

REPRESENTING INJURED PUBLIC SAFETY PERSONNEL --

MASSACHUSETTS POLICE AND FIREFIGHTER INJURY OVERVIEW

J. Michael Conley

(Massachusetts Academy of Trial Attorneys Journal Fall 2008)

Introduction

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. M.G.L. c.152, §§1, 69; *see 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), M.G.L. c.22, §7A and M.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 -- M.G.L. c.41, §§100, 111F.

I. First Party Recovery -- The Compensation Scheme

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

A. Medical Benefits: 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.”

M.G.L. c. 41, § 100.

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. *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 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).

B. Leave With Pay: 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.”

M.G.L. c. 41, § 111F.

“*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. *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 firefighter’s service-related incapacity. *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. M.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 M.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:

(1) designated physician's opinion that incapacity no longer exists, *See Paparo v. Provincetown*, 34 Mass. App. Ct. 625 (1993);

(2) resignation, *Jones v. Wayland*, 374 Mass. 249 (1978);

(3) discharge for cause unrelated to the injury, *Hennessy v. Bridgewater*, 388 Mass. 219, 446 N.E. 2d 58 91983); *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);

(4) retirement or pension.

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

“Incapacitated” refers to incapacity for duty and not necessarily total incapacity. *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. *Newton Branch of Mass. Police Ass'n 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.

C. 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. *Duxbury v. Duxbury Permanent Firefighters Ass'n*, 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. *Willis v. Board of Selectmen of Easton*, 405 Mass. 159 (1989).

The collective bargaining agreement and practices thereunder 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'n 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 M.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.

D. 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 (ADR) under M.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 M.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 M.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 M.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 M.G.L. c.32, §94 inapplicable to M.G.L. c.41, §111F). *See also* M.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 indemnity payments.

II. 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.

A. 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. *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. *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. *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 imperilled 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),

B. 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. *Preferred Mutual Ins. Co. v. Gamache*, 426 Mass 93 (1997); see *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)

C. 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 Supreme Judicial Court, however, has interpreted the Massachusetts Tort Claims Act, M.G.L. c. 258, as precluding an action thereunder against a public employer by an employee eligible for payments under M.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).

D. Premises Liability

The Supreme Judicial Court'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).

E. 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.

III. Automobile Insurance

A. 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 Massachusetts General Laws, Chapter 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 (75%) 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, Massachusetts General Laws Chapter 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 Personal Injury Protection Coverage.

B. 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).

C. 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 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, e.g., *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 generally *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.

D. 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 ;
- Only if the victim has no automobile insurance policies in his/her

household can the victim 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 M.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 M.G.L. c.41, §§100 and 111F. (This offset is discussed in detail in Norman Fine’s article in the December 2007 MATA Journal.)

IV. 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 M.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. *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.) *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 M.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 M.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 M.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.*)

Conclusion

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.