SUMMARY

More than 60 years ago, the Wisconsin Supreme Court issued an opinion that seemed poised to transform the law of governmental immunity. In *Holytz v. City of Milwaukee*, the court abrogated governmental immunity for governmental bodies, and the Wisconsin Legislature later codified this result, and the significant exceptions, in the Wisconsin Statutes.

But *Holytz* and Wis. Stat. section 893.80(4) have been inconsistently applied ever since. The supreme court has provided little guidance as to what constitutes a quasi-legislative or quasi-judicial function, has not set out any clear rule for making such determination, and has been inconsistent in applying the rules that it has tried to establish.

This article discusses a few of the most significant Wisconsin cases in which the supreme court has grappled with the liability or immunity rule, distinctions between governmental entities and governmental employees, and discretionary versus ministerial duties.

BY JOHN A. BECKER

Figuring Out Governmental Immunity

Before arguing about the facts, lawyers representing plaintiffs and defendants in suits against governmental entities or employees must understand the sometimes murky laws regarding governmental immunity and liability.

Before 1962, the doctrine of governmental immunity provided a governmental entity and its employees immunity from liability for damages caused by an employee's negligence. "When such officers are discharging a governmental duty, or exercising the police power, or acting in a matter committed to their discretion, the municipality is not liable."[1] Governmental immunity was a judicially created exception to tort liability.[2]

In *Holytz v. City of Milwaukee*,[3] the Wisconsin Supreme Court abrogated governmental immunity for governmental bodies. The court stated that a municipal entity is liable for the negligence of its employees under the doctrine of *respondeat superior*. There remained an exception if the employee was engaged in a legislative, quasi-legislative, judicial, or quasi-judicial function.

The rule from *Holytz* is now codified in Wis. Stat. section 893.80(4):

"No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."[4]

This statute was adopted "as direct aftermath of this court's decision in *Holytz v. City of Milwaukee* wherein the prior rule of governmental immunity for torts was abrogated."[5]

A problem is that *Holytz* and Wis. Stat. section 893.80(4) have been inconsistently applied ever since. The supreme court has provided little guidance as to what constitutes a quasi-legislative or quasi-judicial function, has not set out any clear rule for making such determination, and has been inconsistent in applying the rules that it has tried to establish. Cases since that time have resulted in what the court has described as "jurisprudential chaos."[6]

Discretionary Versus Ministerial Duties

Before *Holytz*, immunity applied if an employee was negligent when performing a discretionary function, but there was an exception that an officer would be liable for damages resulting from the negligent performance of a purely ministerial duty.[7] A duty is ministerial "when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."[8]

Holytz abolished governmental immunity for governmental bodies. Because the city of Milwaukee was the only defendant in *Holytz*, the court did not address whether discretionary immunity still applied for personal claims against governmental employees. "By reason of the rule of respondeat superior a *public body* shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body."[9] With respect to the state, however, the *Holytz* decision "has no effect upon the state's sovereign right under the Constitution to be sued only upon its consent."[10]

Jurisprudential Chaos

In *Holytz*,the supreme court stated, possibly too optimistically, that "perhaps clarity will be afforded by our expression that henceforward,

so far as governmental responsibility for torts is concerned, the rule is liability – the exception is immunity."[11] Unfortunately, clarity has not followed.

Statements from the supreme court and the court of appeals include the following:

"Wisconsin law has become unintelligible in explaining what rights and remedies are available to persons who have been injured by state or local government."[12]

"The determination that an act is discretionary so as to invoke immunity has appeared almost random at times."[13]

"So far as government responsibility for torts is concerned, immunity has become the rule and liability has become the rare exception. Justice has been confined to a crawl space too narrow for most tort victims to fit."[14]

"[T]his court has had many opportunities to apply Wis. Stat. § 893.80(4), and we have struggled to define the proper scope of governmental immunity. One need only review a handful of this court's recent decisions on the limits of governmental immunity to appreciate the jurisprudential chaos surrounding the phrase 'legislative, quasi-legislative, judicial or quasi-judicial functions.'"[15]

Despite the confusing application of the discretionary and ministerial and quasi-legislative and quasi-judicial distinctions, there is a relatively clear rule that can be drawn from four cases.

Key Cases in Development of Liability or Immunity Rule

In *Lister v. Board of Regents*,[16] students at the University of Wisconsin-Madison claimed they qualified for resident status and thus in-state tuition. The claim was against the state (the Board of Regents) and personally against the registrar of the University of Wisconsin. The state could not be liable because it has sovereign immunity.[17] The supreme court said that the registrar-employee had immunity if his negligence was the result of performing a discretionary duty.

"[T]he most generally favored principle is that *public officers* are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions. Otherwise stated, there is no substantive liability for damages resulting from mistakes in judgment where the officer is specifically empowered to exercise such judgment."[18]

The court said that a duty is ministerial, not discretionary, "only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion."[19]

In a later case, Justice Crooks noted that such a definition makes almost any act discretionary.

"Our ministerial duty analysis at times turns into a search to find any discretion that could have been exercised, and then declaring immunity is required. Ruling out liability wherever any discretion is exercised essentially creates immunity for almost all actions. As an influential treatise noted:

'Stating the reasons for the discretionary-ministerial distinction is much easier than stating the rule.... [T]he difference between "discretionary" and "ministerial" is artificial. An act is said to be discretionary when the officer must exercise some judgment in determining whether and how to perform an act. The problem is that "[i]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."'"[20]

About one year after *Lister*, in *Cords v. Anderson*,[21] the supreme court began to refine what constitutes a ministerial duty. The *Cords* plaintiffs were hiking in a state park and sustained serious injuries after falling at an area of the trail that was narrow and had a dangerous drop-off. Because the state could not be sued, the plaintiffs had to establish the park manager was negligent for failing to perform a ministerial duty. The plaintiffs sued the park manager for negligence for failing to do anything to protect visitors from a dangerous condition.

The court held that, under the circumstances of the case, there was a known and compelling danger such that a ministerial duty arose to do something. The duty was clear and was so "absolute, certain and imperative" that it fit within the definition of a ministerial duty.[22] The defendant might have had some discretion in choosing what type of safety measures could be taken, but doing nothing was not an option. (In a later case, *Bostco LLC v. Milwaukee Metropolitan Sewerage District*, the supreme court stated, "'discretion' in selecting the particular method by which to abate a nuisance *does not eliminate the duty to abate, or make that duty, itself, discretionary*."[23])

It should be kept in mind that *Cords* and *Lister* involved claims against state employees.[24] The specific language in *Holytz* was that a public body was liable for the torts of a governmental employee; *Holytz* did not address whether an employee was personally entitled to immunity when performing a discretionary act. The court later applied that distinction.

Maynard v. City of Madison[25] involved two police officers who released reports that identified a paid police informant. The informant sued the officers and the city of Madison, and the jury awarded damages against both of the officers and the city. The court of appeals stated that the decision whether to delete

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information from or to withhold or release a report was a judgment that allowed discretion of the person making the decision, and so the officers were entitled to immunity.

But the court of appeals upheld the judgment against the city. The court held that the city was liable under the doctrine of *respondeat superior*. "An agent's immunity from tort liability does not flow to the agent's principal.... The rule applies to municipalities claiming the benefit of the immunity of a municipal employee."[26]

The closest the supreme court has come to explaining any governmental-immunity rule was in *Bostco LLC v. Milwaukee Metropolitan Sewerage District*.[27] Although a nuisance case, not a negligence case, the court stated that the rule for governmental entities is different than the rule for governmental employees. "In contrast to governmental *entities*, for *governmental officers* acting in their official capacity, we have stated that the rule is immunity, and the exception is liability."[28]

Distinction Between Governmental Entities and Governmental Employees

The rules that can be extrapolated from these cases would seem to be relatively clear: A governmental employee has immunity for negligence when performing any discretionary act, and a governmental entity has immunity only when the employee is performing a discretionary duty that is legislative, judicial, quasi-legislative, or quasi-judicial.

In *Bostco*, the court explicitly said that different rules apply for an employee than for the governmental entity.

In *Maynard*, the court recognized that distinction and differentiated between the rules. *Maynard* held that employees performing a discretionary act were entitled to immunity, but the employee's immunity did not flow to the city. This result is consistent with *Holytz*, *Lister*, and *Bostco*.

But other than in *Maynard*, a Wisconsin court has never drawn that distinction, and other than in *Bostco*, a Wisconsin court has never clearly explained that distinction. Nor has a Wisconsin court applied such distinction with any consistency.

Application of Liability-Immunity Rule

The *Holytz* holding that liability is the rule and immunity is the exception has been cited by Wisconsin courts too many times to list here. The problem is that when determining whether a governmental entity is liable, the courts often have looked at whether the act of the employee was a discretionary function, rather than whether the act was a legislative, quasi-legislative, judicial, or quasi-judicial function.

Two somewhat recent cases demonstrate how the supreme court has considered the conduct of the employee and then applied the same rule to both the employee and the governmental body.

In *Pinter v. Village of Stetsonville*[29] and *Engelhardt v. City of New Berlin*,[30] the lawsuits were filed against the

municipalities. In both cases, the court discussed whether the negligence of the employee was ministerial or discretionary. In *Pinter*, after finding that the actions of the employees were discretionary, the court held that the village was entitled to immunity. In *Engelhardt*, the court determined that the actions of the employees were ministerial and then did not apply immunity to the city of New Berlin.

The confusion in this area – the court's failure to distinguish between an act that is merely discretionary and one that is quasi-legislative or quasi-judicial – comes from the supreme court's statement that "[u]nder Wis. Stat. § 893.80(4), a municipality is immune from 'any suit' for 'acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.' These functions are synonymous with discretionary acts."[31]

This statement originated in *Lifer v. Raymond*, which involved the issuance of a driver's license by a state officer. The state was immune because of sovereign immunity, so the plaintiff had to show the defendant violated a ministerial duty. The court stated:

"A quasi-legislative act involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed. A quasi-judicial act involves the exercise of discretion and judgment in the application of a rule to specific facts. Acts that are 'legislative, quasi-legislative, judicial or quasi-judicial functions,' are, by definition, non-ministerial acts. *As applied*, the terms 'quasi-judicial or quasi-legislative' and 'discretionary' are synonymous and the two tests result in the same finding."[32]

In *Lifer*, the discretionary decision of the driver's license examiner was quasi-judicial. Judges often make decisions on a person's eligibility for a license and whether a license can be suspended, revoked, or reinstated. In *Lifer*, the court did not say that discretionary functions are necessarily quasi-legislative or quasi-judicial. It said that quasi-legislative or quasi-judicial functions are necessarily discretionary. Because in *Lifer* the function was quasi-judicial, the terms, as applied, might be considered synonymous.

The statement in *Lifer* that quasi-legislative and quasi-judicial functions

are synonymous with discretionary acts has caused many of the problems and is wrong. Quasi-legislative or quasi-judicial functions are discretionary, but not all discretionary functions are quasi-legislative or quasi-judicial. Quasi-legislative and quasi-judicial functions are a subset of all discretionary functions, but there are many discretionary functions that are not quasi-legislative or quasi-judicial. For example, how to put together a chair might require discretion, but assembling a chair is neither quasi-legislative nor quasi-judicial.[33]

In many cases, courts have considered whether the function of the employee was discretionary or ministerial and then imputed that conduct to determine liability for the entity.[34] In these cases, when the entity was subject to liability, it was because the court determined that there was a ministerial duty to act. In cases in which immunity was found, even for the entity, it was not because the function was quasi-legislative or quasi-judicial but merely because the function was discretionary.

Conclusion

If any discretionary act relieves both the entity and the employee from liability, such result would interpret the statute more strictly than it is written, and, in essence, overrule both *Holytz* and the statute. The law would be the same as it was before 1962. If the statute and *Holytz* are to mean anything, a governmental entity would have liability if an employee is negligent, unless the employee is performing a legislative, quasi-legislative, judicial, or quasi-judicial function (not merely a discretionary function).

Although the cases seem to say that the rules are different for employees, the statute seems to apply the same rules to employees as to governmental entities. The Wisconsin Supreme Court could provide clarification by deciding whether the Wisconsin Legislature, via the statute, intended for the same rules to apply to an employee. Or the court could hold that the common-law rule with respect to an employee was never abrogated by *Holytz* and that the greater protections under the common law for discretionary acts still apply for an employee, even though, as in *Maynard*, that protection does not extend to municipal employers. **WL**

ENDNOTES

[1]*See Lindemann v. City of Kenosha*, 206 Wis. 364, 370, 240 N.W. 373 (1932) (quoting *Clinard v. City of Winston-Salem*, 91 S.E. 1039, 1040 (N.C. 1917)).

[2]*Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 39, 115 N.W.2d 618 (1962).

[3]*Id.*

[4]Wis. Stat. § 893.80(4).

[5]*Pattermann v. City of Whitewater*, 32 Wis. 2d 350, 355, 145 N.W.2d 705 (1966).

[6]*Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 58, 262 Wis. 2d 127, 663 N.W.2d 715 (Abrahamson, C.J., concurring); *see also Legue v. City of Racine*, 2014 WI 92, 357 Wis. 2d 250, 849 N.W.2d 837; *Engelhardt v. City of New Berlin*, 2019 WI 2, 385 Wis. 2d 86, 921 N.W.2d 714.

[7]*Lister v. Board of Regents*, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610 (1976).

[8]*Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955); *see also Lister*, 72 Wis. 2d at 301.

[9]*Holytz*, 17 Wis. 2d at 40 (emphasis added).

[10]*Id.* at 41.

[11]*Id.* at 39.

[12]*Willow Creek Ranch L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 59, 235 Wis. 2d 409, 611 N.W.2d 693 (Prosser, J., dissenting).

[13]*Pinter v. Village of Stetsonville*, 2019 WI 74, ¶ 75, 387 Wis. 2d 475, 929 N.W.2d 547 (Dallet, Kelly & R. Bradley, JJ., dissenting). The dissent in *Pinter* cited *Lodl v. Progressive Northern Insurance Co.*, 2002 WI 71, ¶ 31, 253 Wis. 2d 323, 646 N. W. 2d 314; *Scott v. Savers Property & Casualty Insurance Co.*, 2003 WI 60, ¶ 29, 262 Wis. 2d 127; and *Brown v. Acuity*, 2013 WI 60, ¶ 59, 348 Wis. 2d 603, 833 N.W.2d 96.

[14]*Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 78, 769 N.W.2d 1, 319 Wis. 2d 622 (Prosser & Crooks, JJ., concurring).

[15]*Scott*, 2003 WI 60, ¶ 58, 262 Wis. 2d 127 (Abrahamson, C.J., concurring).

[16]*Lister*, 72 Wis. 2d 282.

[17]Governmental immunity as discussed in this article refers to other governmental entities.

[18]*Lister*, 72 Wis. 2d at 301-02 (emphasis added).

[19]*Id.* at 301.

[20]*Showers Appraisals LLC v. Musson Bros. Inc.*, 2013 WI 79, ¶ 68, 350 Wis. 2d 509, 835 N.W.2d 226 (Crooks, J., concurring) (citing McQuillin, *Municipal Corporations* § 53.04.10 (3d ed.) (quoted in *Willow Creek Ranch L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 136, 235 Wis. 2d 409, 611 N.W.2d 693 (Prosser, J., dissenting)).

[21]*Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977).

[22]*Id.* at 541-42.

[23]*Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 33, 350 Wis. 2d 554, 835 N.W.2d 160.

[24]The state has sovereign immunity, so for the plaintiffs to recover, they had to establish personal liability of the employee.

[25]*Maynard v. City of Madison*, 101 Wis. 2d 273, 304 N.W.2d 163 (Ct. App. 1981).

[26]*Id.* at 283.

[27]*Bostco LLC*, 2013 WI 78, 350 Wis. 2d 554.

[28]*Id.* ¶ 50 n.28.

[29]*Pinter*, 2019 WI 74, 387 Wis. 2d 475.

[30]*Engelhardt*, 2019 WI 2, 385 Wis. 2d 86.

[31]*Willow Creek Ranch*, 2000 WI 56, ¶ 25, 235 Wis. 2d 409 (citing *Lifer v. Raymond*, 80 Wis. 2d 503, 512, 259 N.W.2d 537 (1977)).

[32]*Lifer*, 80 Wis. 2d at 511-12 (emphasis added).

[33]*See Meyers v. Schultz*, 2004 WI App 234, 297 Wis. 2d 389, 724 N.W.2d 420.

[34]*Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, 596 N.W.2d 417 (1999); *Rolland v. County of Milwaukee*, 2001 WI App 53, 241 Wis. 2d 215, 625 N.W.2d 590; *Scott*, 2003 WI 60, 262 Wis. 2d 127; *Voss v. Elkhorn Area Sch. Dist.,* 2006 WI App 234, 297 Wis. 2d 389, 724 N.W.2d 420; *Heuser v. Community Ins. Corp.*, 2009 WI App 151, 321 Wis. 2d 729, 774 N.W.2d 653; *Noffke v. Bakke*, 2009 WI 10, 315 Wis. 2d 350, 760 N.W.2d 156; *Brown*, 2013 WI 60, 348 Wis. 2d 603; *Legue*, 2014 WI 92, 357 Wis. 2d 250; *Oden v. City of Milwaukee,* 2015 WI App 29, 361 Wis. 2d 708, 863 N.W.2d 619; *Mellenthin v. Berger*, 2003 WI App 126, 265 Wis. 2d 575, 866 N.W.2d 120. These are not all of the governmental immunity cases brought in Wisconsin; they are examples of the cases in which the Wisconsin Supreme Court or Court of Appeals looked at whether the action of the employee was ministerial or discretionary and then applied that determination to determine whether the municipal entity had immunity.

A more detailed discussion of all of the governmental immunity cases is in John A. Becker, *Recreational and Governmental Immunity in Wisconsin* (Nevin Publishing, 2022). **WL**