

*DeSmet v. County of Rock Island*, 219 Ill.2d 497, 505, 848 N.E.2d 1030, 1036 (Ill.2001)

[T]he purpose of the Act is to protect local public entities and public employees from liability arising from the operation of government. 'By providing immunity, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims.'

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**10/3-104. Failure to provide traffic signals and signs**

- Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers.

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**10/3-108. Wilful and Wanton Conduct Concerning Supervision of an Activity or Use of Property.**

- Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

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10/2-201. Determination of policy or exercise of discretion

- Expect as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion **even though abused.**

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### Example 1

- **Let's say that a roadway is in a state of disrepair so you send your employees out to cold patch a series of potholes. Four days later someone gets in an accident because the pothole patches disintegrated, apparently because not enough moisture was removed from the potholes before the workers applied the cold patches. Is the Township entitled to discretionary immunity?**

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### Example 2

- **Let's say a school district decides that, to save money, we're not going to purchase helmets for our football players. And while playing football without a helmet, one of the players sustains a permanent head injury. Is the School District entitled to discretionary immunity?**

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### Example 3

- Let's say that a vandal steals a stop sign, which no one informs the Township about. There is then an auto accident at the intersection in which someone is injured. Is the Township entitled to discretionary immunity?

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### Example 4

- Let's say the Township Highway Commissioner finds out a stop sign is down and decides to replace it. But the Commissioner doesn't have any extra stop signs or any red paint on hand, so he decides to make his own stop sign using blue paint instead of red. There is subsequently an accident when someone doesn't recognize that the blue sign is a stop sign. Is the highway commissioner entitled to discretionary immunity?

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East Central Illinois Highway Commissioners Association



**DISCRETIONARY IMMUNITY**

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**Section 2-201 Discretionary Immunity**

**THREE ELEMENTS:**

- (1) It must be a “public employee” serving in a position involving the determination of policy **OR** the exercise of discretion.
- (2) The injury results from a his or her act or omission in determining policy; **AND**
- (3) The injury results from his or her exercise of discretion.

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How do we understand these elements?

- (1) Employee is defined in section 1-202 of the Tort Immunity Act. For our purposes, any publicly paid employee, or public volunteer.
  
- (2) Does not include independent contractors.

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How do we understand these elements?

**Element 2:** The injury results from his or her act or omission in determining policy; **AND**

**Element 3:** The injury results from his or her exercise of discretion.

BOTH ELEMENTS MUST BE PROVEN

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To win on Discretionary Immunity You Need to Be  
Colonel Nathan R. Jessup



(...but don't order the code red just yet.)

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## Element 2: Determination of Policy

The Illinois Supreme Court, and all appellate courts, define the determination of policy element as:

“those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests”

*Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15*, 198 Ill. 2d 475, 484 (2002).

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**Element 2: Determination of Policy**

The Court wants a list, via affidavit or deposition testimony, that states how the public employee balanced the following:

- (1) Time/Efficiency/Available Resources
- (2) Money/Costs associated with project
- (3) Safety/Alternatives Considered

**Most Importantly It Must Be A Choice**

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**Element 2: Determination of Policy**

**Van Meter v. Darien Park District**

- Completion of municipal park caused flooding of Plaintiff's home.
- New landscaping caused surface water to be rerouted and flow into the home.
- Defendants argued the design of the park was a discretionary policy decision and filed motion to dismiss on this basis.

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**Element 2: Determination of Policy**

**Van Meter v. Darien Park District**

- Supreme Court held that "determination of policy" element not met from the face of the complaint.
- Two dissenting Justices ask the obvious question: how can a public entity plan and design a new park without weighing competing interests?

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### Element 2: Determination of Policy



You need him on that wall.

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### Element 2: Determination of Policy

With a few exceptions you will not win a discretionary immunity argument without affirmative evidence showing how the public employee weighed competing interests– no matter how mundane.

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### Element 3: Exercise of Discretion

**Element 3:** The injury results from his or her exercise of discretion.

This is most commonly where discretionary immunity arguments fail, a supposed lack of discretion.

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### Element 3: Exercise of Discretion

Discretionary acts are defined as “acts unique to a particular public office.”

Examples:

- (1) Highway Commissioners’ determination to regrade road;
- (2) Teachers’ determination regarding lesson plan;
- (3) Maintenance Supervisors’ determination to repair sidewalk;
- (4) Coroners’ determination to perform autopsy;
- (5) Road workers’ determination of materials to use to patch pot-holes.

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### Element 3: Exercise of Discretion

The reality is that the discretion element of “discretionary immunity” is determined by looking for an **absence** of discretion.

The case law refers to an action with the lack of discretion as a “**ministerial task**.”

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### Element 3: Exercise of Discretion



The lack of discretion prevents Col. Jessup from ordering the “Code Red.”

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### Element 3: Exercise of Discretion

If there is a code, rule, regulation that governs your decision– you do not have the “discretion” to make that particular decision.

The practical effect of this, is that a good Plaintiff’s Counsel will seek to find a statute, ordinance, rule or other regulation to claim you lacked the discretion to act or implement your policy determination.

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### Element 3: Exercise of Discretion

***Snyder v. Curran Township***

- Motorist sued after not being able to handle a “sharp right bend” in roadway.
- Argument was that Defendant placed warning sign on the left side of the road within 425 feet, instead of the “mandated” right hand sided of the road.
- Supreme Court held that upon making the determination of policy that a sign was necessary, compliance with the State Manual and Specifications for signage was required. Therefore the Defendant lacked the discretion to choose where to place sign.

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### Element 3: Exercise of Discretion

***Gutstein v. City of Evanston***

- Plaintiff tripped in her “unimproved” alley on a soft-ball sized depression in the ground (while allegedly looking at an ice-cream truck);
- Alderman had told Plaintiff he would “see to it” that her alley was on the priority list for repairs three months before incident;
- Once the Alderman made the decision to “see to it” that the alley would be regraded/repared, the public works employee lacked discretion to determine **when** and **if** the alley would be regraded.

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### Element 3: Exercise of Discretion

....But not the how.

#### **Wrobel v. City of Chicago**

- Laborers who fix pot holes on street are both determining policy and exercising discretion.
- “The degree to which a pothole should be prepared, and specifically how much loose asphalt and moisture will be removed, is a matter of a worker's personal judgment, and encompassed within that judgment are the policy considerations of time and resource allocation during a given workday.”

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### Navigating the Discretionary Immunity Road Map



The truth is that you need Col. Jessup on that Wall.

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### Two Cases Describe How and When Discretionary Immunity Apply

#### ***Courson v. Danville Dist. No. 118***

1. Public employee (teacher) was given authority to operate shop machinery as he saw fit;
2. Teacher did not have to check with anyone in order to make decision to repair/modify shop machinery
3. Teacher, personally, chose to remove blade guard on table saw, believing it safer to operate without.

#### ***Richter v. College of DuPage***

1. Grounds worker given responsibility to assess sidewalk defects individually (no set policy);
2. Worker did not need to obtain authority before choosing when, how, or which deviations would be fixed;
3. Worker had discretion to choose to do nothing at all.

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### The Details Matter For Discretionary Immunity

It cannot be emphasized enough that the details matter for discretionary immunity. Moreover, your litigation strategy needs input from your attorneys, workers, and supervisors from the very beginning of a potential claim for the immunity to be effective.

Two primary concerns requiring early input:

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### The Details Matter For Discretionary Immunity

- First, in order to prevail you must clip the potential cause of action down to its roots. As allowing a Plaintiff to frame the cause of action generally will limit the effectiveness of your most powerful immunity.
- Second, and generally in order to receive discretionary immunity, you must have your own "Col. Nathan Jessup." For instance, in the *Courson* case, the teacher admitted and stood by his decision to remove the blade guard on the table saw and to allow students to use it.

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### Navigating the Discretionary Immunity Road Map

1. What are the facts showing how the accident happened which allegedly injured Plaintiff?
2. What does Plaintiff allege you did wrong?
3. Did the law (statute, code, rule or regulation) mandate a certain response from you?
4. If there was no mandate, who personally elected to perform that act?
5. Why did that person elect to act in that manner (did it save time, resources, alternatives considered?)?
6. Could that person have elected to do nothing at all?
7. Did that person need your permission in order to perform the act?

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