

Municipal Liability & the Colorado Governmental Immunity Act

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EMPOWERED CITIES & TOWNS, UNITED FOR A STRONG COLORADO



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Session Purpose

- Public entity immunity protections
- Primary focus on the CGIA
- Actionable practice pointers



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Why Governmental Immunity Matters

- Affects whether a claim can proceed *at all*
- Public entities rely on counsel to spot/advise on immunity issues
- Early immunity mistakes → exposure

Why Governmental Immunity Exists

- Policy choice
 - Not about avoiding accountability
 - About protecting public's ability to govern itself effectively
- Governmental immunity:
 - Promotes effective public entity operations for public benefit
 - Allows critical/essential public services/functions without excessive litigation threat/unlimited liability
 - Protects public funds/taxpayer resources from depletion by lawsuits

Foundation of the CGIA

- Abrogates common law sovereign immunity (1972)
- Key principle: Public entities/employees immune from state tort claims unless immunity expressly waived
- N/A to contract or federal claims
- Federal qualified immunity for § 1983 (civil rights) claims—“clearly established law” standard.
- Some common-law immunities remain.

Remaining Common-Law Immunities

Although the CGIA broadly governs tort claims, certain common-law immunities remain relevant*:



Legislative



Quasi-Judicial



Discretionary functions



Prosecutorial



Judicial



Core Features of the CGIA

- Immunity = rule; waiver = exception
- Claims that “lie in tort or could lie in tort”—substance over style
- Notice within 182 days (contents requirements)
- CGIA notice-waiting period (up to 90 days)
- Monetary damage caps
- Defense/indemnification for employees/officials

Special CGIA Provisions

- Honorable mentions:
 - Independent contractors not “public employees” – no immunity. § 24-10-103(4)(a).
 - No duty of care for failure to enforce health/safety regulation. § 24-10-106.5.
 - Strict liability laws N/A to public entities – dangerous condition or operation/maintenance of public water or sanitation facility. § 24-10-106(4).

Statutory Waivers - § 24-10-106

- Main categories:
 - Operation of PE-owned/leased motor vehicle by public employee*
 - Operation of public hospital, correctional facility, or jail
 - Dangerous condition of public building
 - Dangerous condition of public highway, road, streets, sidewalks w/in corporate limits
 - Dangerous condition of public hospital, jail, public facility in park or recreation area
 - Dangerous condition of public water, gas, sanitation, electrical, power, or swimming facility
 - Operation/maintenance of public water, gas, sanitation, electrical, power, or swimming facility

Key Definitions

- Key definitions:
 - Dangerous condition
 - Maintenance
 - Operation
 - Public employee
 - Public entity
 - Public sanitation facility
 - Public water facility
- Some key terms undefined



Key Nuances - Example

Dangerous condition must be:

- Physical condition of public facility/use
- Unreasonable risk* to public health/safety
- Known or should have been known to exist
- Proximately caused by negligence in construction/maintenance





Key Nuances - Example

Dangerous condition does not exist:

- Solely due to design deficiencies
- Due to mere existence of weather conditions*

CGIA Waivers – Voluntary & Other Statutes

- Voluntary waivers: Public entities can waive immunity by resolution. § 24-10-104.
- Other statutes: May include waivers of CGIA immunity and damages caps or create new causes of action not subject to the CGIA.*

Jurisdictional

- CGIA immunity is jurisdictional
- Complete jurisdictional bar → dismissal of claim
- Courts may consider evidence beyond the pleadings



Standards, Burdens & Procedures

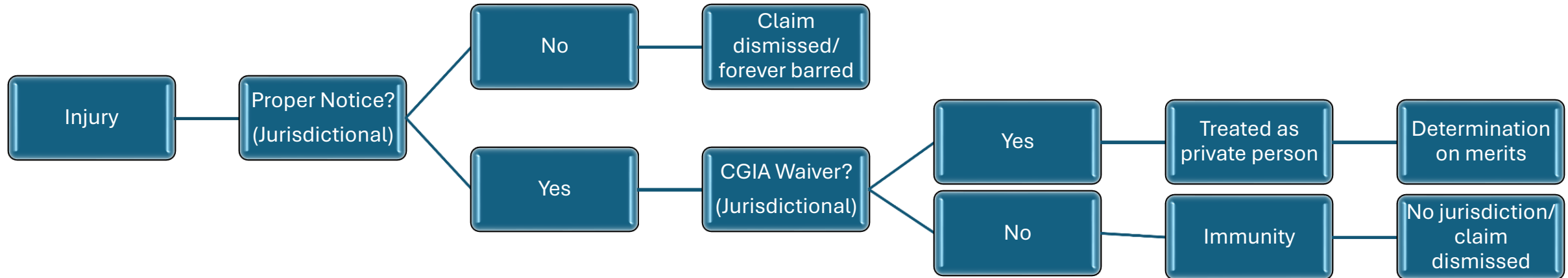
- Must affirmatively assert CGIA immunity – how?
- Once immunity asserted, plaintiff bears burden of proving waiver – preponderance of the evidence
 - When disputed jurisdictional facts “inextricably intertwined with the merits” – likelihood standard
- Material facts disputed, court may hold an evidentiary (*Trinity*) hearing on the immunity issue before allowing the case to proceed on its merits

Waiver Determined – Now What?

- Not the end of the show!
- Case proceeds on merits
- Public entity treated like private defendant
- Common tort defenses available
- Recreational lands example



CGIA Flowchart



Defense & Indemnification

- General rule: Public entities must defend and indemnify public employees acting w/in course/scope *unless* conduct is willful & wanton
- Exceptions:
 - No obligation to indemnify if (1) CGIA bars action against *public entity** or (2) claim settled w/o public entity consent
 - No obligation to defend or indemnify if public entity isn't made party to suit and doesn't receive written notice of claim w/in 15 days of action
 - Public entities may seek reimbursement of defense costs/attorney fees if court determines act/omission not w/in course/scope, willful & wanton conduct, or claim settled w/o consent



Willful & Wanton Conduct

- Willful and wanton conduct requires “conscious disregard”:
 - Actor consciously aware that actions pose danger/risk to safety of others
 - Despite awareness, acts w/o regard to that danger/risk
- Not mere negligence
- *Almost* an intentional tort

Damages Under the CGIA

- Waiver determined → lose on merits → award?
- Damages caps
 - Set maximum recovery for “single occurrence” (adjusted periodically)
 - Not increased in suits brought against both public entity and employee
- No punitive or exemplary damage awards against entity or employee (unless W&W)
- Public entities not required to indemnify* employees for punitive/exemplary awards (W&W conduct)

Advising Your Client Post-Incident

- Consider appropriateness of internal investigation
- Preserve evidence—documents, photos, video, witness statements
- Consider subsequent remedial measures to limit further exposure
- Advise on any related employment issues (e.g., disciplinary/corrective action)
- Protect attorney-client privilege
- Identify potential immunity issues early
- Review notice for conformance to CGIA requirements—send to insurer
- Inform elected/appointed officials about notice and contents
- Advise elected/appointed officials and staff not to make public comments*
- Coordinate with insurer to protect coverage/consider potential remedies

Involve Your Municipal Client's Insurer

- Liability coverage may depend on timely reporting and cooperation*
 - Early notice to your municipal client's insurer is critical
 - Insurance policies typically require insurer involvement and consent to settle, and often an insurer-appointed attorney*
- Insurer can support incident investigation, defense strategy, and potential settlement efforts

Appeals of Immunity Decisions

- Appellate courts:
 - Defer to trial court's factual findings unless they are *clearly erroneous*
 - Review trial court's (legal) conclusion regarding CGIA immunity *de novo*
- Timing of appeal – interlocutory or final judgment

Thank you!

Questions?



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