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Lyman C. Tieman

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LOCAL GOVERNMENTAL AND GOVERNMENTAL EMPLOYEES TORT IMMUNITY ACT — AN OVERREACTION TO *HARVEY*

The Illinois General Assembly by an act of August 13, 1965 adopted the Local Governmental and Governmental Employees Tort Immunity Act.[1] This Act represents the first attempt on the part of the General Assembly to afford *uniform* treatment to all units of local government in the area of governmental tort immunity.[2] Prior to the adoption of the Tort Immunity Act, a legislative pattern had been developed under which selected governmental units enjoyed varying degrees of tort immunity.[3] This was the result of the General Assembly's hasty reaction to the Illinois Supreme Court's landmark decision in *Molitor v. Kaneland Community Unit District No. 302.*[4]

Molitor abolished the judicially created doctrine of partial immunity for torts as applied to school districts and set the stage for similar attacks upon the patchwork of court-made immunity for similar governmental entities.[5] The General Assembly's solution to *Molitor* was to substitute a legislative pattern of governmental tort immunity for existing judicially created immunity. However, by 1965 serious doubt existed as to whether governmental units would continue to enjoy any form of tort immunity unless uniform legislation were to be created. This was readily

[1] ILL. REV. STAT. ch. 85, §1-101 to 10-101 (1969) [hereinafter cited as Tort Immunity Act.]

[2] *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 (1966).

[3] 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).

[4] 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

[5] *Id.* Although the *Molitor* decision only applied to judicially created immunity for school districts, the Illinois Supreme Court expressed a general dislike for judicially created tort immunity:

> It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The doctrine of governmental immunity runs directly counter to that basic concept. What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit any wrongdoing without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortious conduct?

Id. at 20, 163 N.E.2d at 93.

Shortly after *Molitor* was decided, the General Assembly buffered the

apparent after the Illinois Supreme Court's decision in *Harvey v. Clyde Park District* in November, 1964.[6]

In *Harvey*, suit was brought on behalf of a minor plaintiff to recover damages for injuries allegedly sustained as a result of the negligence of the defendant park district in maintaining playground facilities under its control. The defendant moved to dismiss the complaint asserting immunity from suit under section 12.1-1 of the Park District Code.[7] Section 12.1-1 was a general immunity provision insulating the park district from liability for the negligence of its employees. Section 12.1-1 provided:

> Any park district shall not be liable for any injuries to person or property . . . heretofore or hereinafter 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 occasioned by the acts or conduct of such agents, servants, officers or employees.

The Illinois Supreme Court, in deciding for the plaintiff, held that the classification created by section 12.1-1 was not rational and that it unconstitutionally discriminated against the plaintiff in violation of the special legislation prohibition contained in article IV, section 22 of the Illinois Constitution.[8] That section provides: "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 special or exclusive privilege, immunity or franchise whatsoever."[9]

The court, relying upon *Grasse v. Dealers Transport Co.*,[10] reasoned:

> For more is involved here than just the classification of governmental units. Those persons who are injured by the negligence of

effect of the Illinois Supreme Court's decision by enacting tort immunity legislation designed to protect selected governmental units. See note 3 *supra*. *Molitor* is still the law, however, and in the absence of valid statutory grants of tort immunity, local governmental units are liable in tort to the same extent as individuals. Grasso v. Kucharski, 93 Ill. App. 2d 233, 236 N.E.2d 262 (1968).

[6] 32 Ill. 2d 60, 203 N.E.2d 573 (1964). *Harvey* was the first case in which the constitutionality of the post *Molitor* immunity legislation was tested. The specific immunity legislation attacked was section 12.1-1 of the Park District Code, ILL. REV. STAT. ch. 105, §12.1-1 (1963). Section 12.1-1 was held to violate the prohibition against special legislation contained in article IV, section 22 of the Illinois Constitution of 1870.

[7] ILL. REV. STAT. ch. 105, §12.1-1 (1963).

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

[9] ILL. CONST. art. IV, §22 (1870).

[10] 412 Ill. 179, 106 N.E.2d 124 (1952), *cert. denied*, 344 U.S. 837 (1952). The court in *Harvey* was guided by the reasoning in *Grasse*. In support of its holding that the classification created by section 12.1-1 was not rational, the *Harvey* court looked to *Grasse* for support:

> The situation in this case is not unlike that which was before this court in *Grasse v. Dealers' Transport Co.* Section 29 of the Workmen's

particular governmental units are also classified, and section 22 of article IV prohibits the granting of "special or exclusive" privileges to individuals.[11]

By applying different measures of immunity to various governmental units, the legislature had in effect created a secondary classification with respect to governmental units which discriminated against the plaintiff. Plaintiff's right to recover was based solely upon whether the defendant happened to be covered by the Act. In support of this reasoning, the court postulated:

> So far as the present case is concerned, cities and villages, park districts, school districts and forest preserve districts as well as the State itself, all maintain recreational facilities that are available for public use. 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.*[12]

The effect of *Harvey* was to open the door for constitutional attack under article IV, section 22 of the Illinois Constitution upon any of the then existing legislative grants of tort immunity to governmental bodies created in the wake of *Molitor.* The court was undoubtedly aware of the impact its decision would have in the area of governmental tort immunity when it suggested the following guideline for future legislation:

> From this decision it does not follow that no valid classifications for purposes of municipal tort liability are possible. On the

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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 employment and caused by third persons are not treated alike. . . . [t]hose injured by third party tort-feasors not bound by the Act are allowed to institute actions for damages. Both classes of injured employees may be entitled to compensation from their own employers, so that 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 of the activity of the employees at the time of the injury, or from any other factor ordinarily related to the 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 tort-feasor [*sic*] happens to be under the Act."

Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 65-66, 203 N.E.2d 573, 576 (1964).

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

[12] *Id.* at 66-67, 203 N.E.2d at 576-77. (Emphasis added.)

> contrary it is feasible, and it may be thought desirable, to classify in terms of types of municipal function, instead of classifying among different governmental agencies that perform the same function.[13]

The court therefore suggested that for the purposes of article IV, section 22, classification on a functional basis would be per se reasonable. From this it is implied that governmental agencies performing different functions may be classified in the same group with other governmental agencies, but that in any case all governmental agencies performing the same functions must be treated uniformly. All governmental agencies which perform the same function must, by this standard, be afforded the same degree of immunity from suit if tort immunity is to survive an article IV, section 22 attack.

Although the court in *Harvey* never defined the term "function," providing playground facilities was the function of the defendant park district as applied to the plaintiff in that case. The pitfall of the legislation in *Harvey* was that other governmental agencies which also provided playground facilities were not afforded the same degree of tort immunity as was the park district under section 12.1-1 of the Park District Code. Whereas section 12.1-1 prohibited suit against park districts for damages due to injuries resulting from the negligent maintenance of recreational facilities under the control of the park district, no similar prohibition existed for suits on similar grounds against a city or village, and only limited recovery was available for similar suits against school districts or the state.[14]

The General Assembly wasted little time in adopting a statute designed to overcome the pitfalls of the legislation in *Harvey*. On August 13, 1965, the Tort Immunity Act was enacted.[15] Speaking of this Act, the court in *Ritsema-Millgard, Inc. v. Michael J. McDermott Co.*,[16] stated:

> In 1965 the Illinois legislature adopted the Local Government and Governmental Employees Tort Immunity Act. This act was adopted immediately after the Illinois Supreme Court had repudiated the last vestige of the doctrine of governmental immunity. It was intended to assure uniformity in treatment to all units of local government and to salvage certain protections for public entities some of which had found themselves subject to suit for the first time.[17]

Adoption of the Tort Immunity Act was timely, for the fears

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[13] *Id.* at 67, 203 N.E.2d at 577.

[14] *Id.*

[15] The opinion in *Harvey* was filed on November 4, 1964 and was modified on denial of rehearing on January 19, 1965. The second draft of the proposed legislation, with amendments, was introduced in the 1965 General Assembly and enacted August 13, 1965.

[16] 295 F. Supp. 180 (N.D. Ill. 1969).

[17] *Id.* at 180.

predicated upon the decision in *Harvey* soon became a reality. In 1966, the statute which granted counties immunity from negligence actions[18] was held unconstitutional as special legislation.[19] Similarly, the sections of the School Code[20] providing for a six-month notice of injury for suits against school districts and non-profit private schools were held unconstitutional as special legislation.[21] Further, *Haymes v. Catholic Bishop of Chicago*[22] ruled unconstitutional the $10,000 limit of the School Code[23] applicable to non-profit private schools. Thus the post *Molitor* legislation began to crumble. It is to be noted that *Molitor* is still the law in Illinois and, in the absence of valid statutory limitations on tort liability, governmental entities are subject to the same degree of tort liability as individuals.[24]

TORT IMMUNITY ACT

At least upon its face, the Tort Immunity Act would appear to overcome any special legislation objections predicated upon *Harvey*. Legislation which treats all governmental units uniformly with respect to tort immunity cannot be said to create secondary classifications which might discriminate against potential plaintiffs. Nor can there be any doubt that a classification is defined functionally if all potential units which may conceivably perform the same function are classified in the same group. However, the Tort Immunity Act deserves closer scrutiny.

The Tort Immunity Act is a comprehensive grant of immunity from all torts and for all governmental units covered

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

[19] Hutchings v. Kraject, 34 Ill. 2d 379, 215 N.E.2d 274 (1966).

[20] ILL REV. STAT. ch. 122, §823-824 (1965).

[21] Lorton v. Brown County School Dist., 35 Ill. 2d 362, 220 N.E.2d 161 (1966). *Lorton* relied directly upon the rationale of *Harvey* to strike down the six-month notice provision of The School Code, ILL. REV. STAT. ch. 122, §823-824 (1965), as violative of the special legislation prohibition of article IV, section 22. The court drew an analogy to *Harvey*:

> 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.". . . 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.

Id. at 365-366, 220 N.E.2d at 163.

[22] 41 Ill. 2d 336, 243 N.E.2d 203 (1968).

[23] ILL. REV. STAT. ch. 122, §825 (B) (1967).

[24] Grasso v. Kucharski, 93 Ill. App. 2d 233, 236 N.E.2d 262 (1968).

by the Act. Categorically, immunity provisions are divided as follows: (1) general provisions relating to immunity of local public entities,[25] (2) general immunity provisions for public employees,[26] (3) immunity from liability for injury occurring in the use of public property,[27] (4) immunity relating to police or correctional activities,[28] (5) immunity for fire protection activities,[29] and (6) immunities relating to medical, hospital and public health activities.[30]

The scope of the Act is further broadened by the definition of "local public entity," which includes every possible governmental unit except the state itself.[31] The definition of "employee" as used in the Act is likewise given a greater scope than contemplated at common law.[32]

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[25] ILL. REV. STAT. ch. 85, §2-101 to 2-111 (1969). The wording of these sections is such that the general immunity provisions contained therein apply to all local public entities. Therefore, at least within the purview of the Tort Immunity Act, all local public entities which perform the same functions are treated alike. Thus the functional classification requirement of *Harvey* would appear to have been met.

Section 2-102 provides that no local public entity is liable to pay punitive or exemplary damages. ILL. REV. STAT. ch. 85, §2-102 (1969). Specific provisions immunize all local public entities from liability flowing from the following: adoption or failure to adopt an enactment or failure to enforce a law, ILL. REV. STAT. ch. 85, §2-103 (1969); issuance, denial, suspension or revocation of or refusal or failure to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization where the entity or its employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked, ILL. REV. STAT. ch. 85, §2-104 (1969); an oral promise or misrepresentation of its employee, ILL. REV. STAT. ch. 85, §2-106 (1969); any action by its employees that is libelous or slanderous, ILL. REV. STAT. ch. 85, §2-107 (1969).

Section 2-109 provides: "a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." ILL. REV. STAT. ch. 85, §2-109 (1969). In Mills v. County of Winnebago, 104 Ill. App. 2d 366, 244 N.E.2d 65 (1969), the court interpreted section 2-109 to prevent suit against the county for acts of wilful and wanton misconduct caused by the defendant's employee even though a separate action could have been maintained against the employee directly.

[26] ILL. REV. STAT. ch. 85, §2-201 to 2-212 (1969). However, Young v. Hansen, 110 Ill. App. 2d 376, 249 N.E.2d 300 (1969), held that a public official may not hide behind the cloak of immunity provided by the Tort Immunity Act if he maliciously and intentionally misuses the powers of his office.

[27] ILL. REV. STAT. ch. 85, §3-101 to 3-108 (1969).

[28] ILL. REV. STAT. ch. 85, §4-101 to 4-107 (1969).

[29] ILL. REV. STAT. ch. 85, §5-101 to 5-103 (1969).

[30] ILL. REV. STAT. ch. 85, §6-101 to 6-109 (1969).

[31] ILL. REV. STAT. ch. 85, §1-206 (1969). That section provides:

> "[l]ocal public entity" includes a county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district, and all other local governmental bodies. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.

It is to be noted, however, that section 2-101 (b) specifically excepts from the Tort Immunity Act any entity organized under the Metropolitan Transit Authority Act. ILL. REV. STAT. ch. 111-⅔, §301 *et seq.* (1969). ILL. REV. STAT. ch. 85, §2-101 (b) (1969). The Metropolitan Transit Authority is a municipal corporation, *i.e.*, a local public entity, which does not come under the workings of the Tort Immunity Act.

[32] ILL. REV. STAT. ch. 85, §1-202 (1969). Under this section, an "employee" includes an officer, member of a board, commission or committee,

In addition to the general and specific grants of immunity provided for by the Tort Immunity Act, local public entities are further shielded against all tort actions by procedural limitations. The six-month notice of injury provision[33] and the one-year statute of limitations provision[34] were borrowed from prior law and retain the basic parlance of those actions.[35] Although the six-month notice of injury provision applies with equal force to all tort actions brought against local public entities *or* their employees, the one-year statute of limitations applies to suits brought against local public entities only. Failure to comply with a notice provision will result in an involuntary dismissal of the cause of action and will be *res judicata* in further proceedings.[36]

As has been seen, the notice provision and limitations provision of the Tort Immunity Act are not new innovations in the area of governmental tort immunity. Some of these earlier provisions have been held unconstitutional by judicial decision[37]

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servant or employee, whether or not compensated, but does not include an independent contractor.

[33] ILL. REV. STAT. ch. 85, §8-102 (1969). That section provides:

> Within 6 months from the date that the injury or cause of action . . . was received or accrued, any person who is about to commence any civil action for damages on account of such injury against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, must personally serve in the Office of the Secretary or Clerk, as the case may be, for the entity against whom or against whose employee the action is contemplated a written statement, signed by himself, his agent or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, the general nature of the accident, the name and address of the attending physician, if any, and the name and address of the treating hospital or hospitals, if any. [*as amended* October 10, 1969].

The six-month notice provision is substantially similar in form to that required for suits against the state under the Illinois Court of Claims Act, ILL. REV. STAT. ch. 37, §439.22-2 (1969), and against the Metropolitan Transit Authority under the Metropolitan Transit Authority Act, ILL. REV. STAT. ch. 111-⅔, §341 (1969).

[34] ILL. REV. STAT. ch. 85, §8-101 (1969). That section provides: "No civil action may be commenced in any court against a local public entity for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued."

Compare this with the two-year statute of limitation for personal injury actions against the State of Illinois, ILL. REV. STAT. ch. 37, §439.22 (1969), and the general two-year statute of limitations for personal injury actions, ILL. REV. STAT. ch. 83, §15 (1969).

[35] Ritsema-Millgard v. McDermott Co., 295 F. Supp. 180 (N.D. Ill. 1969).

[36] ILL. REV. STAT. ch. 85, §8-103 (1969), provides:

> If the notice under section 8-102 is not served as provided therein, any such civil action commenced against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, shall be dismissed and the person to whom such cause of injury accrued shall be forever barred from further suing.

See, e.g., Fannon v. Aurora, 106 Ill. App. 2d 408, 245 N.E.2d 286 (1969).

[37] Lorton v. Brown County School Dist., 35 Ill. 2d 362, 220 N.E.2d 161 (1966), invalidated the six-month notice provision of The School Code, ILL. REV. STAT. ch. 122, §823-24 (1963).

while others have been expressly repealed by the Tort Immunity Act.[38] Other similar provisions remain in effect in spite of the Tort Immunity Act.[39] It is the existence of these other statutory provisions which may invalidate the notice and limitations provisions of the Tort Immunity Act under the rationale of *Harvey.*

JUDICIAL INTERPRETATION OF NOTICE AND LIMITATIONS PROVISIONS

Before suggesting invalidation of the notice and limitations provisions of the Tort Immunity Act, it is worthwhile reviewing several recent decisions which have construed these provisions. To date, only twenty cases have construed the provisions of the Tort Immunity Act.[40] Exactly one-half of these cases have concerned the notice and limitations provisions.[41] In no case, however, has the constitutionality of these provisions been adjudicated.

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[38] ILL. REV. STAT. ch. 85, §10-101 (1969).

[39] The Tort Immunity Act provides:

> . . . Nothing in this Act affects the liability, if any, of a local public entity or public employee, based on:
>
> . . .
>
> b) operation as a common carrier; and this act does not apply to any entity organized under or subject to the "Metropolitan Transit Authority Act", approved April 12, 1945, as amended; . . .

ILL. REV. STAT. ch. 85, §2-101 (1969).

The Metropolitan Transit Authority Act provides for a one-year statute of limitations for any civil action for personal injuries against the Authority and for a six-month notice of injury. ILL. REV. STAT. ch. 111-⅔, §341 (1969). There are no general immunity provisions beyond the procedural requirements specified in the Metropolitan Transit Authority Act.

The Illinois Court of Claims Act provides for a two-year statute of limitations for tort actions against the State of Illinois and agencies of the state, except where the plaintiff is an infant, idiot, lunatic, insane person, or person under other disability at the time the claim accrues, in which case he is allowed two years to file suit from the time the disability ceases. ILL. REV. STAT. ch. 37, §439.22 (1969). Furthermore, a six-month notice is required as a condition precedent to suit against the state. ILL. REV. STAT. ch. 37, §439.22 (1969).

Unlike the Tort Immunity Act, the Illinois Court of Claims Act sets a monetary limit of $25,000 on recovery for all tort actions. ILL. REV. STAT. ch. 37, §439.8 (1969).

[40] Kerr v. Chicago, 424 F.2d 1134 (7th Cir. 1970); Skrapits v. Skala, 314 F. Supp. 510 (1970); Ritsema-Millgard v. McDermott Co., 295 F. Supp. 180 (N.D. Ill. 1969); Huey v. Barloga, 277 F. Supp. 864 (1967); Van Meter v. Stout, 45 Ill. 2d 784, 256 N.E.2d 784 (1970); Edelen v. Hogsett, 44 Ill. 2d 215, 244 N.E.2d 435 (1969); Hoffman v. Evans, Ill. App. 2d. 263 N.E.2d 140 (1970); Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970); Smith v. Glowacki, 122 Ill. App. 2d 336, 258 N.E.2d 591 (1970); Meyers v. Bd. of Educ., 121 Ill. App. 2d 186, 257 N.E.2d 183 (1970); McLaughlin v. Tilendis, 115 Ill. App. 2d 148, 253 N.E.2d 85 (1969); Young v. Hansen, 110 Ill. App. 2d 376, 249 N.E.2d 300 (1969); Fannon v. Aurora, 106 Ill. App. 2d 408, 245 N.E.2d 286 (1969); Sappington v. Sparta Municipal Hospital Dist., 106 Ill. App. 2d 255. 245 N.E.2d 262 (1969); Schear v. Highland Park, 104 Ill. App. 2d 285, 244 N.E.2d 72 (1968); Mills v. County of Winnebago, 104 Ill. App. 2d 366, 244 N.E.2d 65 (1969); Woodman v. Litchfield School Dist., 102 Ill. App. 2d 780, 242 N.E.2d 780 (1968); Jones v. Rock Island, 101 Ill. App. 2d 174, 242 N.E.2d 302 (1968); Wills v. Metz, 89 Ill. App. 2d 334, 231 N.E.2d 628 (1967); Andrews v. Porter, 70 Ill. App. 2d 202, 217 N.E.2d 305 (1966).

[41] Skrapits v. Skala, 314 F. Supp. 510 (1970); Ritsema-Millgard v.

Wills v. Metz,[42] relying upon the Illinois Supreme Court's decision in *Haymes v. Catholic Bishop of Chicago*,[43] declared that the six-month notice provision did not apply in suits brought on behalf of a minor plaintiff by his next friend. In *Wills*, the plaintiff was 19 years, 10 months and 22 days of age when the suit was brought. Plaintiff's second amended complaint alleging personal injuries and property damages was dismissed upon motion of the defendant that plaintiff did not file a timely notice of suit as required by section 8-102 of the Tort Immunity Act. On appeal, the defendant urged a distinction between the status of the plaintiff in that case and the plaintiffs in *Haymes* and previous cases. It was urged that in *Haymes* and in the line of cases relied upon by *Haymes*, the plaintiffs were in fact physically or mentally incapable of compliance with the provisions by reason of young and tender years, and that with regard to plaintiff Wills, no disability is suggested as to the reason for noncompliance with the notice requirement. The court, however, in rejecting the defendant's contention, reasoned that physical age alone is sufficient to excuse compliance with the notice provision:

> We read the *Haymes* case and its predecessors as making a distinction between minors and adults. The line of demarcation is not one of physical or mental capacity to give the notice but one of ascertaining whether or not the plaintiff is or is not a minor. In this case, the plaintiff was a minor and the notice requirement of section 8-102 was not applicable to nor binding upon him.[44]

McDermott Co., 295 F. Supp. 180 (N.D. Ill. 1969); Van Meter v. Stout, 45 Ill. 2d 7, 256 N.E.2d 784 (1970); Hoffman v. Evans, Ill. App. 2d , 263 N.E.2d 140 (1970); Dear v. Locke, 128 Ill. App. 2d 356, 262 N.E.2d 27 (1970); Smith v. Glowacki, 122 Ill. App. 2d 336, 258 N.E.2d 591 (1970); Fannon v. Aurora, 106 Ill. App. 2d 408, 245 N.E.2d 286 (1969); Sappington v. Sparta Municipal Hospital Dist., 106 Ill. App. 2d 255, 245 N.E.2d 262 (1969); Schear v. Highland Park, 104 Ill. App. 2d 285, 244 N.E.2d 72 (1968); Wills v. Metz, 89 Ill. App. 2d 334, 231 N.E.2d 628 (1967).

[42] 89 Ill. App. 2d 334, 231 N.E.2d 628 (1967).

[43] 33 Ill. 2d 425, 211 N.E.2d 690 (1965). In *Haymes*, the question was presented whether the six-month notice requirement of the School Tort Liability Act was binding upon minor plaintiffs. In holding that it was not, the court stated:

> Moreover we agree with the appellate court in that the language of section 3 is virtually identical with the notice-of-claim provision of the Cities and Villages Act (Ill. Rev. Stat. 1961, chap. 24, par. 1-4-2), which statute, with only minor changes, is the same today as at the time of enactment in 1905. In 1918, this court in *McDonald v. City of Spring Valley*, 285 Ill. 52, held the notice provision of the Cities and Villages Act not applicable to minors, and this case has been followed without exception . . . . It is apparent to us that the legislature in enacting section 3 of the School Tort Liability Act was aware of our holding in *McDonald*, and therefore must have intended that section not to be applicable to minor claimants. If notice were to be required of a minor who cannot make a legally binding appointment of an agent or attorney, the legislature could have provided for notice by a next friend or legal guardian, but it has not seen fit so to provide.

Id. at 428, 211 N.E.2d at 692.

[44] 89 Ill. App. 2d 334, 337, 231 N.E.2d 628, 630 (1967).

In *Schear v. City of Highland Park*,[45] the notice provision was held not to be applied retroactively to bar causes of action which accrued prior to the enactment of the Tort Immunity Act. Plaintiff on May 5, 1967 filed an action for personal injuries allegedly resulting from the negligence of the defendant city employee when a motor vehicle driven by the employee and owned by the city of Highland Park collided with a vehicle driven by the plaintiff. The injuries occurred on July 1, 1965. On June 16, 1967 an amended complaint was filed making the city of Highland Park an additional defendant. Subsequently, both defendants filed a motion to dismiss the amended complaint setting forth the one-year limitations provision and six-month notice provision of the Tort Immunity Act, as well as certain provisions of the Cities and Villages Act.[46] The circuit court dismissed the complaint as to both defendants.

The appellate court held that the complaint was improperly dismissed as to the defendant employee and reversed the circuit court's finding that the notice provision of the Tort Immunity Act was procedural and entitled to retroactive application.[47] This issue was not raised as to the defendant City of Highland Park since the city was at all times protected by virtue of the notice provisions of either the Cities and Villages Act[48] or section 8-102 of the Tort Immunity Act. The notice provision of the Cities and Villages Act immunized only municipalities and did not apply to suits against employees of municipalities. The court stated:

> At the time of the accident, it was not a prerequisite to a suit against Shelton that any notice be filed. This requirement did not apply to suits against city employees until the new Act became effective on August 13, 1965. We disagree with the lower court that this requirement can be applied retroactively since it is merely "procedural." Failure to comply is a complete bar to the action and we, therefore, regard the requirement as a matter of substance rather than procedure. We think it clear that the retroactive application of the notice requirement would deprive the plaintiff of a cause of action which had accrued prior to the time the requirement first became law.[49]

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[45] 104 Ill. App. 2d 285, 244 N.E.2d 72 (1968).

[46] The portions of the Cities and Villages Act asserted by the defendant were ILL. REV. STAT. ch. 24, §1-4-1, 1-4-2, 1-4-3 (1963). These sections were repealed by section 10-101 of the Tort Immunity Act. ILL. REV. STAT. ch. 85, §10-101 (1969).

Section 1-4-1 provided for a one-year statute of limitations in personal injury actions against municipalities. Section 1-4-2 provided for a six-month notice by persons contemplating suit against any municipality for damages on account of any injury to his person. Under section 1-4-3, if the notice required by section 1-4-2 was not given, the suit would be dismissed with prejudice.

[47] 104 Ill. App. 2d 285, 244 N.E.2d 72 (1968).

[48] ILL. REV. STAT. ch. 24, §§1-4-2, 1-4-3 (1963).

[49] 104 Ill. App. 2d 285, 289, 244 N.E.2d 72, 74 (1968).

The court further reasoned that no clear legislative intention to the contrary was indicated by the language of the Tort Immunity Act.

Fannon v. City of Aurora,[50] in construing the requirement of personal service of notice contained in section 8-102,[51] held that service of notice on the proper authorities by registered mail was not personal service as contemplated by the Act. The court reasoned that section 8-102 does not require the plaintiff himself to personally deliver the notice but that the notice may instead be delivered through an agent. The Act does, however, require a service in person and the Post Office is not a proper agent to make such service. Further, *Sappington v. Sparta Municipal Hospital District*[52] held that the formal notice required by section 8-102 was necessary even though there was evidence that the local public entity had or should have had actual notice through its employees due to the fact that, in the course of the plaintiff's treatment during the first three days after his injury, the basic information required by the notice was conveyed to the attending physician and nurse. The court, rejecting plaintiff's contention that under such circumstances no formal notice was necessary, analyzed the reason for such formal notice:

> The giving of a formal notice permits the defendant time to attempt to settle the case before suit is filed. It also lets them know they are about to be sued so they can prepare their defense. In these days when defendants are often insured, the notice requires the defendant to notify his insurance carrier. None of these things are accomplished without the formal notice. Also, a large organization is departmentalized. The fact that one department has knowledge does not mean that this information is known to another department. In this case, the patient's history taken by a treating doctor or nurse is not likely to be passed on to the hospital's legal counsel. The formal notice required by statute ordinarily would be.[53]

The constitutionality of the notice provision and the one-year statute of limitations has not yet been tested. Constitutional arguments have been made in cases to date, but in none of these cases have the constitutional issues been properly presented on

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[50] 106 Ill. App. 2d 408, 245 N.E.2d 286 (1969).

[51] ILL. REV. STAT. ch. 85, §8-102 (1969):

Within 6 months from the date that the injury or cause of action, . . . was received or accrued, any person who is about to commence any civil action for damages on account of such injury against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused such injury, must *personally serve* in the Office of the Secretary or Clerk, as the case may be, for the entity against whom or against whose employee the action is contemplated a written statement, signed by himself, his agent or attorney . . . . (Emphasis added.)

[52] 106 Ill. App. 2d 255, 245 N.E.2d 262 (1969).

[53] *Id.* at 257, 245 N.E.2d at 263.

appeal.[54] In each case, the constitutional issues were presented for the first time on appeal and, since the arguments were not raised nor preserved in the records of the lower courts, the higher courts were powerless to decide these issues. It is likely that the constitutionality of the notice and limitations provisions will be properly challenged and that the Illinois Supreme Court will eventually pass upon these provisions. This comment will next consider this possible constitutional attack under article IV, section 22 of the Illinois Constitution, as that section has been interpreted by *Harvey* and subsequent decisions.

POSSIBLE GROUNDS FOR CONSTITUTIONAL ATTACK

It is not difficult to imagine that the Illinois Supreme Court will be called upon to test the validity of the Tort Immunity Act under article IV, section 22 of the Illinois Constitution. After all, it was this provision as interpreted in *Harvey* which led the General Assembly to adopt a uniform act with respect to governmental tort immunity. At least on its face, the Tort Immunity Act appears to overcome challenges to its validity under the special legislation provision of the Illinois Constitution. However, a closer look at the application of the Tort Immunity Act when viewed in its proper perspective to other existing grants of governmental immunity raises a serious question as to whether the pitfall of the legislation in *Harvey* has indeed been overcome.

Broadly stated, the rule under article IV, section 22, as interpreted by the Supreme Court, is that plaintiffs whose in-

[54] In Van Meter v. Stout, 45 Ill. 2d 7, 256 N.E.2d 784 (1970), suit was brought seeking damages for wrongful death and personal injuries allegedly due to the negligent operation of a school bus owned by the defendant school district and operated by its employee, defendant Stout. The circuit court, upon motions of both defendants, entered an order dismissing the complaint with prejudice, noting specifically that plaintiff had admitted that the required notice had not been given. Appeal was made directly to the Illinois Supreme Court on the grounds that sections 8-102 and 8-103 of the Tort Immunity Act were invalid as special legislation in violation of article IV, section 22 of the Illinois Constitution and as a denial of equal protection under the Fourteenth Amendment to the United States Constitution. The Supreme Court determined that it lacked jurisdiction to decide the constitutional issues on direct appeal since it did not appear from the record that a fairly debatable constitutional question was urged in the trial court nor that ruling thereon was preserved in the record for review and error assigned upon it.

The constitutionality of the six-month notice provision was again challenged in Smith v. Glowacki, 122 Ill. App. 2d 336, 258 N.E.2d 591 (1970). The appellate court declined decision of the constitutional issues on the ground that they were not presented to the trial court for a ruling. *See also* Huey v. Town of Cicero, 41 Ill. 2d 361, 243 N.E.2d 214 (1968).

Plaintiff in Schear v. Highland Park, 104 Ill. App. 2d 285, 244 N.E.2d 72 (1969), contended upon appeal that the one-year statute of limitations in favor of governmental entities was unconstitutional in view of the fact that the general limitations period for personal injury actions was two years. The Appellate Court held that the constitutional issue was waived since it was not raised in the lower court.

juries are brought about in the same tortious manner, but who are discriminated against through secondary classification of defendants shall not be denied access to the courts, nor denied full remedy, nor be limited in monetary recovery, by any statute that legislates by class.[55] The determinative question under article IV, section 22 is whether the statutory classification is rational.[56] And to be rational, the classification must be one which is defined by function.[57] Furthermore, the classification created by the legislature, even though not arbitrary nor irrational on its face, must not operate to effect a secondary classification among persons who are similarly situated.[58]

The court in *Harvey*, while formulating its guideline that future legislation classify in terms of type of municipal function, reasoned:

> Many of the activities that frequently give rise to tort liability are common to all governmental units. The operation of automobiles is an obvious example. From the perspective of the injured party, or from the point of view of ability to insure against liability for negligent operation, there is no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to recover, and one injured by a school district truck is allowed to recover only within a prescribed limit.[59]

The municipal function which gave rise to the claim for injuries in *Harvey* was the maintenance of playground facilities by the defendant park district. The court was fully cognizant of the fact that other governmental bodies likewise maintained recreational facilities. Among these, the court listed cities and vil-

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[55] *See Expanding Application of the Special Legislation Clause of the Illinois Constitution*, 3 JOHN MAR. J. PRAC. & PRO. 96 (1969). The author reviews the application of article IV, section 22 of the Illinois Constitution in striking at legislation dealing with tort liability. From a review of the recent cases, two tests are derived in evaluating a statute under article IV, section 22. *First*, the court will ask if the classification created by the legislature, even though arbitrary and irrational on its face, operates to effect a secondary classification among persons who are similarly situated. *Second*, the court will look to the statute to see if the class legislated for is one that is defined functionally. *Id.* at 114.

These tests may be applied to any class legislation to determine its constitutionality under article IV, section 22. The second test above was derived from the court's guideline for future legislation in *Harvey*. This test was applied in Hutchings v. Kraject, 34 Ill. 2d 379, 215 N.E.2d 274 (1966), to strike down that portion of the Corporate Name and Powers in General Act, ILL. REV. STAT. ch. 34, §301.1 (1965), which granted immunity to all counties and their agents, servants, officers or employees for injuries caused to others as a result of their negligent acts. The reason assigned in the decision was that the legislature had attempted to classify governmental units, as such, without regard to similarity of function. *Id.* at 379, 215 N.E. 2d at 274.

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

[57] See note 10 *supra*.

[58] Grasse v. Dealer's Transp. Co., 412 Ill. 179, 106 N.E.2d 124 (1952).

[59] 32 Ill. 2d 60, 65, 203 N.E.2d 573, 576 (1964).

lages, school districts, forest preserve districts, and the *state itself*.[60]

Why then, if indeed function is to be an outer boundary for any valid classification under article IV, section 22, should not the state be treated the same as other governmental units? For this to occur, article IV, section 22 must be reconciled with the constitutional provision granting immunity to the state.[61] However, this reconciliation has already been made because, the General Assembly has, for all practical purposes, provided for waiver of this sovereign immunity of the state by granting jurisdiction to the court of claims over:

> All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, . . . provided that an award for damages in a case sounding in tort shall not exceed the sum of $25,000 to or for the benefit of any claimant. The defense that the State . . . is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.[62]

The Tort Immunity Act eliminates from its classification: "[t]he State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State."[63] Immunity of the state derives from the Illinois Constitution and the Court of Claims Act, not the Tort Immunity Act. Although this classification may be rational upon its face, clearly there is no functional distinction between certain activities performed by the state or agencies thereof and by other local governmental units. So it seems that not all governmental units performing the same function are treated uniformly. Therefore, the Tort Immunity Act does not strictly adhere to the guidelines set down in *Harvey*. The Court of Claims Act provides for a two-year statute of limitations for tort actions against the state and designated agencies of the state,[64] as opposed to the general one-year statute of limitations provision of the Tort Immunity Act. In the words of *Harvey*: "In this pattern there is no discernible relationship to the realities of life."[65]

The following fact situation exemplifies the article IV, section 22 argument that would be made. Suppose, as in *Harvey*,

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[60] See text at note 12 *supra*.

[61] ILL. CONST. art. IV, §26. "The State of Illinois shall never be made defendant in any court of law or equity."

[62] ILL. REV. STAT. ch. 37, §439.8 (1969). In addition to the state, this provision also applies to the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, and the Board of Governors of State Colleges and Universities.

[63] ILL. REV. STAT. ch. 85, §1-206 (1969).

[64] ILL. REV. STAT. ch. 37, §439.22 (1969).

[65] Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 67, 203 N.E.2d 573,

plaintiff were injured on a slide negligently maintained by a park district. Plaintiff complies with the notice requirement of section 8-102 by filing a timely notice on the park district. Suit, however, is brought one year and six months after the date the cause of action accrued. Defendant then files a motion to dismiss under section 8-101 for failure to file suit within the prescribed one-year statute of limitations. Plaintiff would argue that section 8-101 violates article IV, section 22 of the Illinois Constitution in that section 8-101 does not apply equally to all governmental units which perform the same function. Since the Illinois Court of Claims Act allows suit to be brought within two years after the accrual of a cause of action against the state for negligent maintenance of state-owned playground facilities, section 8-101 of the Tort Immunity Act does not meet the functional classification test of *Harvey*, but is arbitrary, and unconstitutionally discriminates against the plaintiff.

The Tort Immunity Act further excludes from its application: "[a]ny entity organized under or subject of the Metropolitan Transit Authority Act."[66] The Metropolitan Transit Authority Act[67] contains a one-year statute of limitations provision and six-month notice provision, somewhat similar to those contained in the Tort Immunity Act.[68] However, the six-month notice provision of the Metropolitan Transit Authority Act does not apply to suits brought against employees of the Authority, but only applies to suits brought directly against the Authority. Therefore, while employees of all local public entities except employees of the Metropolitan Transit Authority are protected by a six-month notice provision, employees of the Metropolitan Transit Authority do not enjoy the same degree of immunity. As a result, employees of different municipal corporations which conceivably could perform similar functions are not afforded the same degree of immunity in all cases. Furthermore, the Metropolitan Transit Authority Act applies *only* procedural limitations to suits for personal injuries brought against the Authority, whereas the Tort Immunity Act provides blanket shields of immunity for specific tort actions against other local public entities or their employees, in addition to procedural limitations.[69] Again, the Tort Immunity Act has failed to afford the same treatment to all governmental units which perform the same function.

577 (1964).

[66] ILL. REV. STAT. ch. 85, §2-101 (1969).

[67] ILL. REV. STAT. ch. 111-⅔, §301 *et seq.* (1969).

[68] ILL. REV. STAT. ch 111-⅔, §341 (1969).

[69] *See generally* Kionka, *Tort Liability of Local Governments and Their Employees in Illinois*, 58 ILL. B.J. 620 (1970). *See also* Latturner, *Local Governmental Tort Immunity and Liability in Illinois*, 55 ILL. B.J. 23 (1966).

CONCLUSION

It is doubtful that the Tort Immunity Act statute of limitations and notice of injuries provisions will survive constitutional attack under article IV, section 22 of the Illinois Constitution. The shortcoming of the Tort Immunity Act is that, although the classifications proposed by the Act are rational on their face, the Tort Immunity Act, when considered in conjunction with other legislation still in effect in Illinois, does not completely meet the functional test proposed by *Harvey*. The requirement of *Harvey* is that in order for classification to be rational under article IV, section 22, the classification should be defined functionally. This requires that all governmental units performing the same functions should be afforded the same degree of tort immunity. As has been seen, the state and the Metropolitan Transit Authority are both excluded from the workings of the Tort Immunity Act. The immunity from torts afforded these entities is not the same as the immunity afforded local public entities under the Tort Immunity Act, yet functionally certain activities of the state and the Metropolitan Transit Authority are the same as entities under the Tort Immunity Act. To this extent, *Harvey* has not been satisfied.

Presumably, the entire Act will not fall by virtue of these discrepancies in functional classification, for the Tort Immunity Act clearly provides for severability in the event that any provision or clause of the Act or the application to any person or circumstance is held invalid.[70] However, subsequent judicial decisions may severely infringe upon the contemplated scope of the Act.

Several possibilities exist to salvage the limitations and notice provisions of the Tort Immunity Act. The most obvious would be to expand the scope of the Act to include all units of government which perform similar functions and not to limit the scope of the Act to certain governmental entities which perform similar functions. This would mean that the Act would encompass the state as well as agencies of the state and would of necessity include the Metropolitan Transit Authority. Another reasonable alternative which appears to be left open is amendment of the Illinois Court of Claims Act and the Metropolitan Transit Authority Act. Short of these, unless some other means is conceived through the current legislative scheme, the notice and limitations provisions of the Tort Immunity Act are in jeopardy of being stricken under the reasoning of *Harvey*.

Lyman C. Tieman

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[70] ILL. REV. STAT. ch. 85, §1-102 (1969).