

KOPELMAN AND PAIGE, P.C.

101 Arch Street
Boston, MA 02110
800-548-3522

BOSTON
WORCESTER

NORTHAMPTON
LENOX

MUNICIPAL TORT LIABILITY GENERAL LAWS CHAPTER 258

General Laws, chapter 258, section 1, et seq. establishes the procedure for asserting tort claims against municipalities. The following provides an outline of issues concerning such claims.

I. WHAT TYPES OF CLAIMS ARE GOVERNED BY CHAPTER 258?

All claims for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his employment are subject to the requirements of Chapter 258. G.L. c. 258, §1.

II. WHO CAN BE HELD LIABLE UNDER CHAPTER 258?

Public Employer – A public employer can be held liable for the negligence of its employees while acting within the scope of their employment. G.L. c. 258, §2. Aside from cities and towns, boards, committees, and departments are public employers if they exercise discretion and control over public employees. G.L. c. 258, §1. Thus, the following entities have been held to be public employers: city water and sewer commissions, Alex v. Boston Water and Sewer Com., 425 Mass. 509 (1998); city housing authorities, Wheeler v. Boston Housing Authority, 403 Mass. 328 (1988); and regional school districts, Doe v. Town of Blandford, 402 Mass. 831 (1988).

Public Employees In Their Personal Capacities – public employees are immune from liability for personal injury or death caused by negligence committed within the scope of their employment. Taplin v. Town of Chatham, 390 Mass. 1 (1983). Public employees can, however, be held liable for intentional torts, even if committed within the scope of their employment. Spring v. Geriatric Authority of Holyoke, 394 Mass. 274 (1985).

Who Is a Public Employee? A public employee is any “elected or appointed, officers or employees of any public employer, whether serving full or part-time, temporary or permanent, compensated or uncompensated, . . .” G.L. c. 258, §1. Independent contractors are not public employees. Rowe v. Arlington, 28 Mass.App.Ct. 389 (1990).

III. INITIATING A CLAIM

Presentment – Prior to initiating a civil action for damages under Chapter 258, the claimant must present the claim in writing to the executive officer of the municipality. G.L. c. 258, §4. The written claim for damages must be so presented within **two (2) years** from the date

(OVER)

KOPELMAN AND PAIGE, P.C.

101 Arch Street
Boston, MA 02110
800-548-3522

**BOSTON
WORCESTER**

**NORTHAMPTON
LENOX**

that the cause of action accrued. G.L. c. 258, §4. The presentment letter must be sufficiently detailed to put the officer on notice of the claim so that he can investigate its validity. Gilmore v. Commonwealth, 417 Mass. 718 (1994). If the claimant is alleging multiple theories of liability, each one must be set forth in the presentment letter. See Tambolleo v. West Boylston, 34 Mass.App.Ct. 526 (1993).

When the Complaint Can Be Filed – The claimant cannot file a complaint until the claim has been denied in writing by the executive officer of the public employer, or if no denial is made, until six (6) months after the claim is presented. G.L. c. 258, §4. The complaint must be filed within **three (3) years** of the date that the cause of action accrued.

Where the Claim Must Be Filed – A claim for damages under Chapter 258 must be brought in the Superior Court for the county in which the claimant resides or the county in which the public employer is situated. G.L. c. 258, §3.

IV. DAMAGES

Cap on Damages – Chapter 258 limits damages for claims against public employers to \$100,000. G.L. c. 258, §2. The cap is per plaintiff, not per claim. Irwin v. Ware, 392 Mass. 745 (1984). Therefore, a single plaintiff can recover up to \$100,000, regardless of how many claims he has asserted. Multiple plaintiffs, however, can recover up to \$100,000 each.

Punitive Damages/Interest – A public employer cannot be held liable for punitive damages or for interest prior to the judgment. G.L. c. 258, §2. Public employers are, likewise, immune from liability for post-judgment interest. Onofrio v. Department of Mental Health, 411 Mass. 657 (1992).

V. STATUTORY IMMUNITIES

The provisions of Chapter 258 do not apply to ten types of claims which may be brought against a municipality. See G.L. c. 258, §10. Where a claim falls into one of the ten enumerated categories, the municipality is immune from liability. Brum v. Town of Dartmouth, 428 Mass. 684 (1999). Accordingly, municipalities are immune from liability for the following types of claims:

(a) Exercise of Due Care in the Execution of the Law – municipalities are immune from liability for any claim based upon an act or omission of a public employee when such employee was exercising due care in the execution of any statute, regulation, ordinance or by-law, whether or not such law is valid.

KOPELMAN AND PAIGE, P.C.

101 Arch Street
Boston, MA 02110
800-548-3522

BOSTON
WORCESTER

NORTHAMPTON
LENOX

(b) Discretionary Functions – municipalities are immune from liability for any claim based on the exercise or performance of a discretionary function, whether or not the discretion is abused. A two part test must be met for the discretionary function exemption to apply. First, it must be determined whether the actor had discretion to take or not take the challenged action. If the actor was required to do what he did, the exemption does not apply. Second, if the actor had discretion, it must be determined whether the decision was geared towards policy making and planning or towards the implementation and execution of a previously established policy. The exemption only applies if the decision involved policy making or planning. Serrell v. Franklin County, 47 Mass.App.Ct. 400 (1999).

(c) Intentional Torts – municipalities are immune from liability for any claim arising out of an intentional tort including: assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations. In the case of intentional torts, however, public employees may be held liable in their individual capacities, Spring v. Geriatric Authority of Holyoke, 394 Mass. 274 (1985), and the municipality may be called on to indemnify such an employee. See Section VI.

(d) Collection of Taxes/Lawful Detention of Goods – municipalities are immune from liability for any claim arising out of the assessment or collection of taxes, or the lawful detention of goods or merchandise by any law enforcement officer.

(e) Permits and Licenses – municipalities are immune from liability for any claim based on the issuance, denial, suspension, revocation or the failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.

(f) Inspection of Property – municipalities are immune from liability for any claim based on the failure to inspect or an inadequate negligent inspection of any property, to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety; except as otherwise provided in subsection (j)(i).

(g) Fire Protection Services – municipalities are immune from liability for any claim based upon the failure to establish a fire department or a particular fire protection service, or if fire protection service is provided, for failure to prevent, suppress or contain a fire, or for any acts or omissions in the suppression or containment of a fire, but not including claims based upon the negligent operation of motor vehicles or as otherwise provided in subsection (j)(i).

(OVER)

KOPELMAN AND PAIGE, P.C.

101 Arch Street
Boston, MA 02110
800-548-3522

BOSTON
WORCESTER

NORTHAMPTON
LENOX

(h) Police Services – municipalities are immune from liability for any claim based upon the failure to establish a police department or a particular police protection service, or if police protection is provided, for failure to provide adequate police protection, prevent the commission of crimes, investigate, detect or solve crimes, identify or apprehend criminals or suspects, arrest or detain suspects, or enforce any law. See e.g. Carleton v. Framingham, 418 Mass. 623 (1994) (Town immune from liability where police officer failed to detain visibly drunk driver who later caused the death of another). This exemption does not apply to claims based upon the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody or as otherwise provided in subsection (j)(i).

(i) Release from Custody – municipalities are immune from liability for any claim based upon the release, parole, furlough or escape of any person, including but not limited to a prisoner, inmate, detainee, juvenile, patient or client, from the custody of a public employee or employer or their agents, unless gross negligence is shown in allowing such release, parole, furlough or escape.

(j) Failure to Prevent Harm – municipalities are immune from liability for any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer. See e.g. Brum v. Town of Dartmouth, 428 Mass. 684 (1999) (school exempt from liability for failing to prevent attacker from entering upon school grounds and killing a student). This exclusion shall not apply to:

(1) any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. An explicit assurance of safety is “a spoken or written assurance, not one implied from the conduct of the parties or the situation, and by ‘specific’ the terms must be definite, fixed, and free from ambiguity.” Ford v. Town of Grafton, 44 Mass.App.Ct. 715 (1998) (quoting Lawrence v. Cambridge, 422 Mass. 406, 410 (1996)). A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance;

(2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention;

(3) any claim based on negligent maintenance of public property;

KOPELMAN AND PAIGE, P.C.

101 Arch Street
Boston, MA 02110
800-548-3522

**BOSTON
WORCESTER**

**NORTHAMPTON
LENOX**

(4) any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee.

VI. INDEMNIFICATION OF PUBLIC EMPLOYEES

Mandatory Indemnification – A municipality **must** indemnify public employees from personal financial loss and expenses, including legal fees, arising out of any claim, demand, suit or judgment by reason of any act or omission within the scope of his official duties, **IF** the municipality has accepted the provisions of G.L. c. 41, §100I prior to July 1, 1978, or the provisions of G.L. c. 258, §13 at any time. G.L. c. 258, §13. The municipality is **not** required to indemnify a public employee from losses resulting from intentional violations of civil rights. G.L. c. 258, §13.

Permissive Indemnification – A municipality that has not accepted the aforementioned statutes, **may** indemnify public employees from personal financial loss and expenses, including legal fees, arising out of any claim, demand, suit or judgment by reason of an intentional tort or by reasons of any act or omission which constitutes a violation of the civil rights of any person under federal or state law; if such employee was acting within the scope of his official duties at the time of the alleged incident. G.L. c. 258, §9. The municipality may not, however, indemnify a public employee for losses arising out of a claim for the violation of any civil rights if he acted in a grossly negligent, willful or malicious manner. G.L. c. 258, §9.

#96006 v4 ©2006