Legal Matters®

Consumer Safety
fall 2017

'Governmental immunity' doesn't always shield cities, states and towns from responsibility for harm

"Governmental immunity" is a concept that often protects states, cities and towns from being held accountable when someone is injured as a result of careless decision-making. In some cases, it means the amount you can receive as compensation is capped at a modest level. In other cases, it means you can't sue at all.

When and how governmental immunity may apply varies depending on where you live. This means that if you or someone you love gets hurt because of the actions of a state or local agency or one of its employees, it's important to talk to a lawyer right away instead of just assuming you can't take on city hall.

Take, for example, a recent case out of Rhode Island. In that case, a nurse working on a per-day contract at the state-owned Rhode Island Veteran's Home suffered a serious knee injury when she slipped and fell on a wet floor. She had to undergo months of physical therapy, and when she finally returned to work several years later it was at reduced hours, which lowered her earnings.

The nurse sought to hold the state accountable for her injuries, arguing that the carelessness of another worker caused the hazard. When a jury awarded her $500,000 in compensation, the state argued that it should be slashed to $100,000 under the state's "public duty doctrine." That doctrine imposes a cap when the state is sued for harm arising from "discretionary government actions," which are actions

© photography33

taken by a city or state entity that aren't usually performed by private persons.

But the Rhode Island Supreme Court upheld the verdict, finding that patient care, which is routinely done by private individuals and entities, is not the type of activity that immunity is meant to apply to.

For another example, consider a Michigan case where a high-school student suffered a serious hand injury in woodshop class while using a table saw that had no blade guard.

The shop teacher apparently had removed the guard, telling the

continued on page 3

JL LIEBERMAN INJURY LAW

1761 West Hillsboro Blvd., Suite 330
Deerfield Beach, FL 33442
(954) 596-9944
Toll Free: (800) 973-5331
www.yourinjuryfirm.com
message@yourinjuryfirm.com

Crash victim entitled to record 'independent medical exam'

Many auto-accident victims require physical therapy or the services of a chiropractor in order to recover from their injuries. These services can be expensive, but fortunately they're often covered by "PIP" (or Personal Injury Protection) benefits in an auto-insurance policy.

However, the reality is that insurance companies exist to make a profit, and the more they pay out in benefits the less profit they make. That's why insurers can be very aggressive in challenging claims for benefits, particularly PIP benefits. That's also why they require the person making the claim to undergo an "independent medical examination" (IME) with a medical provider — often one chosen by the insurer — in order to verify that the particular treatments being sought are actually necessary.

In many states, the insurers use vendors that contract with specific doctors to perform these IMEs, which means the same doctors are used over and over.

A lot of people suspect that these doctors conduct exams with an eye toward keeping the insurance companies happy so they get repeat business. To counter this potential bias, accident victims in many states have been seeking to either bring their attorney to the IME or arrange to have an audio and video recording made of the exam in order to verify that it's being conducted in an unbiased manner.

This reached a flashpoint in a recent Massachusetts case. In that case an auto insurer, Amica Mutual Insurance Co., tried to claim that an accident victim's refusal to attend an IME without her attorney or a video recording amounted to "non-coooperation." Under the law, non-cooperation is grounds for the insurer to deny a claim.

But a trial court judge found that while the failure to submit to an IME may be *evidence* of non-cooperation, it didn't amount to non-cooperation on its own. In this case, where the doctor who was supposed to conduct the IME had an alleged history of consistently determining that the claimant wasn't injured, the insurer couldn't show non-cooperation at all. Now, in Massachusetts at least, an insurance company is going to need to show that it will somehow be harmed if an IME is recorded or an attorney is present, which will be a tough thing to do.

The law, of course, differs from state to state, so check with an attorney who handles car accident claims to find out the law where you live.

Nail salon held responsible for infection after pedicure

© tonodiaz

Most of us think of manicures and pedicures as luxurious or relaxing treatments that make us feel better about ourselves. Few of us expect such treatments to be hazardous to our health.

But a recent case out of Virginia indicates that it might be a good idea to vet your local nail salon for cleanliness before sitting down in the treatment chair.

In that case, Samantha Payne of Richmond received a pedicure at her local salon and later developed a mycobacterial infection in both legs that produced painful boils and lesions and required multiple surgeries.

She sought to hold the nail salon responsible and was able to show at trial that the owners and employees didn't follow guidelines for cleaning and disinfecting pedicure tools and basins. In fact, Payne was able to show that the salon didn't even have the instructions on how to properly maintain the equipment.

Ultimately, a jury awarded Payne significant damages to compensate her for her medical bills, lost wages, pain and suffering and disfigurement. In addition, the jury awarded her "punitive" damages to punish the salon and send a message that the way it operated wasn't acceptable.

Your local salon probably operates the way it should. That's why injuries like this are fairly unusual. Still, some businesses do try to cut corners. If you've gotten sick or hurt and you think it's because a salon or other personal service-oriented business isn't operating under the standards of the law, contact an attorney to find out what your rights might be.

'Governmental immunity' doesn't always shield cities, states and towns from responsibility for harm

continued from page 1

students that it wasn't consistent with how table saws are used "in real life" and was only there to keep insurance company inspectors happy. The teacher also allegedly encouraged students to use the saw without the guard and directed this particular student to make an angled that she'd never tried before. The student experienced a "kickback" when the wood was propelled back at her. This caused her hand to touch the blade and led to the injury.

When the student sought to take the teacher to court, she argued that the claim was barred by "qualified government immunity," which in Michigan protects public workers from suit unless they engage in "gross negligence."

However the Michigan Court of Appeals agreed with the student that the teacher's conduct did, in fact, amount to "gross negligence." In other words, it was not just carelessness but showed a willful disregard for professionally accepted safety standards.

In a second Michigan case, governmental immunity didn't prevent a man who was seriously hurt when his moped struck a large pothole from suing the city of Dearborn.

© photography33

In Michigan, governmental entities are immune from suit over construction and design defects on roadways, but there's a "highway exception" that allows injured parties to hold authorities accountable when they fail to keep a highway in reasonably safe repair.

For an injured party to use this exception, he or she has to provide sufficient notice of the location and nature of the defect. In this case, the city argued that the plaintiff, who identified the pothole in his notice as being east of the "Southfield Freeway" instead of east of the "Southfield Service Drive," didn't give sufficient notice.

But the Michigan Court of Appeals disagreed, ruling that the description was close enough and thus the case could proceed.

Negligence and 'medical malpractice' are not the same

"Medical malpractice" refers to when a doctor, nurse or other medical provider fails to act according to professional standards of care and a patient is hurt as a result.

In order to protect doctors and hospitals from lawsuits, many states have put up special hurdles that patients must clear before bringing a med-mal claim. These can include shorter statutes of limitation (the time period in which you must file your claim or forfeit the right to do so) than for other cases; requirements that your case be screened by a special panel (often a doctor, lawyer and judge) before filing suit; or requirements that before filing suit you find an expert witness to swear under oath that your treatment fell below acceptable standards of care.

Of course, not every injury in a medical setting is necessarily a medical malpractice claim. Sometimes it's just a garden-variety accident. But because of the barriers to a successful medical malpractice suit, a medical provider like a doctor's office or a hospital has a strong incentive to characterize an "ordinary negligence" case as medical malpractice.

This didn't work in a recent North Carolina case where a patient fell off an operating table while undergoing surgery. The patient, Marjorie Locklear, claimed her surgeon was distracted and didn't position himself close enough to her, which allowed her to tumble to the floor with surgical tools inside her.

The hospital tried to get the case thrown out, arguing that it was a med-mal case and Locklear hadn't gotten it reviewed by a sworn expert before filing suit, as required for med-mal cases under North Carolina law.

The trial judge dismissed the suit, but the North Carolina Court of Appeals reversed the decision, finding that the case was one of "ordinary negligence" as opposed to medical malpractice and therefore wasn't subjected to the special requirements of a med-mal claim.

Specifically, the court found that preventing a patient from rolling off an operating table required no "specialized skill or clinical judgment" that would make it a medical malpractice claim and therefore it could proceed without clearing the med-mal barriers.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

LIEBERMAN
INJURY LAW

1761 West Hillsboro Blvd., Suite 330
Deerfield Beach, FL 33442
(954) 596-9944
Toll Free: (800) 973-5331
www.yourinjuryfirm.com
message@yourinjuryfirm.com

Who's responsible for an accident during a test drive?

A test drive can be an accident waiting to happen. After all, the buyer isn't all that familiar with the car and its features, which means he or she will be fiddling with a bunch of knobs while driving. Additionally, the driver may be more focused on the car and how it's performing than on the road.

So what happens if a test driver hits another car? Is the driver the only one responsible? Or can the dealership be held accountable too?

The answer can vary. One consideration is whether the driver was accompanied by the salesperson or someone else from the dealership. In most states, if the driver was alone he or she is fully responsible. Of course, it may be a different story if the dealership knew or should have known that it was unreasonably risky to let that particular customer take the car out for a spin.

On the other hand, if a salesperson was present the dealer can be held accountable, assuming that the salesperson had the right to direct the driver on where and how to drive the car and could have taken control at any time.

However, some states have concluded that it's unrealistic to think a passenger can control a vehicle more than the operator.

Because the law differs from state to state and can also vary depending on the situation, if you've been injured by someone who's taken a car on a test drive, make sure you ask your attorney how the law works where you live.