Massachusetts Academy of Trial Attorneys Journal

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MATA's Annual Dinner, page 19

Good lawyering

By Mary Jane McKenna

PRESIDENT'S MESSAGE

I look forward to the coming year with both delight and apprehension. Taking on the mantle of the presidency of this organization is at once a source of pride and humility in light of those who have preceded me. The caliber of the membership and leadership of the academy is great motivation to me and I hope in the coming year to make myself available to each and every member who calls upon me, no matter the subject.

The Massachusetts Academy of Trial Attorneys has been a part of my professional life for many years. In more recent times, to my great comfort, the academy has, in many ways, served as an extended family. I marvel daily at the combined intelligence, wit and gracious generosity of the membership, those who unselfishly share hard-earned knowledge and experience. Likewise, I delight at the infusion of younger members with their tireless enthusiasm and determination. The continued commitment of younger members is one of the most important organizational goals.

MATA was established 36 years ago by 20 stalwart members from across the state, representing varied practices and firms. They were committed to the jury system and advocacy for their clients. MATA has now grown to a membership of over 1,300 attorneys from across the state, representing every conceivable type of firm, with numerous subspecialties. This organization of fellow trial lawyers and advocates provides all members with superb benefits, including outstanding legislative efforts, the MATA Forum online, the MATA Journal, continuing legal education, specialty sections and list serves for members.

Recently, the tireless efforts of attorneys Max Borten, Sidney Gorovitz, Annette Gonthier-Kiely, Maura Sheehan, Michael Harris and Michael Conley have brought about a cataclysmic shift in the landscape

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Representing injured public safety personnel

Massachusetts police and firefighter injury overview

By J. Michael Conley

Protecting the public can be dangerous work. Police officers and firefighters in Massachusetts, as elsewhere, are often in harm's way. Risk of injury — often serious injury — is inherent in the public safety service.

For a plaintiff's attorney, representing an injured police officer or firefighter brings with it challenges and opportunities additional to and distinct from those which exist in more routine personal injury cases.

The legal principles governing cases arising from on-the-job injuries to Massachusetts police officers and firefighters are substantially similar to the basic rules controlling compensation for work-related injuries under the Workers' Compensation Act.

Police and firefighting injuries nonetheless warrant separate consideration because the separation in statutory compensation schemes, along with the nature of police and firefighting work, give rise to several important substantive, procedural and practical differences affecting both first-party claims and third-party recovery.

The purpose of this article is to outline the most important features of the statutes providing "injured on duty" benefits to police officers and firefighters, and to highlight recurring issues in first-party and third-party litigation.

Police officers and firefighters are excluded from the enumerated employees covered by the Workers' Compensation Act. G.L.c. 152, §§1, 69; Corbett v. Related Companies Northeast Inc., 424 Mass. 714, 677 N.E.2d 1153 (1997); Eyssi v. Lawrence, 416 Mass. 194, 618 N.E. 2d 1358; Paparo v. Provincetown, 34 Mass. App. Ct. 625, 614 N.E. 2d 1012 (1993).

The multiplicity of police and public safety agencies in the commonwealth has led to the existence of several similar statutes and regulations providing workers' compensation-type benefits. For example, for state police, see Reliance Insurance Co. v. Robertson, 7 Mass. App. Ct. 735, 390 N.E. 2d 739 (1979), G.L.c. 22, §7A and G.L.c. 22B, §§5, 6. By far the most commonly encountered of these enactments, and thus the focus of this article, are the statutes governing police officers and firefighters in the cities and towns of Massachusetts — G.L.c. 41, §§100, 111F.

First party recovery — the compensation scheme

Municipal police officers and firefighters receive benefits protecting against on-duty injuries under General Laws, Chapter 41, §100 (medical) and §111F (wages).

Medical benefits: G.L.c. 41, §100

"Upon application by a firefighter or police officer of a city, town, or fire or water district ..., [the appointing authority] shall determine whether it is appropriate under all the circumstances for such city or town or district to indemnify such firefighter or police officer for his reasonable hospital, medical, surgical, chiropractic, nursing, pharmaceutical, prosthetic and related expenses and reasonable charges for chiropody (podiatry) incurred as the natural and proximate result of an accident occurring or of undergoing a hazard peculiar to his employment, while acting in the performance and within the scope of his duty without fault of his own. Whenever [the appointing authority] denies an application in whole or in part, [it] shall set forth in writing its or his reasons for such denial. …At any time within two years after the filing of an application as aforesaid, an applicant aggrieved by any denial of his application or by the failure of [the appointing authority] to act thereon within six months from the filing thereof may petition the superior court in equity to determine whether [the appointing authority] has without good cause failed to act on such an application or, in denying the application, in whole or in part, has committed error of law or has been arbitrary or capricious, or has abused its discretion or otherwise has not acted in accordance with law."

The statute provides no further guidance as to the substantive standard for undertaking and reviewing decisions concerning the appropriateness of payment. The language suggests broad discretion on the part of the appointing authority. Moreover, a municipality's payment obligation is subject to funding by the appropriating authority. See Berube v. Board of Selectmen, 336 Mass. 634, 147 N.E. 2d 180 (1958). Despite the equivocal language of the statute, the Appeals Court has suggested that payment of medical expenses may be mandated under §100 unless the expenses are unnecessary or unreasonable. See O'Donovan v. Somerville, 41 Mass. App. Ct. 917 (1996).

There has been a paucity of litigation focusing on medical expense indemnification under §100, primarily due to the prevalence of private health insurance covering bills not

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Structured annuities: shelter from the financial storm

Critical that plaintiffs get advice from experts working solely for plaintiffs

By John Bair

Given the current state of our economy, specifically the recent troubles of large institutions, Forge Consulting is releasing the following guidelines to address how these events impact settlement-planning issues. Most importantly, we want to answer one specific question: Is a structure still a "safe" settlement option?

Forge Consulting is a national settlement consulting firm specializing in settlement advice to any trial lawyer or plaintiff in the country. Learn more at www.forgeconsulting.com or contact Forge at info@forgeconsulting.com.

As we sit here today, the answer is "yes." Not only is it safe, it is probably more crucial than ever before for a plaintiff to consider. The body of law that establishes structured settlements and creates the public policy to incentivize the use of them expressly limits the type of assets that can be utilized in a structured settlement to only annuities and U.S. federal treasuries. There is a reason why our congressional leaders so narrowly restricted what your injured citizens could rely upon and why it has been law since 1983. In light of today's financial uncertainty, it's even more important to consider an allocation to a structured settlement annuity.

Why are structured settlements so inherently safe? Because they are insurance policies regulated by each state. Most states have secure consumer protection laws that regulate life insurance companies, providing an exceptionally strong safety net. Plus, the marketplace is flocking to bonds and treasuries, which comprise a majority of life insurers' investments. The National Structured Settlement Trade Association reports, "Life insurers in the United States hold almost 75 percent of their assets in long-term bonds and less than 4 percent in equity securities."

According to Brett Arends of the Wall Street Journal, when a company has troubles on Wall Street, that doesn't necessarily mean it will affect individual policyholders (and people with structured settlements). "There are ... legal firewalls between the crisis you hear about on the news, and your ... policy," Arends explains. "The assets of those subsidiaries are regulated, and are walled off from the troubles of the parent company."

The considerable strength of these regulations was echoed by Sandy Praeger, National Association of Insurance Commissioners president, in a Sept. 16 press release. "It is a state insurance regulator's responsibility to protect policyholders and ensure a healthy, competitive market for insurance products," Praeger stated. "Strict solvency standards and keen financial oversight, based on conservative investment and accounting rules, continues to be the bedrock of state-based insurance regulation."

The power of state insurance regulation isn't hypothetical. It has been tested and proven throughout history, such as the reorganization of Executive Life of California in the mid-1980s. We think this is proof-positive that structured settlement recipients have protections.

In the face of what's happening in the news, it is essential that plaintiffs receive advice from an expert who can allocate towards a structure and the inherent protections it provides. Regardless of whether Forge was involved in your case, don't hesitate to contact us with your structured settlement questions and concerns. In this financial climate, being responsive to plaintiff lawyers, their organizations and their clients is what we are all about. "Getting this kind of expertise from a structured settlement firm that works exclusively for plaintiffs is vital," said John Bair, Forge president.

Good lawyering is common theme among MATA ranks

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of malpractice litigation. Matsuyama v. Birnbaum, et al. and the companion case of Renzi v. Paredes, et al. were the by-products of utter, bare toothed determination, countless hours, expense and more than considerable talent.

As Judge Marshall summarized so succinctly on July 23, 2008, in her introduction to the Matsuyama opinion, "We are asked to determine whether Massachusetts law permits recovery for a 'loss of chance' in a medical malpractice wrongful death action, where a jury found that the defendant physician's negligence deprived the plaintiff's decedent of a less than even chance of surviving cancer. We answer in the affirmative."

Now that the appellants petition for re-hearing has been denied, Massachusetts joins the rank and file of so many other states in recognizing a loss of chance as an injury.

These words brought to mind personal, deeply traumatic experiences with beloved family who were told the dreaded news of a cancer diagnosis, made only more heart-wrenching by the knowledge that delay and misdiagnosis played a role in the eventual death of those close to me, including my beautiful mother, dearest father, and, nearly, my spouse.

The court and our colleagues at the academy have now carved out a claim for those who unjustly lost a chance and in doing so have set forth an eloquent argument based upon the fundamental goals and principles of justice. The court, in its unanimous opinion, wisely cited important precedents in other states. More importantly, they addressed the troubling notion of the "all or nothing rule," which serves to give carte blanche to a negligent health care provider when the injured person cannot prevail on a "but for" showing of causation.

Pointing to the important developments and changes that are ever occurring in medicine, the court conveyed the simple wisdom that loss of a chance of survival is a bona fide injury, saying, "The patient has lost something of great value: a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome."

Mind you, the new five-step proportional method for evaluation of damages for loss of chance of survival is complex and challenging. No doubt this outcome will be the lively source of debate by our members. However, we now at least have an opportunity to advocate for individuals and families who were deprived of the all-important timely diagnosis as the Matsuyama court recognized that such claims are sufficiently akin to wrongful death to be cognizable under the wrongful death statute. It is no longer an all-or-nothing proposition.

After all, who among us would not choose more time, whether simply to put our matters in order, to spend precious time with family and friends, to explore the unknown or to simply savor the moment? Perhaps the heart and soul of this opinion goes to notions of public policy, including reverence for life and basic principles of equity.

But Matsuyama and Renzi provide injured persons with additional tools for successful advocacy. For example, the SJC in Renzi jettisoned the burden to prove that the loss of chance of survival is "substantial." Although I recognize that there are disparate views on the benefits of "but for" causation versus "substantial cause," many see this as progress.

Further, the court in Renzi recognized the burden on the defense expert to lay an adequate foundation for "the goose was cooked defense," the common and all-too-often effective defense that the disease was invariably fatal. Yes, the burden of laying an adequate foundation goes both ways. Another point of clarity from Renzi was the court's approach to digital images (even enhanced images) finding that the admissibility of digital images is the same for videotape as it is for photographs. That is, a person familiar with the depiction need only testify whether the image accurately depicts what is intended to be displayed. Defense counsel had urged that the computer specialist who prepared the images testify , another common approach to undermining presentation of important evidence and testimony to jurors.

Now we await hearings and the court's opinions in Law v. Griffith. Attorney Kathy Jo Cook is pursuing this important issue. MATA, with the special assistance of attorney Michael Najjar, penned an outstanding amicus on behalf of the academy to press the question of the admissibility of special medical damages under G.L.c. 233, §79G. Attorney Michael Conley's tireless efforts on behalf of the Amicus Committee would have surely made his late, dear father proud. As an organization, we are grateful to all of the Mike Conleys among us who give so selflessly of their time to our causes.

Amidst so much criticism of our profession and the tort system we have yet another opportunity to celebrate the contributions and positive impact of lawyers and the jury trial system. This is a very exciting time for the trial bar. It would appear of late that juries are more open to weighing in on the evidence in favor of injured persons and their families. The membership of the Massachusetts Academy of Trial Attorneys has much to be proud of and, without a doubt, a raison d'être on behalf of those who truly rely upon us and our jury trial system for an opportunity to be heard.

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Tips for 401(k)s in a down market

By William O'Donnell, CFP, and Kimberly Miles, LUTCF

MILES

O'DONNELL

During uncertain economic times, participants in defined contribution retirement savings plans, such as 401(k) or 403(b) accounts, may feel tempted to make immediate and drastic adjustments to their portfolio accounts. Such knee-jerk reactions are understandable, as few things can invoke panic like the thought of losing everything you've worked to build.

Bill O'Donnell and Kim Miles are financial advisors with New York Life and support the MATA membership with their extensive knowledge in the financial services field as Affinity Partners. They can be reached at wodonnell@ft.newyorklife.com, kmiles@ft.newyorklife.com or by phone at 781-398-8506.

Be patient — these are long-term growth vehicles

The truth is that defined benefit plans are designed for long-term, tax-deferred accumulation. And with many companies providing a "company match" percentage of what you contribute, such plans can be an ideal vehicle for retirement savings. And, generally, being in the market pays off. According to market historians, the stock market has registered twice as many positive return years as negative, and in the 57 positive years since 1926, 47 have yielded double-digit returns for investors.

In addition, defined benefit contribution plans have built in features, such as asset allocation and diversification capabilities that can help ride out market waves and maximize many savings opportunities.

Dollar cost averaging may help reduce overall risk

Since automatic pre-tax withdrawals are paid into your 401(k) accounts on a regular basis — usually with each check — you are already enjoying dollar cost averaging. Dollar cost averaging is a systematic, disciplined approach, whereby you invest the same amount of money at regular intervals, rather than trying to time the market. When the market is down, your money will buy more shares. When the market is up, you buy less. The bottom line: with dollar cost averaging, you are never "out of the action." And over time, the purchase of shares at regular intervals can help smooth out the impact of short-term market fluctuations.

Keep in mind, however, dollar cost averaging does not assure a profit, nor does it protect against loss in a declining market. To be effective, there must be a continuous investment regardless of fluctuating price levels. Investors should consider their financial ability to make purchases through periods of low price levels.

Know your risk tolerance

Knowing your financial risk tolerance is crucial when assessing how to manage your money. Regardless of how the market performs, some people are more comfortable with risk than others. Regardless, it is prudent to review your portfolio once or twice a year. Making changes to your account in response to a specific market turn is not necessarily advisable, but a balanced 401(k) requires a balanced, informed perspective.

Asset allocation is key

In addition to knowing risk tolerance, a balanced 401(k) includes a mix of stock and bond funds. And within stock funds, you'll want to combine growth, value and large cap funds with some mid cap and smaller funds. This way, you spread risk amongst a variety of investment categories, which can help to safeguard against being hit too hard if one fund doesn't perform as hoped.

The "age percentage equivalent"— a strategy that can grow with you

Here's a general approach: consider allocating the percentage equivalent of your current age into more conservative vehicles. In other words, a 25-year-old with the time to ride out market fluctuations can consider investing 75 percent in riskier funds, thus allocating 25 percent (the equivalent percentage of his/her age) into more conservative choices. As that person nears age 50 s/he could equally split the risk between more growth-oriented funds and bond-type funds.

By the time that person is 65, it may be a good idea to have 65 percent of assets in safer vehicles, while still leaving 35 percent to achieve potentially higher returns in riskier vehicles. By following a strategy similar to this, you can enjoy the benefits of diversification while adjusting your portfolio to suit your age, goals and current situation. It's also a way to help ensure that your assets aren't all invested in a down market just as you're preparing to retire.

It's your future

Defined benefit plans are a wonderful way to save for retirement and benefit from stock market potential simultaneously. But as with any investment, you want to make the right choices. By understanding your risk tolerance, taking advantage of dollar cost averaging, making careful diversification choices and adjusting those choices as needed, you can help ensure that the funds you've worked so hard for will be working just as hard to give you a comfortable retirement.

In this issue

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Representing injured public safety personnel — Massachusetts police and firefighter injury overview

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paid by the municipality. For a discussion of the relationship between private health insurance and §100, see MacArthur v. Mass. Hospital Service Inc., 343 Mass. 670, 180 N.E. 2d 449 (1962).

Leave with pay: G.L.c. 41, §111F

Far more frequently litigated than §100 is §111F, providing for a mandatory grant of leave without loss of pay. Chapter 41, §111F provides, in part:

"Whenever a police officer or firefighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or firefighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town is so incapacitated because of injuries so sustained he shall be granted leave without loss of pay for the period of such leave shall be granted for any period after such police officer or firefighter has been retired or pensioned in accordance with law or for any period after a physician designated by the [appointing authority] determines that such incapacity no longer exists."

"Injury sustained in the performance of his duty" is a phrase that has received a broad interpretation comparable to the construction of the language,"arising from and in the course of employment"under the Workers' Compensation Act. See DiGloria v. Chief of Police, 8 Mass. App. 506, 395 N.E. 2d 1297 (1979); Allen v. Board of Selectmen, 15 Mass. App. 1009, 448 N.E. 2d 782 (1983); see Blair v. Board of Selectmen, 24 Mass. App. 261, 508 N.E. 2d 628 (1987). Many of the fringe cases have involved motor vehicle accidents. Massachusetts courts have held officers injured in car accidents to be within the protection of the statute while returning home from testifying in court (Allen v. Board of Selectmen, 15 Mass. App. 1009, 448 N.E. 2d 782 (1983)), driving to the police station to report to work when on call (Gardner v. Peabody, 23 Mass. App. 168, 499 N.E. 2d 1220 (1986)) and returning to the police station from a lunch break (Wormstead v. Town Manager, 366 Mass. 659, 322 N.E. 2d 171 (1975)). Wormstead is the central Supreme Judicial Court decision on this issue. On the other hand, a firefighter who was injured in automobile accident while driving home after working on a special detail for which he volunteered and was paid over and above his regular pay and was not on call was not injured while in performance of his duties and, therefore, was not entitled to benefits under §111F (Domingo v. Town of Wellesley, 44 Mass. App. Ct. 793 (1998)).

"Injury" has been interpreted to include psychological injuries, at least insofar as the psychological conditions flow from an original physical injury. See Jones v. Wayland, 374 Mass. 249 (1978); English v. Board of Selectmen, 8 Mass. App. 736 (1979).

"Without fault of his own"sounds alarmingly like a contributory negligence exclusion. However, in DiGloria v. Chief of Police, 8 Mass. App. 506 (1979), the Appeals Court ruled that this language disqualifies an officer from benefits only in the presence of serious and willful misconduct of a nature that would cause a disqualification under the Workers' Compensation Act.

"Without loss of pay"results in continued payment of the employee's entire base wage, and is not subject to a ceiling or percentage such as under Chapter 152. The purpose of this statute is to prevent any deprivation of pay, either in time or value, during the period of a police officer's or firefighters service-related incapacity. See Todino v. Wellfleet, 448 Mass. 234 (2007). Accordingly, a recovery of wrongfully withheld benefits should include prejudgment and post-judgment interest. Id. Payments under §111F may, at least in instances of retrospective payment, be subject to reduction based upon amounts received from collateral sources, including group insurance and welfare benefits. See Jones v. Wayland, 374 Mass. 249 (1978).

The wage replacement scheme is somewhat different for special or reserve police officers. On most road details these part-time officers are conclusively presumed to be the employees of the contractors in charge of the jobs, and are therefore covered under the contractors' workers' compensation insurance, G.L.c. 152, §1(4). In other circumstances, the part-time officer receives under §111F his or her average police wage, and may receive supplemental benefits under G.L.c. 32, §85H to replace other lost income. See Jones v. Wayland 380 Mass. 110 (1980).

Termination of benefits may occur on a number of bases:

The designated physician's opinion that incapacity no longer exists (Paparo v. Provincetown, 34 Mass. App. Ct. 625 (1993)); resignation (Jones v. Wayland, 374 Mass. 249 (1978)); discharge for cause unrelated to the injury (Hennessy v. Bridgewater, 388 Mass. 219, 446 N.E. 2d 58 (1983); contrast Thibeault v. New Bedford, 342 Mass. 552, 174 N.E. 2d 444, city cannot avoid obligation under §111F by sending termination notice to probationary employee; O'Donovan v. Somerville, 41 Mass. App. Ct. 917 (1996), firefighter who sustained work-related injury on day before he was to be laid off from his position was entitled to leave without loss of pay; Paparo v. Provincetown, 34 Mass. App. Ct. 625 (1993)); retirement or pension.

By paying benefits under §111F, the employer does not irrevocably accept a claim. See DiGloria v. Chief of Police, supra. An employee returning to work does not thereby forfeit future benefits for a recurring injury. See Jones v. Wayland, 374 Mass. 249 (1978).

"Incapacitated"refers to incapacity for duty and not necessarily total incapacity. See Votour v. Medford, 335 Mass. 403, 140 N.E. 2d 177 (1957). Subject to collective bargaining restrictions, a partially incapacitated officer may be returned to a modified or light duty position. See Newton Branch of Mass. Police Ass. v. Newton, 396 Mass. 186 (1985).

According to the concept of"leave"the injured employee remains under the supervision of his or her department head. As a result, the municipality may regulate or restrict the activities of employees on leave pursuant to §111F. See Atterberry v. Police Commissioner, 392 Mass. 550 (1984) (upholding Boston Police regulation prohibiting injured or sick officers to leave home without notice and permission).

Enforcement of §111F is by way of a civil action in the Superior Court.

Collective bargaining

It is impossible to analyze a first-party police or firefighter injury case without a copy of the collective bargaining agreement between the public employer and the union. The labor contract may supplement or modify §111F, see Rein v. Marshfield, 16 Mass. App. 519 (1983), and will often subject injured-on-duty claims to the grievance and arbitration procedure. See Duxbury v. Rossi, 69 Mass. App. Ct. 59 (2007); Worcester v. Borghesi, 19 Mass. App. 661 (1985).

In the event of conflict, the terms of a collective bargaining agreement will prevail over those of §100 and/or §111F. See Duxbury v. Duxbury Permanent Firefighters Ass., 50 Mass. App. Ct. 461 (2000). A collective bargaining agreement, however, will not be considered to overrule §111F in absence of clear language expressing such intent. See Willis v. Board of Selectmen of Easton, 405 Mass. 159 (1989).

The collective bargaining agreement and practices therein may also regulate or affect such important issues as the permissibility of partially incapacitated officers to return for light duty, see Newton Branch of Mass. Police Ass. v. Newton, 396 Mass. 186, 484 N.E. 2d 1326 (1985), the circumstances or timing of medical examinations and the identity of physicians to be designated by the municipality to determine incapacity, and even the municipality's reimbursement rights in a third party case.

Many agreements incorporate the terms of §111F, or certain provisions more favorable to covered employees. It is important, nonetheless, whenever possible, to treat the injured-on-duty claim as statutory in nature. Payments under such a statute are, like workers' compensation payments, typically excluded from taxable income, while contractual wage continuation could, like normal sick leave, may represent taxable income, under Section 104(a) of the Internal Revenue Code. Payments to a partially disabled employee performing light duty constitute salary and are taxable as such.

Another practical consideration to be aware of is the frequent availability to the injured police officer or firefighter of free or low cost representation through a union's attorney. The availability of union representation coupled with the existence of an arbitration remedy often weighs against a private attorney undertaking a first party case.

Significantly, controversies under G.L.c. 41, §111F are most frequently viewed by municipalities as well as by injured personnel and their unions primarily as labor law issues rather than personal injury issues. As a consequence, many police officers and firefighters forego viable third-party actions for want of recognition.

Long-term disabilities

A public employee who becomes permanently incapacitated for duty by an injury or risk sustained or undergone in the performance of his duty is eligible for accidental disability retirement under G.L.c. 32, §7. Accidental disability retirement, which may be sought by the injured worker (voluntary) or initiated by the employer (involuntary) terminates benefits under G.L.c. 41, §111F at which time the employee receives, under the auspices of the applicable retirement board, a pension slightly in excess of seventy-two percent of the officer's pre-injury compensation. See G.L.c. §32, §7.

The details of public employee ADR rights are beyond the scope of this article, but are important in representing police officers and/or firefighters in relation to significant personal injuries. (MATA-member Deborah Kohl has agreed to provide a treatment of this subject for a future edition of the MATA Journal). Attorneys evaluating police and firefighter injury cases need to be familiar with both Chapter 32 and Chapter 41, because the statutory schemes, while roughly complementary, do not fit together perfectly.

For example, an officer incapacitated by hypertension or a heart condition may, due to a statutory presumption, may be eligible for disability retirement under Chapter 32, but not for paid leave under Chapter 41 §111F. See G.L.c. 32, §94 (presuming service-relatedness of heart disease suffered by certain police officers/firefighters); Vaughan v. Auditor, 19 Mass. App. 244, 473 N.E. 2d 698 (1985) (presumption contained in G.L.c. 32, §94 inapplicable to G.L.c. 41, §111F). See also G.L.c. 32, §94A (similar presumption of service-relatedness for respiratory or pulmonary disease suffered by certain firefighters).

Lump sum settlements of the type routinely encountered in the workers' compensation system are exceedingly rare for police and firefighter injuries. This is largely a by-product of the separation of funding sources for transient and permanent disabilities. Such lump-sum settlements as do occur are typically compromise settlements focused upon past losses rather than redemptions of potential future in-

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demnity payments.

Third Party recovery

As much or more than in any other profession, injuries to police officers and firefighters are discernibly attributable, directly or indirectly, to the negligence or intentional misconduct of others. Moreover, there are few categories of plaintiffs with more jury appeal than a police officer or firefighter seriously injured in the line of duty. Accordingly, police and firefighter injury cases may be a fertile ground for third-party recovery.

It is not the purpose of this article to discuss comprehensively the broad field of third-party recovery. There are, however, a number of rules, theories and issues which recur in the litigation of police and firefighter injury cases and to which attorneys evaluating such cases should be alert.

Rescue doctrine

In abbreviated, and somewhat elementary form, the rescue doctrine may be characterized as follows: negligence which creates peril invites rescue and, should the rescuer be hurt in the process, the tortfeasor will be held liable not only to the primary victim, but to the rescuer as well. See Hopkins v. Medeiros, 48 Mass. App. Ct. 600 (2000); Barnes v. Geiger, 15 Mass. App. 365, 366-367 (1983). The Restatement (Second) Torts recognizes this principle as it applies to questions of duty, Restatement (Second) Torts, §§281, 290, and as it applies to proximate cause, Restatement (Second) Torts, §§443, 445.

Massachusetts courts have recognized Restatement (Second) §443 and 445, see Edgarton v. H. P. Welch Company, 321 Mass. 603 (1947), and have repeatedly decided in accordance with the dictates of these sections. See Rollins v. Boston and M.R.R., 321 Mass. 586 (1947) (death in fire while trying to safeguard property threatened by fire); Burnett v. Connor, 299 Mass.(1938) (attempt to stop car rolling due to faulty brake); Burns v. Berkshire St. Ry., 281 Mass. 47 (1932) (plaintiff injured assisting friend in moving automobile stalled on street car tracks when street car collided with automobile); Dixon v. New York, New Haven and H.R.R., 207 Mass. 126 (1910) (injury restraining horses negligently frightened by railroad).

Although much of the early Massachusetts case law uses the rescue doctrine to neutralize the defense of contributory negligence, the principle is not limited to that context. See Barnes v. Geiger, 15 Mass. App. at 368. Nor does the applicable analysis differ significantly when focusing on the question of duty as opposed to the question of proximate cause. See Whittaker v. Saraceno, 418 Mass. 196, 198-199 (1994) (As a practical matter, in deciding the foreseeability question, it seems not important whether one defines a duty as limited to guarding against reasonably foreseeable harm or whether one defines the necessary causal connection between a breach of duty and some harm as one in which the harm was a reasonably foreseeable consequence of the breach of a duty).

In Hopkins v. Medeiros, 48 Mass. App. Ct. 600 (2000), a police officer injured while attempting to subdue a melee filed suit for negligence and for wanton and reckless conduct against an individual who allegedly instigated the melee but who had no direct interaction with the injured officer. The Appeals Court ruled in favor of the injured officer, deciding that the liability of the defendant was an issue for the jury to determine with the benefit of a charge on the rescue doctrine. The Hopkins Court elaborated on the application of the doctrine.

"'Rescue' as used in ordinary parlance means 'to free from … danger.'"(Campbell v. Schwartz, 47 Mass. App. Ct. 360, 364 (1999), quoting from Webster's Third New Intl. Dictionary 1930 (1993)). "Danger is defined as 'the state of being exposed to harm.'"(Campbell v. Schwartz, supra) To be considered a rescuer, an individual must engage in a proactive attempt to free another from danger. "[A] claimant's purpose must be more than investigatory. There must be asserted some specific mission of assistance by which the plight of the imperiled could reasonably be thought to be ameliorated."(Barnes v. Geiger, 15 Mass. App. Ct. at 371).

In addition, such rescue missions must be voluntary. "[I]nclusion within [the class of rescuers] is by virtue of a volunteered action by the putative claimant." (Migliori v. Airborne Freight Corp., 426 Mass. at 637, 690 N.E. 2d 413). However, the notion of "voluntary" does not preclude claimants who have arrived at the rescue scene as a result of their employment.

The court ruled that Officer Hopkins qualified as a rescuer because he was present at the melee because of a fellow officers' emergency call, his employment brought him to the scene where he engaged in proactive attempts to assist the other officers who were faced with a dangerous situation, and he was injured during the rescue attempt.

In addition, the Hopkins court rejected the so-called "fireman's rule" which, as applied in other states serves to preclude rescuers such as firefighters and police officers from maintaining a negligence action against a person allegedly responsible for bringing the officer to the scene of a crime, fire, or some other job-related incident of similar exigency where the officer is then injured because of this same person's alleged negligence. Hopkins v. Medeiros, 48 Mass. App. Ct. 600 (2000)

Insurance coverage — intentional acts

Often public safety workers suffer injuries attributable to criminal or intentional misconduct. In such cases, liability may be clear, but collectability or insurance coverage questionable. However, "intentional acts" exclusions to homeowners and general liability insurance policies may not necessarily preclude coverage for injury to police officers or firefighters caused by an insured's intentionally injurious conduct directed towards property or persons other than the injured officers. Nor do such exclusions bar coverage for injuries caused by criminally reckless conduct. See Preferred

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The Parratt-Hudson Doctrine revisited

By Kevin F. Moloney and Roger T. Manwaring

MOLONEY

MANWARING

State, county and municipal governments are often sued by former employees who claim to have been fired without a hearing or other procedural safeguards. Where the former employee has worked for long enough to attain civil servant or other tenured status, and hence a property interest in expected continued employment, such claims take on a constitutional dimension because the federal constitution prohibits the taking of life, liberty or property without due process of law.

Due process usually requires that a public employer provide such a civil servant a hearing prior to terminating his or her employment (Gilbert v. Homar, 520 U.S. 924, 929 (1997); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985)), and the civil service laws require a pre-termination hearing. See e.g. G.L.c. 35, §51. Therefore, if the public employer denies a civil servant the requisite pre-termination hearing, the civil servant may have a claim for damages under 42 U.S.C. §1983 (a "§1983 action") based on a violation of his or her procedural due process constitutional rights.

However, a public employer accused of a procedural due process violation has an important defense in the so-called Parratt-Hudson Doctrine. Under that rule, if a deprivation of property (e.g. the termination of a civil servant's employment) "is occasioned by random and unauthorized conduct by state [or municipal] officials," then no pre-deprivation hearing is required and due process is satisfied if "adequate post-deprivation remedies" are provided (O'Neill v. Baker, 210 F.3d 41, 50 (1st Cir. 2000), quoting Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992)).

The 1st U.S. Circuit Court of Appeals recently applied the Parratt-Hudson Doctrine in Hadfield v. McDonough, 407 F.3d 11 (1st Cir. 2005), cert. denied, 546 U.S. 961 (2005), in which the sheriff of Plymouth County defeated claims that he had violated the first amendment rights of certain deputy sheriffs and an assistant deputy superintendent by terminating them on the basis of their political beliefs and had violated the due process rights of the ADS, who claimed to have tenured status, by failing to provide a pre-termination hearing.

Prior to trial, the lower court dismissed the claims of the ADS and he appealed only the due process issue after the jury at trial found for the sheriff on all other counts. Holding that there had been no procedural due process violation, the Hadfield court explained that "the Parratt-Hudson doctrine shields a public entity from a federal due process claim where the denial of process was caused by the random and unauthorized conduct of government officials and where the state has provided adequate post-deprivation remedies to correct the officials' random and unauthorized acts." (407 F.3d at 19-20.)

Stated another way: "Parratt and Hudson preclude §1983 claims for the 'random and unauthorized' conduct of state officials because the state cannot "anticipate and control such conduct in advance." In addition, unauthorized deprivations of property by state employees do not constitute due process violations under the Fourteenth Amendment so long as meaningful post-deprivation remedies are available." (Brown v. Hot, Sexy and Safer Products Inc., 68 F.3d 525, 535 (1st Cir. 1995)).

While simple in its formulation, the Parratt-Hudson Doctrine raises numerous thorny problems in its application, among them the question what type of conduct by a public official is "random and unauthorized."

For example, is a public official's conduct "unauthorized" whenever it is in violation of an established, non-discretionary state procedure, or is something additional required? Does conduct in violation of established procedures by a high ranking official (a policy maker) itself create new policy and render such conduct "authorized" by definition?

Another issue is what constitutes adequate post-deprivation remedy. While not all federal circuits agree on every aspect of the Parratt-Hudson Doctrine, the 1st Circuit's approach is relatively clear, and provides significant protection to state and municipal defendants.

General parameters of the Parratt-Hudson Doctrine

The U.S. Supreme Court has recognized that while substantive due process violations occur at the time of the deprivation (because it is the deprivation itself which is unconstitutional), procedural due process violations are not complete at the time of the deprivation, but only when the state fails to provide due process (because it is the lack of appropriate process, not the deprivation, which is unconstitutional). Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). The critical inquiry is what process the state provided and whether it was adequate. Id. There simply is no procedural due process violation if adequate state remedies are available.

The Parratt-Hudson Doctrine applies only to procedural, not substantive, due process violations. In determining what process is due, a court must weigh several factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest ..."

(Zinermon, 494 U.S. at 127, quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

In Loudermill, the court applied this balancing test to a claim that a school district violated its employees' procedural due process rights when it terminated their employment without a prior hearing. Although the terminated employees had a statutory right to appeal the termination, the statute made no provision for a pre-termination hearing. Concluding that due process normally requires at least a minimal pre-deprivation hearing, the Supreme Court held that the terminated employees had stated a due process claim.

Like Loudermill, the Supreme Court's decisions in Parratt v. Taylor, 451 U.S. 527 (1981), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), Hudson v. Palmer, 468 U.S. 517 (1984), and Zinermon all apply the factors outlined in Matthews to determine what procedural protections are constitutionally required. According to the Court in Zinermon, "Parratt is not an exception to the Matthews balancing test, but rather an application of that test to the unusual case in which one of the variables in the Matthews equation — the value of pre-deprivation safeguards — is negligible in preventing the kind of deprivation at issue." (494 U.S. at 128-29.)

In Parratt, a state prisoner brought a §1983 action because prison employees had negligently lost materials he had ordered by mail. While recognizing that a pre-deprivation hearing usually is required, the court stressed the special situation in Parratt, noting that the loss was not due to "some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." 451 U.S. at 541. The Parratt court pointed out that the deprivation in that case, "occurred as a result of the unauthorized failure of agents of the state to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that is was practicable for the State to provide a predeprivation hearing." Id. at 543.

In Hudson, the court extended the reasoning of Parratt to intentional deprivations of property, explaining that "[t]he state can no more anticipate the random and unauthorized intentional conduct of its employees than it can similar negligent conduct." 468 U.S. at 533.

In Logan, an employee filed a claim with the Illinois Fair Employment Practices Commission but the commission, through inadvertence, failed to commence a fact finding conference within 120 days as required by statute and thereby lost jurisdiction to hear the case. The employee claimed that the state's established procedure, which divested the commission of jurisdiction to hear the claim, violated his procedural due process rights. The Supreme Court agreed, holding that Parratt did not apply because the employee was challenging not the random and unauthorized conduct of a state official but the established state procedure itself.

The 'Zinermon' decision

Zinermon is consistent with Parratt, Logan and Hudson, but involved circumstances that rendered the Parratt-Hudson doctrine inapplicable. In Zinermon, Burch had been admitted to a psychiatric institution as a "voluntary" patient but alleged that hospital staff had failed to obtain his informed consent and therefore, wrongfully had deprived him of his liberty. The defendants claimed that the Parratt-Hudson doctrine applied, but the Supreme Court disagreed. While confirming that the Parratt-Hudson doctrine can apply to deprivations of liberty as well as property, the court stressed the distinction made in prior cases between losses caused by random and unauthorized conduct (to which Parratt-Hudson applied) and losses resulting from established state procedure (for which a §1983 claim could be brought). 494 U.S. at 130.

Applying that distinction, the Zinermon court concluded that the loss suffered by Burch occurred because Florida's statutes delegated broad power to hospital staff to admit psychiatric patients (depriving them of their liberty), but failed to circumscribe that power by requiring that a member of the staff determine whether the prospective voluntary admittee was mentally fit to give informed consent to a voluntary admission:

"The Florida statutes, of course, do not allow incompetent persons to be admitted as "voluntary" patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. Florida chose to delegate to petitioners a broad power to admit patients to FSH, i.e., to effect what, in the absence of informed consent, is a substantial deprivation of liberty. Burch is not simply

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Moloney and Manwaring successfully defended the sheriff of Plymouth County before the 1st Circuit in Hadfield and successfully opposed a motion for writ of certiorari in the U.S. Supreme Court.

attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue."Id. at 135.

The court in Zinermon distinguished Parratt and Hudson in three ways. First, due to the special nature of mental illness, it was foreseeable that under Florida's statutory scheme, which did not require a procedure to determine the competency of a patient before voluntary admission, a patient seeking treatment for mental illness might not be competent and might be admitted despite a lack of informed consent. Moreover, the state could predict precisely when that deprivation of liberty would occur. In contrast, the court noted that while the state in Parratt and Hudson might anticipate that on occasion a prison employee negligently or intentionally would lose or destroy an inmate's property, the state could not predict when those deprivations would occur. Id. at 136.

Second, the court in Zinermon concluded that, unlike in Parratt and Hudson, pre-deprivation process was possible and would have been of value in avoiding the deprivation complained of. The court noted that Zinermon was not a case like Hudson in which the employee was"bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards." Id. at 137. Had the state in Zinermon established procedures for obtaining informed consent, there was no reason to believe that the staff would not have followed those rules.

Finally, in Zinermon, the court said that the conduct of the hospital staff in that case was not"unauthorized"within the meaning of Parratt and Hudson. Instead, the court noted that the hospital staff had been delegated broad discretionary authority that had not been delegated to the prison employees in Parratt or Hudson. The deprivation in Zinermon, the court said, was"'unauthorized' only in the sense that it was not an act sanctioned by state law."Id. at 137-38.

The 1st Circuit's interpretation of 'random and unauthorized'

Zinermon created confusion as to what type of conduct is"random and unauthorized"for purposes of Parratt-Hudson. One view is that an official's conduct is"unauthorized"whenever it violates an established non-discretionary state law procedure. The contrary view is that even conduct in violation of such an established procedure can still be"authorized"if the official in question had the power to act as he or she did, but abused that power.

Under the former view, for example, the act of a county sheriff in terminating civil servant deputies without the prior hearing required by law is unauthorized precisely because it violates the non-discretionary requirement that a prior hearing be conducted. Under the latter view, however, such conduct would be authorized because a sheriff has the general power to terminate deputies, and simply abused that power by doing so without the required hearing.

These two approaches correspond to two views of §1983 liability generally, the legalist model and the governmental model. Bogart v. Chapell, 396 F.3d 548, 563-64 (4th Cir. 2005) (Williams, J., dissenting). The legalist model imposes liability on the state for an official's constitutional violation only if the state (or municipality) has endorsed that violation. Id. Thus, conduct is"unauthorized,"the Parratt-Hudson Doctrine applies, and there is no state liability for a procedural due process violation, if the conduct at issue violates state law or established policy and there is an adequate post-deprivation remedy. Language in Zinermon stressing the distinction between losses caused by random and unauthorized conduct and losses resulting from established state procedure supports the legalist interpretation.

The governmental model deems conduct to be authorized, imposes liability on the state, and renders Parratt-Hudson inapplicable, whenever the violation at issue was committed by an official in the scope of his or her employment, even if the conduct violates state law. Id. Courts adopting this view rely on the statement in Zinermon that the deprivation was"'unauthorized' only in the sense that it was not an act sanctioned by state law."494 U.S. at 137-38.

The 1st Circuit has consistently favored the legalist approach, narrowing §1983 liability by broadly applying the Parratt-Hudson Doctrine.

According to the court in Hadfield,"Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law … In other words, conduct is "random and unauthorized"within the meaning of Parratt- Hudson when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself."(407 F.3d at 20.)

Similarly, in Chmielinski v. Comm. of Massachusetts, 513 F.3d 309, 315 (1st Cir. 2008), the Appeals Court explained that"The Parratt-Hudson doctrine exists to protect states from needlessly defending the adequacy of state law process when the alleged due process violation results from a deviation from that process. Neither the statute nor the regulations set out any procedural requirements, providing only that the hearing be'informal.'Thus, the hearing that Chmielinski received cannot be characterized as a deviation from the state law; it was not random and unauthorized."See also Bourne v. Town of Madison, 494 F.Supp.2d 80, 88-89 (D.N.H. 2007).

An additional issue left undecided by Zinermon is whether, if conduct consistent with established policies is"authorized,"conduct by a high ranking, policy making official must necessarily be deemed authorized because that very conduct effects a change in prior policy. The 2nd U.S. Circuit Court of Appeals has adopted this rule (Dwyer v. Regan, 777 F.2d 825 (1985)), holding that conduct which otherwise could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a"high-ranking official having final authority over the decision-making process."Id. at 832.

However, the other circuits which have considered the issue have rejected the rejected the high ranking official exception to Parratt-Hudson. The 1st Circuit has not considered the issue directly. Notably, however, while the plaintiffs in Hadfield raised the high ranking official exception, the court, without discussion, held that Parratt-Hudson applied.

What constitutes an adequate post-deprivation remedy?

For the Parratt-Hudson Doctrine to apply, an adequate state law post-deprivation remedy must have been available to the plaintiff at the time of the deprivation. However, establishing the existence of a post-deprivation remedy is not difficult. Citing Parratt, the Appeals Court for the 1st Circuit has noted that such a remedy may be statutory or provided by common law, as in the case of a tort action (Lowe, 959 F.2d at 341).

In addition, the availability of administrative and judicial review of decisions made by state officials constitutes adequate post-deprivation process (Hadfield, 407 F.3d at 21, citing Herwins v. City of Revere, 163 F.3d 15, 19 (1st Cir.1998)). Notably, a state post-deprivation remedy may be adequate even where it fails to provide all of the relief which would have been available through a §1983 action (Parratt, 451 U.S. at 544).

In Hadfield, the Appeals Court held that Massachusetts provided adequate post-deprivation remedies to the deputy sheriffs who had been terminated without prior hearing because G.L.c. 35, §51 allowed the deputies to appeal their terminations to the civil service commission and, if successful, to obtain reinstatement and back pay.

While a plaintiff may assert that a state provided remedy is inadequate because it would require the plaintiff to endure long delays associated with litigation, a court is likely to reject such an argument in all but the most extreme circumstances. Although the U.S. Supreme Court has recognized that"at some point, a delay in the post-termination hearing would become a constitutional violation,"(Loudermill, 470 U.S. at 547), the slow pace of normal litigation is not the kind of delay which renders a post-deprivation remedy inadequate.

In fact, the Loudermill court held that a nine-month delay in providing a hearing did not work a denial of due process, while other federal courts have held that delays of two years did not violate due process (Mathews v. Eldridge, 424 U.S. 319, 342, (1976) (11-month delay); Isaacs v. Bowen, 865 F.2d 468, 477 (2d Cir. 1989) (19 months); Ritter v. Cohen, 797 F.2d 119, 124 (3d Cir. 1986) (20 months); Givens v. United States Railroad Retirement Bd., 720 F.2d 196, 201 (D.C. Cir. 1983) (19 months); Frock v. United States Railroad Retirement Bd., 685 F.2d 1041, 1047 (7th Cir. 1982) (two years)).

In Easter House v. Felder, 910 F.2d 1387, 1406 (1990), the Appeals Court for the 7th Circuit, noting that"almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process," stated:

"[W]e should not reject the application of Parratt unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the fourteenth amendment."

A powerful weapon for government defendants

The Parratt-Hudson Doctrine, especially as broadly applied in the 1st Circuit, affords state and municipal defendants substantial protection from §1983 lawsuits based on alleged violations of procedural due process. While still subject to suit where the deprivation of due process was consistent with established policy, or where the state delegated to officials broad and uncircumscribed discretion to effect the deprivation complained of, Parratt-Hudson shields government employers from liability based on a public official's unforeseeable violation of facially valid procedures.

Post-litigation: Does nursing home litigation benefit the plaintiff?

By Harry S. Margolis

Most nursing home residents are covered by MassHealth. This presents a significant challenge in cases brought against facilities for poor treatment or assault. If the nursing home resident succeeds in her claim, her recovery will render her ineligible for MassHealth (which has a $2,000 limit on countable assets). In all likelihood, the funds will be spent down paying for her continuing care.

And to add insult to injury, if she is in the facility where she suffered harm, the nursing home will now receive payment for her care at the higher private pay rate rather than the lower MassHealth rate, thus recovering some of what it paid out to her — perhaps even profiting if the claim was covered by insurance.

Further, the changes to the MassHealth transfer rules included in the Deficit Reduction Act of 2005 make it more difficult than it had been previously for successful plaintiffs to transfer a share of their settlement proceeds to other family members. Prior to its passage, it was customary for nursing home residents to transfer approximately half of their liquid assets, which could include assets obtained through litigation, to family members, using the remaining half to pay for their care during the resulting MassHealth ineligibility period. The DRA as interpreted by the Office of Medicaid, which administers MassHealth, has made this virtually impossible.

Finally, if the nursing home resident has died and was a MassHealth beneficiary, the state will have a claim for reimbursement against her probate estate. This claim may or may not swallow up the entire recovery.

Nevertheless, it is still possible for a nursing home resident to benefit from a successful lawsuit against the facility that injured her. This article will explore those opportunities.

Using the recovery for the nursing home resident's benefit

While the receipt of settlement proceeds may throw the recipient off of MassHealth, having the funds may also do her a lot of good. It may enable her to move to a better facility, or out of the nursing home setting altogether if the funds can be used to pay for extra care needed in assisted living or at home. The funds may be used to pay for other benefits, such as visits by family members, oversight of care by geriatric care managers, trips away from the facility, or computers and entertainment equipment.

If the recipient owns a home, whether outright or through a life estate, funds can be used to pay for maintenance, whether for utilities and taxes or painting and repairs. While the house may ultimately be subject to estate recovery at the nursing home resident's death, maintaining or increasing its value adds to the likelihood that the estate recovery will not eat up all of the equity in the home. It also may permit it to be rented, bringing more income to the client.

The nursing home resident also may prepay for her funeral, relieving her family of that ultimate expense.

Avoiding estate recovery

States may recover their MassHealth costs from the estates of MassHealth beneficiaries. In most instances, these claims are against family homes, since they are the only substantial assets MassHealth beneficiaries may keep and still qualify for benefits. But a successful litigant may receive MassHealth benefits for several years, then recover settlement funds and die before the recovery is spent down. In such instances, proper planning generally can protect such remaining funds from estate recovery.

We should note that MassHealth may also have a lien on the lawsuit itself. To the extent this is paid out of the litigation proceeds, its estate recovery claim will have been satisfied. But usually the commonwealth is not completely compensated for its MassHealth expenditures both because its payments are not all connected to the injury for which suit was brought and because its claim is reduced in the process of settling the lawsuit. So, an estate recovery claim is likely to survive any nursing home litigation.

First, in many states, estate recovery is only against the deceased MassHealth beneficiary's probate estate. Thus, holding the settlement funds in a way that avoids probate also avoids estate recovery. This can be done through joint accounts or the use of revocable trusts.

Second, the nursing home resident can transfer assets to family members during her life, thus removing them from her estate altogether. In most instances, this will cause the nursing home resident to be ineligible for MassHealth coverage during the subsequent five years, meaning that the family members will have to pay for her care from the transferred funds. This can actually have some tax advantages for the family members (deducting the nursing home costs as a medical expense) and protect the transferred funds from ultimate estate recovery.

Half-a-loaf despite the DRA

While the DRA has made traditional "half-a-loaf" or "rule-of-halves" planning — transferring approximately half and keeping half to pay for care during the resulting penalty period — difficult or impossible in many states, its application varies from state to state. Many states, while having implemented the DRA, permit variations on the old strategy, known as "gift-and-cure," "gift-and-lend" or "gift-and-annuity" approaches. However, none of these approaches seems to work in Massachusetts.

Making use of permitted transfers

While most transfers of assets are penalized, a few are not. Thus, a nursing home resident may freely transfer a litigation recovery to the following recipients without affecting her eligibility for MassHealth: a spouse; a permanently blind or disabled child (meaning a child of the nursing home resident of any age); or a trust for the sole benefit of any permanently disabled individual under age 65.

While probably irrelevant in this context, two further exceptions apply to transfers of homes. They may be freely transferred to the recipients listed above and to a child who lived with and cared for the nursing home resident for at least two years before her move to a nursing home and to a sibling who already has an equity interest in the home and lived there for at least a year before the nursing home resident moved

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16-19	NATLE Government Affairs Conference New Orleans
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Post-litigation: Does nursing home litigation benefit the plaintiff?

Continued from page 8

to the nursing home.

Keeping these exceptions in mind, a nursing home resident may well be able to use litigation proceeds to benefit certain family members.

Making use of (d)(4)(C) trusts

MassHealth law provides two safe harbors to its usual trust rules which deem to the applicant any funds in a trust that the applicant (or her spouse) has created where the applicant (or spouse) is also a trust beneficiary. One of the safe harbors, which can be found at 42 U.S.C. §1396p (d)(4)(C), can be an excellent vehicle for nursing home residents to protect assets to be used for their own benefit.

The statute permits pooled trusts operated by non-profit organizations to be administered for the benefit of disabled beneficiaries. The one drawback of these trusts is that they must provide that at the beneficiary's death, any trust funds not retained by the trust for its own administrative costs, must be used to reimburse the state for its MassHealth expenditures. Thus, it is unlikely in most instances that family members would benefit from these trusts. However, the nursing home resident herself can be the beneficiary of a (d)(4)(C) trust to pay for enhancements to her life, and still qualify for MassHealth to pay for her basic costs of care.

The one ambiguity in terms of using a (d)(4)(C) trust for this purpose is that the states are inconsistent as to whether they apply a penalty for transfers into (d)(4)(C) trusts when the nursing home resident is over age 65. This is not a problem in Massachusetts, which permits transfers to (d)(4)(C) trusts at any age. For a nationwide list of (d)(4)(C) trusts, go to: http://www.specialneedsanswers.com/resources/directoryofpooledtrusts.asp.

Or (d)(4)(A) trusts

A similar safe harbor is provided at 42 U.S.C. §1396p (d)(4)(A) for individual trusts for MassHealth beneficiaries. However, it is of limited use for nursing home residents because it is only available to individuals under age 65 (though the trust continues to be valid after age 65 if funded before that age).

Annuities or structured settlements

Annuities, whether in a structured settlement or purchased after the settlement is received, may be used in some instances to pass a portion of the proceeds on to children or other beneficiaries. The nursing home resident may continue to be eligible for MassHealth benefits if the settlement is annuitized. The monthly annuity check would be added to his income and paid to the nursing home. The way that some of the annuity money may ultimately go to other beneficiaries is if the nursing home resident dies with payments still due on the annuity. For instance, if the annuity was purchased for a seven-year term and the nursing home resident died after three years, the annuity would continue to pay out for four more years.

Under the DRA, the commonwealth must be made the primary beneficiary of the annuity upon the death of the nursing home resident up to the amount of MassHealth paid out. The family beneficiaries would be next in line. Whether anything remains for them depends on how much is due the commonwealth and how much remains to be paid on the annuity. The reason this strategy can work is that the monthly annuity payments while the nursing home resident is alive help defray the MassHealth costs and reduce the commonwealth's ultimate claim for estate recovery. These calculations need to be made on a case-by-case basis. In addition, the annuity or structured settlement must meet certain parameters set out in the DRA so that its purchase is not deemed to be an uncompensated transfer of assets.

Conclusion

While bringing actions against nursing homes for abuse and neglect has the deterrent effect of encouraging facilities to better care for their residents, its benefit to the injured plaintiff is less certain due to the ongoing cost of care, the resulting disqualification for MassHealth, and ultimate MassHealth estate recovery. However, a number of strategies remain for gaining benefits for the nursing home resident and/or her family. Since the appropriate strategies vary from case to case and MassHealth interpretation of the law can change from month to month, litigators need to work with qualified elder law attorneys in advising clients of their options.

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By Jennifer L. Comer

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These contributions make it possible for both MATA and AAJ to continue and increase their political efforts both locally and nationally. It allows for both organizations to educate the public and politicians and to directly impact consumers via the legislature.

We are grateful for the support our Monthly Contributors provide and their dedication to the rights of consumers and victims.

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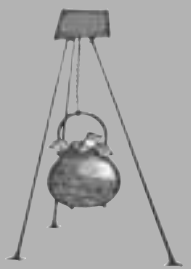

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Deposition tips, wine recommendations and free hors d'oeuvres? Yes, right here

By Lauren Guth Barnes

Our conversation ranged from her work for the Massachusetts Committee for Public Counsel Services to the pros and cons of the do-it-yourself method of renovating a backyard and building a patio. Over drinks and hors d'oeuvres at the most recent MATA Women's Caucus gathering and in the midst of a crowd of attorneys gathered to mix and mingle, I got to know a little bit more about this solo practitioner from north of Boston.

She's been to nearly every meeting of the Women's Caucus this year, starting with our wine tasting benefit in February and continuing through various other networking events, and she cannot wait until the next one. Working day in and day out by herself, appearing in front of countless judges, she has little time or opportunity to convene with other female trial attorneys, to share experiences, ask questions, and provide advice. She's found a home and terrific camaraderie in the MATA Women's Caucus.

The importance of networking and creating relationships in our business cannot be overstated. As Orison Swett Marden once said, "It is like the seed put in the soil — the more one sows, the greater the harvest." Our strides towards leadership in the courtroom, on behalf of our clients, and for the people and causes that mean the most to us are supported best by the community of peers who can offer an encouraging word, a "best practices" tip, or an introduction to a new friend and colleague.

Our success in advocating for our clients and relating with juries comes in part from a willingness to share and connect with our peers, to nourish long-standing relationships and openly enter new ones. Keith Ferrazzi, co-author of Never Eat Alone, wrote "The currency of real networking is not greed but generosity." The women active in the MATA Women's Caucus never fail to offer more — more of themselves for their clients, more of their time for friends, colleagues, and causes, more advice, more recommendations, more help, more mentoring, more laughter. I am honored by my connections to them and more successful because of them.

I am a member of the MATA Women's Caucus because where else do I get an opportunity to speak with incredible leaders like Kathy Jo Cook, president of the Women's Bar Association, about her work with the WBA and then segue into a discussion of our favorite places to go for a drink in Boston? Or to swap deposition stories and practices with other female attorneys while also getting tips on great realtors in Winthrop? The MATA Women's Caucus is a catalyst like no other for fostering valuable relationships, having a great time doing it all the while.

We will continue to share more advice, stories, laughter and tips at upcoming events, both educational and social in nature, that the MATA Women's Caucus has in the works. We're already working on February's wine tasting benefit. We invite any and all to join the camaraderie, take part in our events and help plan them. For more information or to get involved, please contact Susan Simpson at MATA at susan@massacademy.com or me at lauren@hbsslaw.com.

Our thanks to Lawyers Weekly for sponsoring our recent Women's Caucus gathering!

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Representing injured public safety personnel — Massachusetts police and firefighter injury overview

Continued from page 5

Mutual Ins. Co. v. Gamache, 426 Mass 93 (1997); Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 469 N.E. 2d 797 (1984). In addition, even if the claim of an injured police officer or firefighter is barred by an "intentional acts" exclusion, claims on behalf of the spouse and children of the victim for loss of companionship will nonetheless be covered by some policies. See Worcester Insurance Co. v. Fells Acre Day School, Inc, 408 Mass. 393, 558 N.E. 2d 958 (1990).

Employer liability

In contrast to the Workers' Compensation Act, Chapter 41 contains no exclusivity provisions barring injured employees and/or their families from suing their municipal employers. See Foley v. Kibrick, 12 Mass. App. 382, 425 N.E. 2d 376 (1981). The SJC, however, has interpreted the Massachusetts Tort Claims Act, G.L.c. 258, as precluding an action therein against a public employer by an employee eligible for payments under G.L.c. 41, §§100, 111F. (Monahan v. Methuen, 408 Mass. 381 (1990)).

Significantly, claims exempted from Chapter 258, such as intentional tort claims against fellow servants, are not affected by the Monahan ruling. Similarly unimpaired are claims against the municipality pursuant to the Tort Claims Act for loss of consortium or emotional distress brought by spouses, children and/or parents who are financially dependent upon the injured employee. See Eyisi v. Lawrence, 416 Mass. 194 (1993).

Premises liability

The SJC's historic abandonment of categories for those lawfully on the premises occurred in the context of a police injury case, Mounsey v. Ellard, 363 Mass. 693 (1973). The Mounsey decision established that property owners owe a duty of reasonable care to anyone lawfully on the premises. Police officers and firefighters entering in the course of their duty (formerly categorized as licensees to whom only a limited duty was owed) are now among the lawful visitors entitled to reasonable protection. Id. Cf. Carroll v. Hemenway, 315 Mass. 45, 51 N.E. 2d 952 (1943) (police officer as licensee). The plaintiff's attorney must nonetheless attend to the issue of foreseeability. The Mounsey court cautioned:

"[I]f the plaintiff policeman, in the course of chasing a thief, was injured at 2 a.m. when he fell into an unguarded hole in the defendants' private cellar, the defendants might well be entitled to a directed verdict because the time and place of the policeman's entrance was not an event which the defendants should have foreseen in the exercise of reasonable care. On the other hand, if the defendants directed the policeman to search the cellar or knew he was going there, it could be found that the defendants were under a duty to warn the policeman of the dangers known to the defendants."

This language has invited undue attention in the trial courts to the specific foreseeability of the time, place and purpose of the public servant's presence on the premises, which the plaintiff's attorney must be prepared to counter. Helpful in this regard is discovery concerning the existence and location of alarms, smoke detectors, fire extinguishers, emergency exits, prior police contact, fires, and thefts, as well as the defendant's knowledge through friends and neighbors or the media of the risks giving rise to encounters with police officers and firefighters. When the foreseeability evidence is fully developed, there emerges a persuasive argument that the presence of police officers and/or firefighters is foreseeable at virtually any place and at virtually any time. The Supreme Judicial Court has, however, held that the murder of a police officer during a drug raid was not foreseeable, even if the owner/landlord was aware of drug activity on the premises and negligently failed to inform the police. (Griffiths v. Campbell, 425 Mass. 31 (1997)).

Motor vehicle accidents

It is important in evaluating police and firefighter injury cases to take an expansive view of causation. For example, it is undeniably foreseeable that police or fire personnel may respond to the scene of any motor vehicle accident. A driver's negligence contributing to the original accident may be held causally related to an injury to a public safety officer involved in a rescue effort or simply remedying a dangerous situation by clearing the disabled vehicles or other wreckage. See Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955) (plaintiff struck by car while warning traffic of obstruction caused by accident); Scott v. Texaco, Inc., 48 Cal. Rptr. 785, 239 Cal.App.2d 431, 48 Cal. Rptr. 785 (1966) (plaintiff who was struck by oil company's truck as she stood in highway to warn oncoming vehicles of overturned vehicle ahead); Newsome v. St. Paul Fire & Marine Ins. Co., 350 So.2d 825 (Fla. App. 1977) (plaintiff struck by car while pushing defendant's disabled vehicle), Hale v. Burgess, 478 S.W. 2d 856 (Tex. Civ. App. 1972) (police officer struck by vehicle while directing traffic around two-car wreck caused by defendant). See also D'Angeli's Case, 369 Mass. 812 (1976); Abdow v. Silverbrand, 301 Mass. 337 (1938); Hollidge v. Duncan, 199 Mass. 121 (1908).

Similarly, the negligence of a motorist pursued by the police may be considered the proximate cause of a one-vehicle accident involving the pursuing cruiser. See Commonwealth v. Berggren, 398 Mass. 338 (1986). On the other hand, although the owner or custodian of a car may be liable for negligently permitting the car to be stolen, the owner's liability does not extend to a police officer injured in a foot chase following apprehension of the stolen vehicle. Poskus v. Lombardo's of Randolph, Inc., 423 Mass. 637, 670 N.E. 2d 383 (1996). The fleeing thief would still be liable and potentially covered by homeowner's insurance.

Automobile insurance
Personal injury protection

The Personal Injury Protection provisions of the Massachusetts Auto Insurance Policy includes an exclusion, "we will not pay PIP benefits to or for anyone who is entitled to worker's compensation benefits for the same injury." Often the question arises whether the exclusion applies to on-the-job accidents of police officers and firefighters. In these cases the policy exclusion is not applicable because the payments to which the victim is entitled from his or her municipal employer are pursuant to G.L.c. 41, §§100 and 111F, and are not worker's compensation benefits. Therefore, the injured police officer or firefighter has access to the Personal Injury Protection coverage for medical expense (subject to coordination of benefits), and for seventy five percent of his or her lost wages not covered by wage continuation — typically comprised of extra paid details and overtime.

The statute authorizing and defining personal injury protection, G.L.c. 90, §34A, authorizes an exclusion only where the injured person is "entitled to payments or benefits under the provisions of Chapter 152."This exclusion has been interpreted to extend beyond just Chapter 152 and to those entitled to compensation under worker's compensation laws of another state or to the Federal Government. See Mailhot v. Travelers Insurance Company, 377 N.E. 2d 681. However, injured police officers and firefighters are not governed by the Massachusetts workmen's compensation law or any other pure worker's compensation law. Chapter 152, §69 exempts police officers and firefighters from the provisions of the workmen's compensation act.

Significantly, the Massachusetts Supreme Judicial Court, in Wincek v. West Springfield, 399 Mass. 700, has specifically recognized that §111F is not a "pure" workmen's compensation law...." 399 Mass. at 704, n 3. Discussing other sections of the insurance policy which refer to "a worker's compensation law or any similar law," the court recognized that section 111F was not a worker's compensation law, but was a "similar law." Accordingly, payments pursuant to §111F may have some significance under Part 3 of the policy (uninsured motorists) and Part 12 of the policy (underinsured motorist) which contain such "similar law" language.

This section is not, therefore, a pure worker's compensation law such as is contemplated by the exclusion to PIP. This position was upheld by a divided panel of the Appellate Division of the Boston Municipal Court in Cox v. Safety Insurance Co. (C.A. No. 220479). Moreover, as to medical expenses, chapter 41, §100 has little resemblance to worker's compensation law. Payments under §100 may not even be compulsory. See MacArthur v. Massachusetts Hospital Service, Inc., 180 N.E. 2d 449; Berube v. Selectmen of Edgartown, 147 N.E. 2d 180.

Thus, because neither Chapter 41, § 111F (wages), nor §100 (medical expenses) of the same chapter provides pure worker's compensation benefits, an injured police officer or firefighter is entitled to the benefits of PIP coverage.

Medical payments

The standard auto insurance policy provisions for Medical Payments coverage include no exclusion directed toward work-related injuries. Frequently, however, payment of this optional coverage may be denied under the regular use exclusion, (denying payment to an insured injured while occupying a vehicle owned or "regularly used" by insured or household member"), depending upon the regularity with which the injured officer uses the vehicle in which he or she become injured, or any other vehicle in the fleet to which the employee has access. See Galvin v. Amica Mutual Insurance Co., 11 Mass. App. 457, 417 N.E. 2d 34 (1981).

Arising from the use of a vehicle

The availability of automobile insurance to compensate for an injury, whether for a first party claim for uninsured/underinsured coverage or for a third party claim to a tortfeasor's bodily injury coverage, depends in the first instance upon establishment of a nexus between the insured vehicle and the accident in question. The Massachusetts (Personal) Automobile Insurance Policy only covers "accidents and losses which result from the ownership, maintenance or use of autos." An accident is defined as "an unexpected, unintended event that causes bodily injury or property damage arising out of the ownership, maintenance or use of an auto."Therefore, there must be a sufficient relationship between the use of a motor vehicle and the injuries claimed in order for coverage to apply.

In Foley v. Nationwide Mut. Ins. Co., 2000 WL 1923516, a Superior Court justice examined the availability of coverage to a physical altercation at the end of a police pursuit. The intoxicated tortfeasor had been overtaken after a high-speed chase. The plaintiff police officer and the tortfeasor were standing outside of the subject vehicle. The tortfeasor then tried to get back into the car, presumably to escape. At the same time, the police officer lunged into the car to remove the keys from the ignition. As the officer turned the vehicle off and removed the keys, the tortfeasor pushed against his arm in effort

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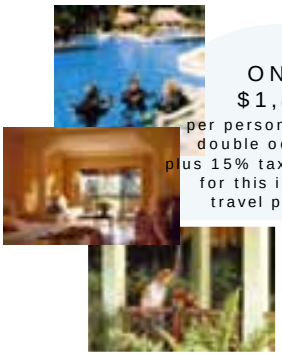

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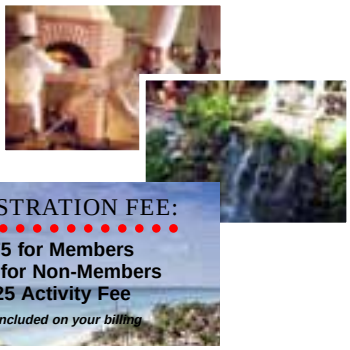

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Representing injured public safety personnel — Massachusetts police and firefighter injury overview

Continued from page 16

to restart the car, injuring the officer. Nationwide sought to avoid coverage on the bases that the perpetrator acted intentionally and that the injury did not arise from use of the vehicle.

The court rejected the insurer's argument based on intentional conduct, citing a series of cases establishing the proposition that for coverage purposes conduct is intentional only if it is specifically intended to cause harm or the tortfeasor is substantially certain that such harm will result from his conduct. See Preferred Mut. Ins. Co. v. Gamache, 42 Mass. App. Ct. 94 (1997), aff'd 426 Mass. 93. Reckless conduct, although sufficient to establish the intent necessary for a battery, is not sufficient to render conduct non- accidental for purposes of avoiding bodily injury coverage. See Sheehan v. Gorianski, 321 Mass. 200, 72 N.E.2d 538, 542 (1947) (discussing differences in treatment of recklessness state of mind in insurance coverage cases as opposed to criminal cases); Quincy Mutual Fire Insurance Company v. Abernathy, 393 Mass. 81, 84, 469 N.E.2d 958 (1984).

The court additionally ruled that the injury arose out of the use of the vehicle. "There was a direct and immediate connection between the vehicle, the conduct of the plaintiff ... in reaching inside to remove the keys, and the simultaneous conduct of the defendant ... in trying to get past the plaintiff and into the vehicle as he sought to escape from the scene. The critical events took place within the passenger compartment of the ... vehicle."

Recently, in Bonina v. Marshall, 71 Mass. App. Ct. 904 (2008), the Appeals Court ruled that an injury in an altercation outside of a vehicle did not arise from the use of the vehicle for insurance purposes even though the arrestee tried to hold on to the vehicle in an effort to resist arrest.

In Quincy Mut. Fire Ins. Co. v. Gorman — the pertinent facts of which are set forth in the Supreme Judicial Court's related decision in Poskus v. Lombardo's of Randolph, Inc., 423 Mass. 637, 640 (1996) — the Superior Court rejected the efforts of a homeowner's insurer to avoid, as arising from the use of a vehicle, coverage for an accident occurring in a foot pursuit at the end of a police chase of the defendant's vehicle. Gorman, the insured perpetrator had stolen a vehicle, driven the car while intoxicated, and fled the police. Officer Poskus and his partner apprehended the tortfeasor. The tortfeasor was outside of the vehicle and being approached by the police officers. In order to flee, the tortfeasor jumped over the nearby guardrail and fell down an embankment with the officers close behind. Officer Poskus was injured as he fell down the embankment onto the tortfeasor. The insurer sought to avoid paying under the tortfeasor's homeowner's policy, citing that policy's exclusion for injuries arising from the use of a vehicle. The Superior Court rejected the insurer's argument, reasoning that the involvement of or with the vehicle ended when all parties were out of their respective vehicles and the foot chase was underway.

Uninsured and underinsured coverage

As to both uninsured and underinsured coverage, the injured employee has available one policy in the following descending order of preference: The highest limit policy on which the victim is the named insured; if the victim is not the named insured on any policy, the highest limit policy in the victim's household ; if the victim has no automobile insurance policies in his/her household, he/she can gain access to the uninsured/underinsured coverage, if any, covering the municipal vehicle — police cruiser or fire apparatus — occupied at the time of the accident.

In order to apply to uninsured or underinsured claims the broad theories of causation discussed above, it is helpful to be aware of Surrey v. Lumbermens Mutual Casualty Co., 384 Mass. 171, 424 N.E. 2d 234 (1981), establishing that an uninsured claim may proceed on a hit-and-run (unidentified motorist) theory even in the absence of physical contact with the negligent driver's vehicle.

Both the underinsured and the uninsured coverage provide for a reduction of payments by the "amount paid under a workers' compensation law or similar law." In Wincek v. West Springfield, 399 Mass. 700, 506 N.E. 2d 517 (1987) the Supreme Judicial Court held that G.L.c. 41, §111F "is such a similar law.'" 506 N.E. 2d at 519 and n.3. Viewing the automobile policy in light of Wincek suggests that an automobile insurance carrier may reduce its uninsured or underinsured payments to avoid duplication of municipal payments under G.L.c. 41, §§100 and 111F. (This offset is discussed in detail in Norman Fine's article in the December 2007 MATA Journal.)

Liens/reimbursement

Sections 100 and 111F contain practically identical provisions for reimbursement on third party cases:

"When the injury ... was caused under circumstances creating a legal liability in some person to pay damages in respect thereof, either the person so injured or the city, town or fire or water district ... [having paid under Chapter 41] may proceed to enforce the liability in any court of competent jurisdiction. The sum recovered shall be for the benefit of the city, town or fire or water district ..., unless the sum is greater than [the payments under Chapter 41], in which event the excess shall be retained by or paid to the person so injured. For the purposes of this section, "excess" shall mean the amount by which the total sum received in payment for the injury, exclusive of interest and costs, exceeds the amount paid under this section. The party bringing the action shall be entitled to any costs recovered by him. Any interest received in such action shall be apportioned between the city, town or fire or water district and the person so injured in proportion on the amounts received by them respectively, inclusive of interest and costs. The expense of any attorney's fees shall be divided between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively."

The municipality's lien, therefore, is substantively similar to that of a workers' compensation insurer under G.L. c. 152; the repayment calculations are the same as for workers compensation (and outlined in Alan Pierce's article in the December 2007 MATA Journal), and thus the DIA's interactive form is useful in computing the lien. There is no case law addressing whether repayment applies to future benefits under the principles of Hunter v. Midwest Coast Transport, Inc., 440 Mass. 779 (1987). However, based on the similarity of statutory language, attorneys should be mindful of the potential that Hunter may be applied to reduce Chapter 41 benefits following a third party settlement.

There is no requirement of, or mechanism for, court or agency approval of third-party settlements. See Corbett v. Related Companies Northeast, Inc., 424 Mass. 714, 677 N.E.2d 1153 (1997). The amendments to the Workers Compensation Act affecting loss of consortium claims – both as to limiting claims against the employer and as to requiring approval of settlement allocations do not apply to these public safety cases. See Eyssi v. City of Lawrence, 416 Mass. 194 (1993).

In a Superior Court case, Justice Gershengorn has ruled that the municipality's statutory subrogation lien extends only to amounts actually paid by the employer, and not to amounts covered by insurance. (The insurer, however, may have its own right of subrogation under the policy.) This was Wulleman v. North Reading, 1997 WL 1366844 (Mass.Super., Dec 17, 1997) (NO. 972988).

The municipality has no lien on first-party insurance proceeds such as uninsured or underinsured motorist coverage. (Wincek v. West Springfield, supra) The Wincek court held that the employer-municipality had no claim to the proceeds of an underinsured motorist recovery by an officer to whom the city had paid benefits under G.L.c. 41, §111F.

In addition to its right to reimbursement for payments to or on account of the injured employee, the municipality may, under G.L.c. 41, §111F, recover directly from the tortfeasor for overtime or other costs of replacing the injured police officer or firefighter. This is separate from and independent of the municipality's lien on the employee's third-party case, as the statute does not provide for enforcement of this claim by the employee.

Finally, practitioners in this area should also be mindful of G.L.c. 32, §14A, which provides under the heading of "Third Party Recovery" for an offset against disability retirement of amounts recoverable "for lost wages" against any third parties other than employers by reason of the same injury. The application of this statute is detailed in Deborah Kohl's article in the December 2007 MATA Journal.

Representing injured public safety personnel provides an exciting opportunity for aggressive and creative lawyering in support of worthy claimants. To achieve the best results for these clients, it is important to be mindful of the special issues addressed above.

Academy seeks 'Journal' input

If you would like to write an article for the MATA Journal, or would like to see an article on a specific topic or issue, call Mike Conley at (781) 848-9891 or e-mail michael@kenneyconley.com.

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