Federal law

This paper does not address issues related to lawsuits under 42 USC § 1983 for deprivation of federal constitutional or statutory rights. Although the 11th amendment bars federal lawsuits against states, local governments are not considered an arm of the state and are not entitled to immunity from § 1983 actions. Monell v. NY City Dept. of Social Services, 436 US 658 (1978). Local governments may be sued for federal constitutional violations traceable to their official policies or customs. Individual local government officers and employees also may be sued under § 1983. Legislative and judicial immunity is available to local public officials exercising those functions. Other public officials may have a qualified immunity/good faith defense which means they are subject to payment of monetary damages only if they knew or should have known that their acts were unlawful. The qualified immunity applies only to public officials, not public employees (the distinction is discussed below in connection with immunity from state tort claims).

The distinction between sovereign immunity and governmental immunity in claims brought under state law

Sovereign immunity is the state’s immunity from a lawsuit of any kind unless the state consents to be sued.

Governmental immunity is distinct from sovereign immunity. Governmental immunity applies to local governments, sovereign immunity to the state and its agencies. Meyer v. Walls, 347 NC 97 (1997). Governmental immunity is immunity from tort liability only and is based not on sovereign immunity and the “king can do no wrong” concept but instead is based on the policy decision that governmental agencies should not have to pay money damages. See Moody v. State Prison, 128 NC 12 (1901).

Court decisions often use the terms interchangeably and treat sovereign immunity and governmental immunity as the same.

The case law is not always consistent on whether sovereign immunity extends to local governments. Some cases suggest it has been waived by enactment of the statutes governing counties (GS 153A-11), cities (GS 160A-11) and public schools (GS 115C-40), all of which refer to those units of government as corporate bodies and say that their governing boards may sue and be sued. See, e.g., Smith v. State, 289 NC 303 (1976), and Meares v. Brunswick County, 615 F Supp 14 (EDNC 1985). Other cases apply sovereign immunity to local governments without

Irrespective of sovereign immunity, governmental immunity clearly applies to local governments and may be used as a defense to tort claims, subject to the rules described below.

**Claims under state law against the governmental body itself**

An action against a government official in that person’s official capacity is the same as an action against the governmental body itself. *Meyer v. Walls*, 347 NC 97 (1997).

**Breach of contract**

There is no immunity from a claim for breach of contract; by entering the contract the governmental body waives immunity and consents to be sued for damages for breach of the contract. *State v. Smith*, 289 NC 303 (1976).

**Violation of state constitutional rights**

An action may be brought directly under the State Constitution when there is no other adequate state remedy for the violation. *Corum v. University of North Carolina*, 330 NC 761 (1992). While the governmental body may be liable for damages for a claim brought directly under the State Constitution, there is no action for monetary damages against a defendant sued in the person’s individual capacity.

The adequacy of the remedy must be realistic in order to bar the constitutional claim. Thus, the existence of a common law action for negligence did not bar constitutional claims against the local board based on the same conduct, because the negligence claim was not a realistic remedy, it could be pursued only if the board had purchased insurance and thereby waived its immunity, and the board had not done so. *Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 NC 334 (2009).

Governmental immunity is not applicable to constitutional violations. *Sale v. Highway Commission*, 242 NC 612 (1955) (taking of property without just compensation); *Corum* (denial of free speech).

**Tort claims** (for either an intentional tort such as assault or for negligence) against a governmental body for acts or omissions of governmental officials or employees (acting within the scope of employment)

**Liability for a proprietary function**

If the injury to the plaintiff arises from the governmental employee’s performance of a proprietary function, there is no immunity and the
governmental body may be sued for damages. *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 NC 14 (1975).

Determining whether an activity is a governmental or proprietary function is difficult, and the court decisions are not always consistent. *See Sides v. Cabarrus Memorial Hospital*.

Proprietary functions include those activities which are not traditionally performed by a government agency. They tend to be activities which also are performed by the private sector, which benefit a definable category of individuals rather than the general public, and for which a fee is charged. Operation of a golf course would be considered a proprietary function, for example. *Lowe v. Gastonia*, 211 NC 564 (1937). In *Sides* operation of a hospital was considered a proprietary function. The notion of what is proprietary and what is governmental changes over time.

**Immunity for a governmental function**

If the injury to the plaintiff arises from the government employee’s performance of a governmental function, the local government is immune from liability unless it has waived its immunity. *Steelman v. City of New Bern*, 279 NC 589 (1971).

Governmental functions are those traditionally performed by governmental bodies for the benefit of the public at large. As already mentioned, the distinction between proprietary and governmental functions is not always easy to define. Simple examples of governmental functions include the operation of traffic lights, *Hamilton v. Hamlet*, 238 NC 741 (1953), and garbage collection, *James v. Charlotte*, 183 NC 630 (1922); *Broome v. City of Charlotte*, 208 NC 729 (1935). A 911 call center is a governmental function. *Wright v. Gaston County*, 698 SE2d 83 (NC App 2010).

**Waiver of immunity from liability for a governmental function**

Governmental immunity can be waived, but waiver of immunity is not to be lightly inferred, and statutes waiving immunity are to be strictly construed. *Guthrie v. NC State Ports Authority*, 307 NC 522 (1983).

By statute, boards of county commissioners, city councils and school boards waive governmental immunity by the purchase of insurance, up to the amount of the insurance. The statute for counties is GS 153A-435; for cities is GS 160A-485; and for school boards is GS 115C-42.

A separate statute, GS 160A-485.5 allows cities with a population of 500,000 or more — Charlotte is the only city to qualify — to waive immunity and become subject to the state Tort Claims Act. Claims are
heard in the local superior court rather than at the Industrial Commission. Charlotte has elected to use the GS 160A-485.5 option.

For counties and cities, participation in a government risk pool is considered the purchase of insurance and constitutes waiver of governmental immunity up to the amount of coverage. A governmental risk pool is defined by the insurance statutes and requires that more than one governmental unit participate and share risk. *Lyles v. City of Charlotte*, 344 NC 676 (1996).


Local governments often purchase supplemental insurance and cases on waiver of immunity often depend on a close reading of the wording of the several policies and the limits of their coverage. See, e.g., *Fulford v. Jenkins*, 195 NC App 403 (2009).

**Public duty doctrine**

Even if a local government has waived immunity through the purchase of insurance, the public duty doctrine may bar recovery. The public duty doctrine says that a governmental body is not liable when law enforcement officers fail to protect an individual from harm. Although the local government may undertake to protect the public at large, the duty of protection does not extend to individuals. With no legal duty to protect the individual, there can be no negligence from the failure to protect.

Although state agencies performing a variety of functions may invoke the public duty doctrine to avoid liability, at the local level the public duty doctrine applies only to claims made against law enforcement agencies for negligence in failing to protect individuals from harm by third parties. *Lovelace v. City of Shelby*, 351 NC 458 (2000); *Wood v. Guilford County*, 355 NC 161 (2002). Earlier cases extending the public duty doctrine to fire protection, animal control, building inspections and other local services were overruled by *Lovelace*. *Hargrove v. Billings & Garrett, Inc.*, 137 NC App 759 (2000); *Willis v. Town of Beaufort*, 143 NC App 106, *disc. rev. denied*, 354 NC 371 (2001).

A local agency may be serving as an agent for the state in performance of a particular function and be entitled to protection of the public duty doctrine for that specific activity. For example, a county health department is an agent of the state Dep’t of Environment and Natural Resources for inspection of wastewater treatment systems and thus is protected by the public duty doctrine for that activity. *Murray v. County of Person*, 191 NC App 575 (2008).
An exception to the public duty doctrine, giving rise to liability, is when the law enforcement agency has made an actual promise to protect an individual or when a special relationship has been created in which such protection is expected. See Multiple Claimants v. NC Dep’t of Health and Human Services, Div. of Facility Services, Jails and Detention Services, 361 NC 372 (2007).

Even with respect to law enforcement, the public duty doctrine is limited in scope. It is a barrier to lawsuits for failure of the law enforcement agency to protect the plaintiff from harm by third parties, but not a barrier to lawsuits for harm caused directly by the agency. It is a barrier to liability for negligence claims, but does not bar liability for intentional torts. It is a barrier to liability for discretionary actions that involve the active weighing of safety interests, but does not bar lawsuits based on failure to comply with mandatory, ministerial requirements. Smith v. Jackson County Board of Education, 168 NC App 452 (2005).

The public duty doctrine provides protection from lawsuit for governmental bodies and for officers sued in their official capacity. It is not a barrier to a lawsuit against someone in their individual capacity. Murray v. County of Person, 191 NC App 575 (2008).

**Dobrowolska claims**

If a local government has governmental immunity for a tort claim, and has not waived its immunity by the purchase of insurance, but arbitrarily settles some such claims and not others, the local government may be liable under 42 USC § 1983 for denial of the constitutional rights of due process and equal protection. Dobrowolska ex rel. Dobrowolska v. Wall, 138 NC App 1 (2000).

**Punitive damages**

Punitive damages are not allowed against a governmental body unless specifically authorized by statute. Jackson v. Housing Authority of City of High Point, 316 NC 259 (1986); Long v. City of Charlotte, 306 NC 187 (1982).

**Claims under state law against an individual government official or employee**

While governmental immunity protects a governmental body from being held liable for an injury caused by one of its officers or employees, it does not protect the public officer or employee from being held liable individually. Meyer v. Walls, 347 NC 97 (1997). Other forms of immunity may protect individuals, however.

The caption of a pleading should indicate whether a person is being sued in the person’s official or individual capacity. When the caption or other parts of the pleading fail to specify the capacity in which the person is being sued, the court looks to the relief
sought. Injunctive relief indicates the person is being sued in their official capacity. If the relief sought is monetary damages, the court looks to whether the plaintiff is seeking the payment from the government or from the individual defendant’s own pocket. *Mullis v. Sechrest*, 347 NC 548 (1998).

**Absolute immunity for legislators and judges**

*Legislative immunity*

Local elected officials, when acting in their legislative capacity, are entitled to the same immunity as legislators, so long as their acts are not illegal acts. *Vereen v. Holden*, 121 NC App 779 (1996); *Scott v. Granville County*, 716 F2d 1409 (4th Cir 1983).

*Judicial immunity*


Boards of county commissioners, city councils and school boards hold a number of different kinds of hearings which would be considered quasi-judicial.

**Qualified immunity for public officials**

A public official sued individually is not subject to liability unless the official’s actions were malicious, corrupt or outside the scope of official duties. *Epps v. Duke University*, 122 NC App 198 (1996).


**Defense of local officials and employees and payment of claims against them**

The statutes governing counties, cities and public schools all authorize, but do not require, the governing board to provide for the defense of current and former board members, officers and employees against civil or criminal claims based on acts or omissions in the scope of employment. The statutes are GS 153A-97 for counties, GS 160A-167 for cities, and GS 115C-43 for public schools. The officers and employees to whom a county or city’s defense may extend are listed in GS 153A-97 and 160A-167, but the list in the latter statute is longer than in the former.

The same statutes allow, but do not require, boards of county commissioners, city councils and school boards to pay civil judgments entered against the same categories of current and former board members, officers and employees. The boards are required to adopt uniform standards stating when such claims will be paid. For school boards, the uniform standards also are to state when the board will pay for the defense of claims.

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