



## Discretionary Immunity: Making it Work

Mark Rauch, CIS General Counsel  
February 19, 2009

Too often cities and counties are missing out on an important defense against liability: **discretionary immunity**. This can be an especially important tool in tough economic times when local governments are simply unable to fund important maintenance and other projects or staffing that might reduce exposure to risk.

For example, (and these are actual facts from a CIS claim in which the public body was found liable for the damage) a small city, with a small budget, has a sanitary sewer system that was installed about 80 years ago. The system has a 4 inch main. The city does a reasonable job of ongoing maintenance of its sewer lines, but is well aware the lines are both undersized and in poor condition. As a result, the lines tend to become plugged. The city's "policy" and practice has been to repair the system as it breaks down. However, there is no evidence this "policy" been formally adopted by action of the city council. The city lacks the funds to upgrade to the system. When the line becomes plugged through normal and foreseeable usage and backs up into houses causing damage, is the city liable? Under these facts, probably yes. But they likely could have avoided liability with a few simple (and cost free) steps to establish discretionary immunity.

Whenever a public body becomes aware of a hazard or condition that could potentially cause harm, there is arguably a duty to remedy the problem or face liability for resulting injuries. Often, in fact, the "notice" to the entity of such hazards comes by way of written safety recommendations from CIS risk management consultants. But the city may lack the funds to fix the problem or may have other needs they give a higher priority. If the problem is not fixed and there is an injury and claim, the safety recommendation (possibly now in the hands of the injured party's attorney through a public record or litigation discovery request) could actually aggravate the liability picture. Does that mean we should avoid making recommendations for fear they won't be complied with promptly? Not necessarily. Again, the best approach when circumstances don't allow immediate implementation of the recommendations might be steps to implement discretionary immunity.

### What is "discretionary immunity"?

Public bodies historically were immune from liability altogether under the legal doctrine of "sovereign immunity" ("The King can do no wrong"). Oregon, like most

states, has waived much of its sovereign immunity by passing a “Tort Claims Act” (OTCA), which provides the means and method for pursuing tort claims against public bodies. The OTCA also sets important conditions and limitations on public body liability, such as the 180 day notice requirement, caps on liability, and certain immunities, including discretionary immunity. Specifically, public bodies are immune from liability for:

“Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”

ORS 30.265(c).

In practice this immunity has not proved to be as sweeping as it might sound. Courts have been fairly strict in their interpretation. Nonetheless, the immunity is available and the published court decisions provide good counsel on what needs to be in place for the immunity to apply ... and it need not be that difficult in most cases.

### What the courts have said.

The following is short list of legal principles from some of the key cases that pretty well define the current state of discretionary immunity: (Citations are included if you want to read more.)

1. Discretionary immunity defense requires evidence regarding actual consideration process by which decision was reached. Sande v City of Portland, 185 Or App 262 (2002).
2. A discretionary action requires the exercise of judgment involving public policy as opposed to the mere implementation of a judgment made by others. . Ramirez v Hawaii T and S Enterprises, Inc., 179 Or App 416 (2002).
3. Where a public body exercises consideration of alternative methods of fulfilling non-discretionary duty to act, the public body is immune from liability for failure to make discretionary choice among alternatives before injury occurred. Miller v Grants Pass Irrigation District, 297 Or 312 (1984).
4. Decisions such as the design, location, and installation of traffic signals, or the make up of programs such as tree and sidewalk maintenance at the policy level of government are typically immune from liability. Morris v Oregon State Transportation Comm., 38 Or App 331 (1979), Gallison v City of Portland, 37 Or App 135 (1978), Bakr v Elliott, 125 Or App 1 (1993).
5. However, where there is a failure to implement or perform established inspection or maintenance programs, discretionary immunity likely will NOT apply.  
E.g., Tozer v City of Eugene, 115 Or App 464 (1992).

6. To qualify for discretionary immunity, public body must show that it made a decision involving the making of policy, as opposed to a routine decision made by employees in the course of their day-to-day activities. Vokoun v Lake Oswego, 335 Or 19 (2002).

### Practical steps to make it work.

While there is no clear set of instructions guaranteed to establish discretionary immunity, the case law provides guidance on key elements that should be considered.

- Consider whether the matter involves the expenditure of public funds not already specifically budgeted. Consider also whether it involves a choice among competing alternatives, even if money is not the issue. (E.g., there are two types of warning devices available, each with its own advantages and disadvantages, and only one can be used.) If so, discretionary immunity should be available. In many sewer backup claims there is an allegation of failure to properly inspect and/or maintain the system. Setting a sewer maintenance protocol as a policy level (e.g., city council) action probably brings discretionary immunity into play, so long as the prescribed timelines and procedures are met.
- Be sure the decision is made at the proper policy-setting level. Typically this will be the council or commission level unless there has been a clear and demonstrable delegation of policy setting authority on certain matters to lower administrative levels. Most likely it will be up to staff to recognize these situations and take them to the appropriate policymaking level for consideration.
- Be sure the action is clearly documented, such as through a resolution, and that the documentation can be readily located to assist defense council in establishing the defense. It is important the documentation cover the decision maker's consideration of alternatives and/or competing interests, etc. It would be a good practice to keep copies of this type of documentation, along with any staff reports, recommendations, studies, etc. related to discretionary immunity matters in a separate file or binder for ready reference.
- Check with legal counsel if unsure about the applicability of discretionary immunity or the proper steps to establish this defense.