

TOWN SNOW PLOW OPERATOR IS NOT IMMUNE FROM SUIT IN A PERSONAL INJURY ACTION

Recently, the Vermont Supreme Court held that a town employee operating a plow truck was not immune from suit in a negligence action (see *Morway v. Trombly*, 2001 WL 165182 (Vt. 2001)).

Although at first glance the *Morway* decision may seem like a drastic change in the law, it really constitutes a reaffirmation of the Court's 1993 ruling in *Hudson v. Town of East Montpelier*, 161 Vt. 168 (1993). In *Hudson*, the Court concluded that a town highway employee was not immune from a personal injury suit stemming from alleged improper repair of a town road. In extending the principles of *Hudson* to the *Morway* case, the Court reached the same conclusion in the context of town employees who engage in winter highway maintenance. In short, however much the League may disagree with the *Morway* decision, it really changes nothing in terms of the circumstances under which town employees may be exposed to personal liability.

So how can certain town employees be individually exposed to liability when other employees and their employers are not? The answer lies somewhere between the Court's interpretation of legislative intent and the purpose behind qualified immunity. The Court has reasoned that the Vermont Legislature has, through the passage of certain laws, indicated its intent to *preserve* sovereign immunity for municipalities. In contrast, it has "done nothing to protect lower-level municipal employees from tort suits in situations in which the town is immune from suit." *Morway v. Trombly*, 2001 WL 1658182 (Vt. 2001).

In addition, qualified immunity is designed in part to shield government employees who exercise discretion regarding matters of public policy from "a judicial system that is ill-suited to assess the full scope of factors involved in such decision-making." *Hudson, supra*, 161 Vt. at 172. Thus, municipal employees who make policy decisions that are based on factors such as availability or allocation of public resources or public acceptance are immune from suit. *Id.*

Because town highway workers engaged in road maintenance are not engaged in discretionary decisions that require a weighing of the type of policy considerations outlined above, they are not entitled to the defense of qualified immunity.

What does this mean for highway employees or similarly situated workers? Just as before the recent decision, it means that they can be sued individually for negligently performing their duties and that it is unlikely that they could assert the defense of qualified immunity. Nevertheless, a plaintiff in such a suit must still prove negligence against the employee. For those municipalities that are part of the VLCT Property and Casualty Intermunicipal Fund (PACIF), liability coverage for the employee will typically be afforded (barring any unusual coverage circumstances). If your municipality is not a member of VLCT PACIF, you should check with your insurance carrier as to coverage for your employees when performing their duties.

The Vermont League of Cities and Towns will continue to monitor this important issue. In the event that the Legislature addresses the matter, the League will be ready to represent the best interests of our member municipalities. If you have any questions or thoughts on this subject, please give us a call at 800/649-7915.

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