

Municipal Tort Law 101: Liabilities, Defenses, Indemnification

Dan Lloyd
City of Vancouver



Robin Aronson
Washington Cities
Insurance Authority



OVERVIEW

- Insurance v. Risk Pool
- Abrogation of Sovereign Immunity/
Tort Claims Procedure
- Understanding Duty / Public Duty Doctrine
- Typical Areas of Municipal Liability
- Liability Allocation



Limiting Exposure

Insurance and Risk Pool Coverage

Incidents, Claims, and Lawsuits

(Trouble is brewing for my municipal client....now what?)

- Risk Pools
- Self Insurance/Insurance Company

RCW [48.62.031](#) (*Provides in part*):

Authority to self-insure—Options—Risk manager.

(1) The governing body of a local government entity may individually self-insure, may join or form a self-insurance program together with other entities, including the board of pilotage commissioners, and may jointly purchase insurance or reinsurance with those other entities for property and liability risks,

[[2019 c 26 § 3](#); [2015 c 109 § 3](#); [2005 c 147 § 1](#); [1991 sp.s. c 30 § 3](#).]

Risk Pools

- Formed out of crisis during a “hard” insurance market in the 1980’s.
- Originally thought to be a temporary fix when insurance companies were not interested in providing insurance for municipalities with their unique risks and losses
- Mission is rate stability; not for profit
- Over 80% of municipalities in Washington are part of a risk pool
- Hard insurance market the past few years and likely to continue



Insurance Coverage v. Risk Pool Coverage

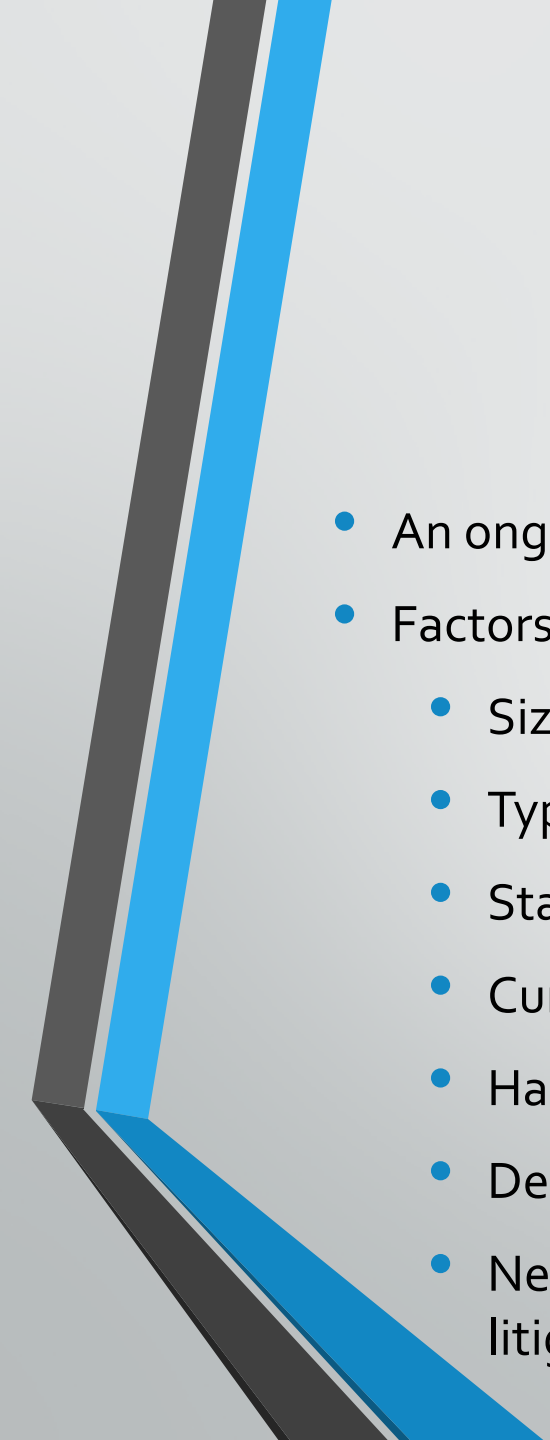
(Two different approaches)

Insurance Coverage

- WA State Insurance Commissioner regulates insurance companies (RCW Title 48.02 et al.)
- Insurance companies are for profit entities
- Municipality will self insure using a deductible/self insured retention and then buy an insurance policy through a broker for additional limits
- Claims may be handled internally or through a TPA
- Municipality /agency attorneys file Notice of Appearance and handle all aspects of litigation, or contract with outside law firms to defend claims and lawsuits; may or may not be replaced by outside counsel depending upon insurance policy requirement if insurance is triggered
- No additional services from the insurance carrier such as risk management advice or pre litigation assistance
- Self insured municipality makes decisions on claims/lawsuits until insurance is triggered and then insurance company is involved in decisions including settlement, trial strategy etc.

Risk Pool Coverage

- WA State Risk Manager regulates Risk Pools (RCW 48.62 et al.)
- Risk Pools are not for profit entities
- Risk Pool writes its own coverage document and then purchases reinsurance through a broker. Risk Pool Members have input on the coverage document.
- Claims may be handled directly by Risk Pool staff or through a TPA
- Municipal attorney will often file Notice of Appearance until outside attorneys are engaged to defend claims and lawsuits and substitute as counsel
- Risk Pool may offer additional services such as risk management, training, pre defense assistance
- Risk Pool Members have direct input on all aspects of the Pool including rate setting, underwriting, and contents of coverage document. More nimble when responding to members' needs; mission is to prevent risk/loss exposures.



Self Insurance v. Risk Pool

So.... What's Right for my Municipal Client?

- An ongoing debate; no right or wrong answer
- Factors to consider:
 - Size of municipality
 - Types of risks/loss history
 - Staffing to process claims and manage litigation
 - Current rates (\$\$) and ability to withstand rate fluctuations
 - Hard or soft insurance market
 - Desire for control over claims and litigation
 - Need and desire for additional services such as risk management, training, pre litigation assistance

Abrogation of Sovereign Immunity

- Sovereign cannot be sued absent consent
- Const., art. II, § 26: Legislature determines “in what manner, and in what courts, suits may be brought against the State”
- RCW 4.96.010 (1967): “local government[s] ... liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation.”



Immunities that Remain

- Legislative
 - *Miller v. Pacific County*, 91 Wn.2d 744 (1979)
- Discretionary (4-part test)
 - *Evangelical United Brethren Church v. State*, 67 Wn.2d 246 (1965)



Tort Claims Process

- Tort claim “shall be a condition precedent” to filing suit. RCW 4.96.010(1)
- Applies only to state law *tort* claims
- Federal claims (*e.g.* § 1983) are exempt (Supremacy Clause)
Felder v. Casey, 487 U.S. 131 (1988)
- Non-tort claims excluded (*e.g.* breach of contract)

Tort Claim Process

RCW 4.96.020(2)

- Must designate agent to receive claims
- Record with county auditor:
 - Identity
 - Address during business hours
- Claims may be delivered in person or mail (receipt determines date of filing)
- State form or local government form



Tort Claim Nuances

- Failure of claimant to substantially comply = dismissal
 - *Lee v. Metro Parks Tacoma*, 183 Wn. App. 961 (2014) (lawsuit 2 weeks after tort claim)
- Statute of limitations tolled 65 days from filing
 - *Rumburg v. Ferry County PUD #1*, 1 Wn. App. 2d 333 (2017) (5-day grace period after 60 days)
- If missing element can be easily ascertained, not a basis for dismissal
 - *Renner v. City of Marysville*, 168 Wn.2d 540 (2010) (description of economic damages by city employee suing for wrongful termination sufficient for “statement of damages”)
- Statute applies to lawsuits against public employees acting in scope of employment
 - *Hanson v. Carmona*, 1 Wn.3d 362 (2023) (dismissal of suit against govt employee in individual capacity)

Elements of Negligence

Duty

Breach

Causation

Damages

Duty vs. Breach



DUTY

QUESTION OF LAW
(COURT)



BREACH

QUESTION OF FACT
(JURY)

Public Duty Doctrine

- Not sovereign immunity
 - Immunity: recognizes existence of duty, but denies liability for breach
 - PDD: no duty at the outset
- Doctrine applies only when duty arises from statute/ordinance
- Plaintiff must be within class of persons protected
 - “Focusing tool”

Typical Areas of Tort Theories Asserted

- Sidewalks/Streets: “reasonably safe for ordinary travel”
- Law Enforcement:
 - Misfeasance v. Nonfeasance
 - Negligent investigation (?) – only in child abuse cases
 - Intentional torts (assault/battery/false arrest/false imprisonment)
- Premises liability: invitee v. licensee v. trespasser
 - Recreational immunity – RCW 4.24.210
- Civil Rights – 42 U.S.C. § 1983 (federal constitutional law)

42 U.S.C. § 1983

- **Federal** constitutional deprivation
- **Monell**: “*respondeat superior*” does not exist
 - Official policy
 - Custom/practice
 - Final policymaker
- **Qualified immunity**: constitutional right must be defined on a particularized level before individual liability attaches (inapplicable to *Monell*)
- Damages / Attorneys’ fees (42 U.S.C. § 1988)

A close-up photograph of a computer keyboard, showing keys with numbers 0-9, symbols like @, #, \$, %, ^, &, *, and =. A thick blue diagonal line runs from the top right towards the bottom left, passing over the keyboard. The background is a dark wooden surface.

Liability Allocation

RCW 4.22.070(1)



Terminology Refresher: *Who Pays??*

- **Joint liability**: liable for entirety of damages
- **Several liability**: only liable for damages specifically caused
- **Joint & several liability**: plaintiff can recover any part or all of judgment from **any** at fault defendant
- **Contribution**: defendant seeks reimbursement from other at fault entity

RCW 4.22.070(1)

- Allocation must = 100% of all at fault entities
- Pure comparative fault (99% v. 1%)
- Presumption of **several** liability
- **Joint & several**: only when (a) more than one defendant is “at fault”, and (b) plaintiff is not at fault
- **Empty chair**: plaintiff’s recovery reduced by fault of non-party
- Intentional tortfeasors (*Tegman*)
- Federal claims (§ 1983) unaffected



Questions/Comments?

Dan Lloyd

360.487.8520

Dan.Lloyd@cityofvancouver.us

Robin Aronson

206.687.7900

robina@wciapool.org