special legislation which became the foundation of judicial interpretation of section 22 of article IV of the 1870 Illinois Constitution. He states:

> First: If there is a rational ground for legislating in behalf of the objects to which the Act applies and not for others of the same general sort, and if the rationale of the distinction is embodied in the Act's description of the objects themselves to which it applies, then the Act is not a 'local or special' law.

Id. at 66-67. He continues:

> Second: If there be no rational ground of distinction, on any view of the facts, upon which some objects are legislated for and others of the same general sort are not, the Act is a 'local and special' law.

Id. at 70. Finally he states:

> Third: Even if there be one or more rational grounds for legislating in behalf of the objects to which the Act applies and not for others of the same general sort, yet *if no rational ground is embodied in the Act's description of the objects to which it applies the Act is held to be 'local or special'."*

Id. at 76. (Emphasis added.)

[23] 34 Ill. 2d 379, 215 N.E.2d 274 (1966).

[24] ILL. REV. STAT. ch. 34 §301.1 (1963).

[25] Note 23 *supra.*

[26] *Id.* at 380, 215 N.E.2d at 274.

where the classification is a reasonable result of the purpose of the statute.

With neither obscurity nor uncertainty, *Hutchings* cited *Harvey* as being controlling and recognized the infirmity of this type of legislation in its classifying governmental units without regard to similarity of function.[27] The court decisively followed *Harvey's* guideline for statute uniformity by implicitly stating that a statute which classifies all governmental units by function is a general law, uniform in nature and in no way arbitrary or capricious.

The proposition that a special law which classifies on the basis of a rational and realistic purpose in accord with a valid legislative intent will be unheld as constitutional was espoused in *Treece v. Shawnee Community Unit School District.*[28] Here, the defendant school district asked for leave to file a third-party counterclaim against its employee, a physical education instructor. The school district appealed from a judgment in the lower court denying the school the right to receive damages from the teacher since he was entitled to indemnification for any loss he would sustain from the suit.[29]

The direct appeal questioned the validity of section 10-21.6 of the School Code which gave a right of indemnification to such teachers who were employed in a district having a population of less than 500,000.[30] The court ruled that a classification based on population, where the purpose and intent of such a classification was reasonable, was not in violation of article IV, section 22. Consequently, the *Treece* court rejected the plaintiff's argument that the difference between the duties imposed on school boards, to indemnify in one case and to insure in the other, based on population violated section 22 of article IV.[31] Moreover, judicial countenance was accorded the legislative intent and purpose

[27] *Id.* at 380, 215 N.E.2d at 275. The court stated therein:

> Those persons who are injured by the negligence of particular governmental units are also classified, and section 22 of article IV prohibits the granting of 'special or exclusive' privileges to individuals. * * * And to the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of section 22 of article IV. The infirmity of this legislation lies in classifying governmental units as such without regard to similarity of function.

[28] 39 Ill. 2d 136, 233 N.E.2d 549 (1968).

[29] *Id.*

[30] ILL. REV. STAT. ch. 122 §10-21.6 (1965).

[31] Note 29 *supra* at 141, 233 N.E.2d at 552. The court stated:

> The controlling rule is well established that: 'Classification on the basis of population is not objectionable where there is reasonable basis therefore in view of the object and purpose to be accomplished by the legislation and such an act is not local or special merely because it operates in only one place, if that is where the conditions necessary to its operation exist.'

of the statute which was to give the employee the benefit of liability insurance from districts with populations of more than 500,000, while recognizing that school districts with populations of less than 500,000 could not afford such insurance and would therefore be liable for indemnification in respect to sued employees. Of course, those persons outside the classified group are not entitled to the same rights. However, section 22 does not strike down such a classification since it is both reasonable and rational and the problems of the school district may only be soluble by such classification.[32]

Harvey was then extended in *Begich v. Industrial Commission.*[33] The question presented was whether the provision in section 8(e)9 of the Workmen's Compensation Act which limits recovery to compensation for the loss of a hand, though a part of the forearm has been removed for the purpose of permitting the use of an artificial member, was constitutional.[34] Plaintiff, who had such an amputation, contended that the statute created an arbitrary classification of persons similarly situated.[35] Further, those persons with essentially the same loss were prejudiced simply because their original injury occurred four inches too low, even though it resulted in the identical loss of an extremity.

In its decisive utterance, the court stated that the differentiation of persons who suffer traumatic amputations at the forearm from those whose forearms are amputated for the purpose of permitting the use of an artificial member is arbitrary and unreasonable. The court stated:

> Here, the classification of employees such as the appellant is based on the situs of the trauma without regard to the final disability or loss incurred as a result of the employment injury. We cannot find a reasonable basis for differentiating between the appellant's class and those who lost the use of an arm solely through trauma. The attempted classification is unrealistic or, as we put it in *Harvey*, does not bear any *"discernible relationship to the realities of life."*[36]

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[32] *Id.* at 399.
[33] 42 Ill. 2d 32, 245 N.E.2d 457 (1969).
[34] ILL. REV. STAT. ch. 48 §138.8(e)9 (1967).
[35] Note 33 *supra.*
[36] *Id.* at 37, 245 N.E.2d at 459.

II. THE *MALONEY* CASE — ANALYSIS

AN APPLICATION OF HARVEY

In December of 1970, the Supreme Court of Illinois in *Maloney v. Elmhurst Park District*,[37] upheld the constitutionality of section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act.[38] That section provides:

> Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of *a condition* of any public property intended or permitted to be *used* as a park, playground or open area for recreational purposes unless such local entity or public employee is guilty of *wilful and wanton negligence* proximately causing such injury.[39]

The plaintiff, by his next friend, brought a direct appeal from an order of the Circuit Court which granted judgment on the pleadings in favor of the defendant park district in an action for personal damages sustained by the plaintiff, a minor, while he was playing in the defendant's park facility.[40] Plaintiff alleged that while playing on an "artificial hill" he fell and was severely injured. Further, it was contended that the hill was allowed to remain in a dangerous condition in that no fencing was provided, that it was ungraded and that rocks and other debris were allowed to remain thereon. The defendant answered by stating that under the Tort Immunity Act a park district could not be held liable unless it was proven that its conduct was wilful and wanton negligence. The plaintiff amended his complaint and, relying on *Harvey v. Clyde Park District* contended that section 3-106 was unconstitutional as special legislation.[41]

The court distinguished *Harvey* from *Maloney* in that the statute involved in *Harvey* did not attach to other governmental entities in similar circumstances and when they were performing a similar function, while section 3-106

> applied equally to all governmental entities, and operates only where liability of a particular governmental entity is sought to be predicated upon the existence of a condition of public property maintained by it and intended or permitted to be used as a park, playground or open area for recreational purposes.[42]

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[37] 47 Ill. 2d 367, 265 N.E.2d 654 (1970).

[38] *See generally* Kionka, *Tort Liability of Local Governments and their Employees in Illinois*, 58 ILL. B.J., 620 (1970); and Latturner, *Local Governmental Tort Immunity and Liability in Illinois*, 55 ILL. B.J. 28 (1969). Also, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity*, 61 NW. U.L. REV. 265 (1966).

[39] ILL. REV. STAT. ch. 85 §3-106 (1965).

[40] Note 37 *supra*.

[41] *Id.*

[42] *Id.* at 370, 265 N.E.2d at 655-66.

In judicial dicta, the court followed the *Harvey* test and stated, "only if it can be said that the classification is clearly unreasonable and palpably arbitrary will the courts act to hold the classifying enactment invalid."[43] In direct application of the *Harvey* test, the court ruled that since section 3-106 was based on the function of the local governmental entity it was constitutional.[44]

FUNCTIONAL ANALYSIS OF SECTION 3-106

In view of the consistent and patently clear applications of *Harvey*, *Maloney* seems to be another extension. Admittedly, section 3-106 is constitutional in the context in which it had been attacked. However, the decision's definitive determination and reasoning omitted any discriminating inquiry and resulted in a subtle undermining of the functional question.

The statute is clearly functional in application despite the obvious classification among plaintiffs falling within the purview of the statute and those falling outside it. The fundamental concept of the Tort Immunity Act is based on the premise that governmental entities are different and distinct from private persons, and that classification for the purpose of recognizing these differences and distinctions is an expressed right of the General Assembly.[45] In this sense, the statute is neither an arbitrary nor capricious classification despite it being "special" and legislating for a class on the basis of function. Moreover, the legislation is reasonable in the purpose to be achieved and within the legislative intent of the statute.

The function covered by section 3-106 is that of providing

[43] *Id.*

[44] *Id.*

[45] Note 22 *supra*. *See* 4 Cal. Law Revision Comm'n Reports, Recommendations and Studies 801-1611 (1963). The commission summarized the various distinctions and differences between private persons and institutions which thus give the right of classification to the General Assembly:

> 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. . . .

See also Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28, 30 (1921).

public property for recreational use.[46] However, the section fails to distinguish between an injury resulting from an artificial condition and an injury resulting from a natural condition. Rather, all plaintiffs injured by "a condition" on property used for recreational purposes fall within the section.[47] It may be argued that had the section distinguished between injuries resulting from natural conditions and those resulting from artificial conditions, an arbitrary secondary classification would have been created. For example, had the statute confined itself to immunity for injuries resulting solely from natural conditions, a plaintiff injured by a natural condition may be barred from a remedy while another plaintiff with the same injury, resulting while playing in the same park, if injured by an artificial condition may have a remedy. Since no distinction is made, seemingly no plaintiff is arbitrarily classified merely due to the manner in which he was injured.

However, the artificial-natural dichotomy raises the proposition that although section 3-106 is functional as to the recreational use, it should be directed to the particular type of recreational function engaged in. Although the general function may be recreational use, a more specific sub-functional distinction should be made between those local public entities providing natural conditions and those providing artificial conditions for recreational use. A recreational facility that affords for the users of that facility an artificial condition has in fact a different function than those recreational facilities that provide natural conditions. Acceptance of this proposition would mean that section 3-106 should be broken down into sub-functions. This would create a classification among plaintiffs similarly situated, but since such classification could be said to be reasonable in that it recognizes the intended purpose of the statute and further evidences a reasonable dichotomy in recognition of the *realities of life*,[48] the classification would be valid and constitutional.

The court in *Harvey* recommended that the General Assembly use as a guideline in its formulation of a Tort Immunity Act, the California Government Code.[49] It is interesting to note that nowhere in the Illinois statute is there such a drastic de-

[46] Note 39 *supra*.
[47] *Id.*
[48] Harvey v. Clyde Park District, 32 Ill. 2d 60, 67, 203 N.E.2d 573, 577 (1964).
[49] For a general discussion of the California Government Tort Immunity Act *see* Van Alystyne, *Governmental Tort Liability:A Decade of Change*, U. ILL. L.F. 919, 935 (Winter 1966), Van Alystyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463 (1963).

parture from the California Code as in section 3-106.[50] An analysis of the pertinent California Code provisions reveals that a distinction in liability is made between natural and artificial conditions as is urged above. Section 831.2[51] is an unqualified grant of "blanket" tort immunity to a public entity providing natural conditions on unimproved public property. That section is dependent upon the fundamental cognizance of the burden and expense of both defending a multitude of claims for injuries and maintaining the property in a safe condition. Additionally, it recognizes the unreasonableness of permitting suits for injuries resulting from those natural conditions where the inherent function of the public entity is to provide "naturalness" for the public's enjoyment.[52] However, section 835[53] predicates the conditions of liability for a public entity providing artificial conditions on the existence of a "dangerous condition." Collectively, the California statutes indicate conclusive legislative countenance to the primary distinction between two separate yet often coterminous functions of local public entities establishing areas for recreational use.

Therefore, it may be contended that although section 3-106 of the Illinois Tort Immunity Act is functional and not patently "arbitrary" and unreasonable in one context, in another, the statute may be arbitrary in that it fails to recognize the precise sub-functions of the more general recreational function of local public entities. The immunity granted in section 3-106 is primarily based upon the rationale that such recreational activities will inevitably generate an endless amount of unfounded claims, and that such public entities which exist for the benefit of the

[50] Comment, *Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity*, 61 NW. U.L. REV. 265, 286 (1966).

[51] Cal. Govn't Code §831.2 (West 1966). This section provides:

> Natural Condition of Unimproved Public Property. Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

[52] *Id.*, Legislative Committee Comment.

[53] Cal. Ann. Gov. Code §835 (West 1966). That section provides:

> Conditions of liability. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
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> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
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> (b) The public entity had actual or constructive notice of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

public should not be placed at their mercy.[54] However, such a reason does not account for the failure to distinguish between an activity requiring the preservation of natural conditions and one where the condition has been created by the hands of the entity itself. A failure to recognize this primary distinction is a failure to recognize "the realities of life."

III. THE FUTURE

Despite the recent Illinois Supreme Court's decision in *Sullivan v. Midlothian Park District*,[55] effectively waiving the "wilful and wanton" burden of proof required by the statute by acquisition of insurance pursuant to section 9-103(b) of the Tort Immunity Act, section 3-106 still remains a "functional dilemma." The *Sullivan* court's recognition of the harsh effect of the "wilful and wanton" requirement ameliorates the inequitable effect of the statute, but does not go to the constitutionality of it.

In discussing the unconstitutionality of section 3-106, the *Sullivan* court for the first time did, however, recognize that a functional dilemma may exist. The plaintiff contended that the same type of injury as occurred to him "might also be suffered in a court house, on a city street, or some other place under the jurisdiction and control of a local public entity and for which recovery could be had upon proof of negligence." In response the court stated:

> We do not question the correctness of the plaintiff's argument, but as we said in *Maloney*, "the wisdom of the legislation is a matter outside the purview of this court's inquiry," and the classification created by the General Assembly in order to encourage the development of parks and playgrounds will not be nullified by this court *on the ground that we might have chosen another means to achieve the desired result.*[56]

This arresting expression of the court not only acknowledged legislative supremacy in the area of classification, but impliedly admitted that a better means could arguably be advanced to replace section 3-106.

In conclusion, expanded illumination of the 1970 constitutional provision regarding special legislation may result in a greater role played by the judiciary in this area since the deter-

[54] Baum, *Tort Liability of Local Governments and their Employees: An Introduction to the Illinois Immunity Act*, 3 U. ILL. L.F. 981, 1017 (Winter 1966).

[55] 51 Ill. 2d 274 (1972).

[56] 51 Ill. 2d 274, 279 (1972).

mination of a special law is now a judicial right.[57] Hopefully, future courts presented with the "functional dilemma" will respond with astute and perceptive analysis rather than vague expression of rubric or language wanting in precision. Inasmuch as the functional concept permeates through our entire legal system, any failure to explore it with discrimination is tantamount to judicial forbearance.

"We might have chosen another means to achieve the desired result."

Ira P. Gould

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[57] Note; Article IV, §13 of the 1970 Illinois Constitution raises the same question of constitutionality. The 1970 Constitution provides:

> The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

This section seemingly encompasses in its broad periphery all of the many provisions of article IV, section 22, including the granting of an exclusive or special privilege, although the same basic concept has been adopted by the 1970 Constitution in that it forces one to ask when a general law is applicable, the right to determine reasonableness has been divested from the legislature and made a question for the judiciary. Thus, the "arbitrary and capricious" test of *Harvey* and the functional answer seemingly have not been altered by this new special legislation section.

For an analysis of the problems raised by article IV section 22 of the 1870 Illinois Constitution and a discussion of special legislation *see* Braden and Cohen, *The Illinois Constitution: An Annotated and Comparative Analysis*, 203, 225 (1969). *See also* Committee Recommendations of the 6th Ill. Const. Conv: Style & Drafting, Committee Prop. #10 — Legislature, 58 (1970).

Further, it should be noted that although the basic test of constitutionality has remained the same, item 23 of article IV, section 22 of the 1870 Illinois Constitution which prohibited the granting of an "exclusive or special privilege" has been stricken from the new special legislation clause. However, the item is still available in that it has been incorporated in article I, section 2 of the Bill of Rights in the 1970 Illinois Constitution. That section provides: No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.