
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

WORCESTER, SS.

DOCKET NO. SJC-12736

JANICE MAGLIACANE,
APPELLANT and PLAINTIFF,

v.

CITY OF GARDNER & OTHERS
APPELLEES and DEFENDANTS.

ON DIRECT APPELLATE REVIEW FROM A FINAL JUDGMENT
ENTERED BY THE WORCESTER SUPERIOR COURT

**BRIEF OF *AMICUS CURIAE* OF THE MASSACHUSETTS MUNICIPAL
LAWYERS ASSOCIATION IN SUPPORT OF THE CITY OF GARDNER**

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Dated: September 16, 2019

TABLE OF CONTENTS

Table of Contents.....2

Table of Authorities.....3

Amicus Declaration.....5

Statement of Interest of Amicus Curiae.....5

Questions Presented.....6

Argument.....6

I. THE MASSACHUSETTS TORT CLAIMS ACT, M.G.L. C.
258, APPLIES TO CLAIMS BY RESIDENTS OF INJURY OR
DAMAGE STEMMING FROM THE MUNICIPALITY'S SALE AND
DISTRIBUTION OF WATER.....6

 A. The MTCA Governs the Liability of Public
Employers Without Regard to Whether the
Municipality is Engaging in Commerce.....7

 B. The Policies Underlying The MTCA Support
Inclusion Of All Tort Claims Under its
Rubric.....13

Conclusion.....17

Mass. R.A.P. 16(k) Certification.....19

Certificate of Service.....20

Addendum..... 21

TABLE OF AUTHORITIES

Cases:

Alake v. City of Boston,
40 Mass. App. Ct. 610 (1996).....8

Baumgardner v. City of Boston,
304 Mass. 100(1939).....10, 11

Board of Educ. v. Assessor of Worcester,
368 Mass. 511 (1975).....8, 11

Dinsky v. Framingham, 386 Mass. 801 (1978).....9, 10

Emerson College v. City of Boston,
391 Mass. 415 (1984).....14

Hanlon v. Rollins, 286 Mass. 444 (1934).....8

Industrial Fin. Corp. v. State Tax Comm'n,
367 Mass. 360 (1975).....8

Irwin V. Town of Ware, 392 Mass. 745 (1984).13, 14, 15

Jean W. v. Commonwealth, 414 Mass. 496 (1993)....9, 10

King v. Viscoloid Co., 219 Mass. 420 (1914)....7, 8, 9

Lafayette Place Assocs v. BRA, et al.,
427 Mass. 509 (1998).....12

Morash & Sons, Inc. v. Com.,
363 Mass. 612 (1973).....10, 11, 13

Morrissey v. New England Deaconess Ass'n - Abundant
Life, 458 Mass. 580 (2010).....6, 7, 10

Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534
(1996), cert. denied, 520 U.S. 1131 (1997).....7, 8

Vining v. Com., 63 Mass. App. Ct. 690 (2005).....7

Whitney v. City of Worcester,
373 Mass. 208 (1977).....7. 10, 11, 13, 14

Yun Ku v. Town of Framingham,
53 Mass. App. Ct. 727 (2002).....13

Statutes:

M.G.L. c. 258.....*passim*

M.G.L. c. 258, § 2.....7, 8, 9

M.G.L. c. 258, §10(a)-(j).....10

M.G.L. c. 258, § 13.....9

1993 Mass. Acts, c. 495, § 57.....10

Other Authorities:

Hawke, Fiscal Year 2020 Operating Budget for the City
of Gardner, (May 2, 2019), [https://www.gardner-
ma.gov/Archive.aspx?AMID=50](https://www.gardner-
ma.gov/Archive.aspx?AMID=50).....fn-16

United States Census Bureau, Quick Facts, Gardner
City, Massachusetts,
[https://www.census.gov/quickfacts/gardnercitymassachus
etts](https://www.census.gov/quickfacts/gardnercitymassachus
etts).....fn-16

AMICUS DECLARATION

Neither the party, nor its counsel, authored this brief in part or in whole. Neither the party, nor its counsel, contributed money that was intended to fund the preparation or submission of this brief. Neither the MMLA, nor its counsel, has represented either of the parties to the present appeal in any other proceeding involving similar issues, or in any proceeding that is at issue in the present appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Municipal Lawyers Association (the "MMLA") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. MMLA's mission is to promote better local government through the advancement of municipal law. The MMLA's primary concern in this case is to ensure that municipalities throughout the Commonwealth can rely on the protections and predictability afforded by the Massachusetts Tort Claims Act ("MTCA" or "Act") as written by the legislature and are not subjected to tort claims based on whether a municipality is engaging in commerce rather than performing a governmental function. As this Court has acknowledged, such a classification system has been

tried and has failed. The MMLA believes this Court should not judicially reinstate this antiquated, unwieldy approach to municipal tort liability.

QUESTIONS PRESENTED

1. Whether the Massachusetts Tort Claims Act, M.G.L. c. 258, applies to claims by residents of injury or damage stemming from the municipality's distribution of water.

2. Whether, by selling and distributing water, a municipality is engaging in commerce rather than performing a governmental function pursuant to the Act.

ARGUMENT

I. THE MASSACHUSETTS TORT CLAIMS ACT, M.G.L. C. 258, APPLIES TO CLAIMS BY RESIDENTS OF INJURY OR DAMAGE STEMMING FROM THE MUNICIPALITY'S SALE AND DISTRIBUTION OF WATER.

The Appellant seeks to have this Court carve out an exception to the MTCA when a municipality sells water to its residents. Such judicial intervention would be at odds with the plain language of the MTCA and the policies underlying its enactment. At this Court's instigation, the legislature enacted the MTCA,

G.L. c. 258, to replace the common law doctrine of sovereign immunity "with a comprehensive statutory scheme that would govern the liability of public employers in tort actions..." Morrissey v. New England Deaconess Ass'n - Abundant Life, 458 Mass. 580, 587, 590 (2010), and "completely restructure the functional analysis which [the courts] have applied in the past." Whitney v. City of Worcester, 373 Mass. 208, 216 (1973).

The MTCA "grants subject matter jurisdiction to courts of the Commonwealth for claims against governmental entities, which historically have enjoyed sovereign immunity from such claims." Vining v. Com., 63 Mass. App. Ct. 690, 691 (2005). Although municipalities thus became liable for its torts, the remedies provided by the Act "are exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer." M.G.L. c. 258, § 2.

A. The MTCA Governs the Liability of Public Employers Without Regard to Whether the Municipality is Engaging in Commerce.

Statutory language is the principal source of insight into legislative purpose. Pielech v. Massasoit

Greyhound, Inc., 423 Mass. 534, 539 (1996), cert. denied, 520 U.S. 1131 (1997); see also King v. Viscoloid Co., 219 Mass. 420, 425 (1914). A statute shall be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Hanlon v. Rollins, 286 Mass. 444, 447 (1934); Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513 (1975), quoting Industrial Fin. Corp. v. State Tax Comm'n, 367 Mass. 360, 364 (1975). Massachusetts courts have ruled that the scope of the MTCA should be construed liberally to effectuate its purpose and intent. Alake v. City of Boston, 40 Mass. App. Ct. 610, 613-614 (1996) (citations omitted). Given these fundamental bases for the law, it would be contradictory for a municipality's liability under the Act to turn on whether the function in question is classified as done in commerce or governmental.

The plain language of the MTCA clearly states that the Act applies to all "public employers" without

further qualification and to all services or functions they are authorized to provide. M.G.L. c. 258, §§ 1-2. The words "in commerce" or "government function" do not appear in the MTCA, and this Court does not "read into [a] statute a provision which the Legislature did not see fit to put there." King, 219 Mass. at 425 (observing that words "indictment," "criminal complaint," "charges," "order to show cause," and "ethics violation" do not appear in § 13 or in any other section of G. L. c. 258).

It is for the legislature, not the judiciary, to limit the class of public employers and the types of activities subject to the Act's comprehensive scheme. This is a dance the courts and the legislature have engaged in before.

In Jean W. v. Commonwealth, 414 Mass. 496 (1993), the Court announced its intention to abolish the judicially-created public duty rule, created 15 years earlier as an exception to the MTCA's abrogation of immunity. See Dinsky v. Framingham, 386 Mass. 801, 808-809 (1978). Finding the rule "inconsistent with the Act," the Court deferred, once again, to the legislature, concluding that prior judicial efforts to distinguish viable claims from those subject to

dismissal by virtue of a public duty-special relationship dichotomy have not succeeded in producing a rule of predictable application. "[T]he result has been to resurrect effectively the antiquated and outmoded concepts of sovereign immunity which we and the legislature have sought to shed." Jean W., 414 Mass. at 499.

Though the Court thought it necessary to amend the MTCA, the Court acknowledged that such changes should be made by the legislature and consequently allowed the legislature time to enact the changes it thought necessary. In response to Jean W., the legislature amended the MTCA and for policy reasons preserved sovereign immunity for certain claims. 1993 Mass. Acts, c. 495, § 57. See G.L. c. 258, §10(a)-(j).

The MTCA was enacted to end the unworkable system of attempting to classify municipal functions as either commercial or governmental and to end the common law use of sovereign immunity and its "crazy quilt" of resulting exceptions. Morrissey, 458 Mass. at 587 (citations omitted). In 1977, the Supreme Judicial Court explained:

Such rigid classifications of municipal activities and municipal personnel have served only to obscure the issue of whether a particular plaintiff should recover from a governmental entity for his injuries and to prevent the systematic and straight-forward development of a rational scheme of governmental liability that is consistent with accepted tort principles and the reasonable expectations of the citizenry with respect to its government.

Whitney, 373 Mass. at 214-15. See, e.g., Morash & Sons, Inc. v. Com., 363 Mass. 612, 621 (1973) (further citations omitted) (discusses allowing recovery against water department employee but not fire department employee for same conduct); Baumgardner v. City of Boston, 304 Mass. 100, 107(1939)(recovery against city for injury caused by a garbage truck collecting commercial trash but not residential trash). "As the distinctions become more refined, their relevance becomes more questionable. It has been said of similar rules in another jurisdiction that they are 'as logical as those governing French irregular verbs.'" Morash & Sons, Inc., 363 Mass. at 622 (citations omitted). In interpreting the Act, the Court should consider the cause of the enactment and the object to be accomplished. See Board of Educ. 368 Mass. at 513.

Moreover, Plaintiff's attempt to carve out an exception for what it terms "commercial" "non-core" governmental activity - purportedly outside the application of Chapter 258 - is not unlike the many prior attempts to evade the statute's broad reach. For example, when a plaintiff argued that the Boston Redevelopment Authority was not a public employer and, therefore, not subject to the protections afforded under Chapter 258, this Court explained that it would resolve any "indeterminacy ... in favor of subjecting the BRA to the general regime of c. 258." Lafayette Place Assocs v. BRA, et al., 427 Mass. 509, 532 (1998). The concern then, as it is now (argued more fully below), was the effect of "removing a governmental body from the protection of the immunity [afforded under the Act]." Id.

This Court was particularly prescient at the time, raising the following concern with these sorts of attempts at evading the Act: "This may have large consequences to which none of our cases so far has attended." Id. This Court should resist the request by plaintiffs to go backward and read into the MTCA a distinction the Act was specifically designed to

eradicate. Any carving out of an exception to the Act's comprehensive liability scheme should come from the legislature, not from judicial interpretation.

B. The Policies Underlying The MTCA Support Inclusion Of All Tort Claims Under its Rubric.

The MTCA insulates cities and towns against calamitous losses. Such insulation is necessary to protect taxpayers and ensure the provision of services. Although the MTCA waives sovereign immunity for cities and towns in certain situations, it does so with due regard for protection of public funds and operational predictability. For example, its presentment procedures ensure orderly administration of claims, Yun Ku v. Town of Framingham, 53 Mass. App. Ct. 727, 731 (2002), while its damages cap balances individual recovery with preservation of public funds. Irwin v. Town of Ware, 392 Mass. 745, 772 (1984). Exceptions from these substantive and procedural governors of liability expose municipalities to "potentially catastrophic financial burden[s]." Morash, 363 Mass. at 623 n.6.

The Act balances the good of the general citizenry with the needs of one citizen. See Whitney,

373 Mass. at 216 ("An appropriate balance should be struck between the public interest in fairness to injured persons and in promoting effective government."). The Act allows an individual to seek recovery from a municipality for personal injury or property damage caused by the alleged wrongful conduct of public employees. Recognizing that so-called "in commerce" activities fall within the plain language and purpose of the MTCA promotes the fair and equitable treatment of all plaintiffs harmed by the acts or omissions of public employees. Plaintiffs seeking similar relief for similar injuries arising from similar conduct by similar defendants should be treated similarly.

The cumbersome "division between commerce and governmental functions is made more complicated by the appropriateness of municipal activities which result in the receipt of money. The imposition of fees designed to compensate for government services or taxes to generate revenue are both proper and ordinary tasks of cities and towns." Emerson College v. City of Boston, 391 Mass. 415, 424-427. Municipalities need the predictability offered by the MTCA to adapt the

provision of services to reflect the changing wants and needs of their communities.

Reinstating the government function analysis into the MTCA, as the Appellant urges this Court to do, could render the provision of some government services economically infeasible. Unexpected drains on municipal funds undercut the capacity of a municipality to provide its inhabitants with important public services, and would incentive municipalities to restrict or eliminate their availability despite the public benefits that accrue.

The potential for unlimited recoveries by plaintiffs against a city or town harms the public interest. If this Court were to adopt the Appellants' position and revert to the unwieldy classification of a municipal activity as "in commerce" or as a "governmental function", it would jeopardize the carefully crafted balance between individual and governmental rights struck by the legislature. As written, the MTCA allows meaningful recovery to an individual, while simultaneously limiting a public employer's exposure to excessive liability. Irwin, 392 Mass. at 772.

The financial implications of reverting to a functional analysis of government tort liability are staggering. By way of example, Ms. Magliacane has alleged \$3,700.00 in damages for the costs of replacing a hot water heater, including parts and labor, an amount well below the \$100,000 damages cap imposed by the Act. According to the 2010 Census, Gardner has a population of 20,228 and there were 8,254 households in the City between 2013-2017.¹

If each household alleged a similar claim, the City could potentially be liable in the amount of \$30,539,800. Gardner's budget for Fiscal Year 2020 is \$67,365,703. A claim of this size on this issue alone could be more than forty-five percent (45%) of the City's annual budget.² When one considers the potential for additional claims against the City arising from the wide variety of it offers for a fee (e.g., sports, recreational, educational, recycling, trash removal) the potential liability to the City is staggering.

¹ Hawke, Fiscal Year 2020 Operating Budget for the City of Gardner, (May 2, 2019), <https://www.gardner-ma.gov/Archive.aspx?AMID=50>.

² United States Census Bureau, Quick Facts, Gardner City, Massachusetts, <https://www.census.gov/quickfacts/gardnercitymassachusetts>

The public policy concerns underlying the MTCA support its application to all tort claims without regard to whether a municipality is engaging in commerce rather than performing a governmental function. The government function analysis approach would wreak havoc on the carefully crafted comprehensive statutory scheme of municipal liability embodied in the MTCA and would leave the Commonwealth's cities and towns facing the very evils the MTCA was designed to eradicate.

CONCLUSION

For the reasons set forth more fully above, this Honorable Court should affirm the decision and final judgment of the Superior Court and rule that the municipal provision of water service for a fee is subject to the MTCA.

Respectfully submitted,

The Massachusetts Municipal Lawyers
Association,

By,

/s/ Cynthia L. Amara

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Mass. R.A.P. 16(k) Certification

I, Cynthia L. Amara, certify that the foregoing Brief of the *Amicus Curiae*, The Massachusetts Municipal Lawyers Association complies with Massachusetts Rules of Appellate Procedure, including but not limited to, Rule (16)(a)(13); Rule 16(e); Rule 17(c)(9); Rule 18; Rule 20; and Rule 21. Compliance with Rule 20 was ascertained by preparing the brief in a Word 2013 document utilizing the following standards: 1.5 inch margins on the left and right sides, 1 inch margins on the top and bottom of each page and 12 point Courier New font with double spacing. The number of non-excluded sections of the brief pursuant to Rule 20(a)(2)(D) contain 2251 words, counted by the Microsoft Word word-processing software.

/s/ Cynthia L. Amara

Dated: September 16, 2019

COMMONWEALTH OF MASSACHUSETTS
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CERTIFICATE OF SERVICE

I, Cynthia L. Amara, hereby certify that on the below date, I served a copy of the foregoing Brief of the *Amici Curiae* The Massachusetts Municipal Lawyers Association by e-filing service, and to non-registered counsel by first class mail, postage prepaid, to the following counsel of record:

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ADDENDUM TABLE OF CONTENTS

M.G.L. c. 258.....ADD 21

Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)

Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)

Chapter 258. Claims and Indemnity Procedure for the Commonwealth, Its Municipalities, Counties and Districts and the Officers and Employees Thereof (Refs & Annos)

M.G.L.A. 258 § 1

§ 1. Definitions

Effective: June 29, 2012

[Currentness](#)

As used in this chapter the following words shall have the following meanings:--

“Acting within the scope of his office or employment”, acting in the performance of any lawfully ordered military duty, in the case of an officer or soldier of the military forces of the commonwealth.

“Executive officer of a public employer”, the secretary of an executive office of the commonwealth, or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; the county commissioners of a county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or as designated by the charter of the town; and the board, directors, or committee of a district in the case of the public employers of a district, in the case of the Massachusetts Bay Transportation Authority, its general manager and rail and transit administrator, and, in the case of any other public employer, the nominal chief executive officer or board.

“Public attorney”, the attorney who shall defend all civil actions brought against a public employer pursuant to this chapter. In the case of the commonwealth he shall be the attorney general; in the case of any county he shall be the district attorney as designated in [sections twelve](#) and [thirteen of chapter twelve](#); in the case of a city or town he shall be the city solicitor or town counsel, or, if the town has no such counsel, an attorney employed for the purpose by the selectmen; in the case of a district he shall be an attorney legally employed by the district for that purpose; and, in the case of the Massachusetts Bay Transportation Authority, the attorney shall be the general counsel. A public attorney may also be an attorney furnished by an insurer obligated under the terms of a policy of insurance to defend the public employer against claims brought pursuant thereto.

“Public employee”, elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, and officers or soldiers of the military forces of the commonwealth. For purposes of this chapter, the term “public employee” shall include an approved or licensed foster caregiver with respect to claims against such caregiver by a child in the temporary custody and care of such caregiver or an adult in the care of such caregiver for injury or death caused by the conduct of such caregiver; provided, however, that such conduct was not intentional, or wanton and willful, or grossly negligent. For this purpose, a caregiver of adults means a member of a foster family, or any other individual, who is under contract with an adult foster care provider as defined and certified by the division of medical assistance.

“Public employer”, the commonwealth and any county, city, town, educational collaborative, or district, including the

Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts Turnpike Authority and any public health district or joint district or regional health district or regional health board established pursuant to the provisions of [section twenty-seven A](#) or [twenty-seven B of chapter one hundred and eleven](#), and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or cooperative which operates a telecommunications system pursuant to [section 47E of chapter 164](#), department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Port Authority, or any other independent body politic and corporate. With respect to public employees of a school committee of a city or town, the public employer for the purposes of this chapter shall be deemed to be said respective city or town.

“Serious bodily injury”, bodily injury which results in a permanent disfigurement, or loss or impairment of a bodily function, limb or organ, or death.

Credits

Added by St.1978, c. 512, § 15. Amended by St.1980, c. 151; St.1980, c. 315, § 1; St.1981, c. 179; St.1981, c. 403; St.1983, c. 537; St.1992, c. 343, § 5; St.1993, c. 110, § 227; St.1993, c. 467; St.1998, c. 459, §§ 1, 2; St.2000, c. 12, § 9; St.2009, c. 25, §§ 123, 125, eff. July 1, 2009; St.2009, c. 25, § 124 as amended by St.2009, c. 120, § 40, eff. Nov. 1, 2009; St.2009, c. 120, § 22A, eff. Nov. 1, 2009; St.2012, c. 132, §§ 3, 4, eff. June 29, 2012.

[Notes of Decisions \(22\)](#)

M.G.L.A. 258 § 1, MA ST 258 § 1
Current through Chapter 66 of the 2019 1st Annual Session

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