

CASE & STATUTE COMMENTS

Civil Practice — Indemnification Under the Massachusetts Tort Claims Act: Government As Insurer

Maimaron v. Commonwealth, 449 Mass. 167 (2007)

In *Maimaron v. Commonwealth*,¹ the Supreme Judicial Court (“SJC”) found that the commonwealth violated a statutory duty under the Massachusetts Tort Claims Act² (“Tort Claims Act”), to defend an off duty state trooper who was sued for intentionally assaulting, and then arresting, a man outside a bar in Quincy, Massachusetts. The SJC also remanded the case to the superior court for a separate trial on whether the trooper was acting outside the scope of his official duties, and whether he “had acted in a willful, wanton, or malicious manner.”³ Perhaps more noteworthy is the emphasis placed upon the methodology recommended by the court to the governmental employer in a previous case, *Pinshaw v. Metropolitan District Commission*.⁴

In *Maimaron*, the SJC again endorsed the provision of a defense under a reservation of rights and the pursuit of a separate declaratory judgment action, as used in insurance cases, to resolve issues of governmental obligation to indemnify under the Tort Claims Act. The court thus embraced an approach to governmental indemnification which places public entities governed by the Tort Claims Act⁵ on a par with insurance companies, while treating defense and indemnification provisions of the act⁶ as analogous to insurance policy language.

I. THE UNDERLYING CASE

According to an agreement of the parties for purposes of summary judgment, on the evening of November 22, 1995, off-duty State Trooper David Oxner and his friend Stephen Roche went to a lounge in Quincy, where, in the company of Oxner’s wife and a female friend, Oxner had several drinks at the bar. There he met Mark Maimaron, an ironworker, who had consumed approximately

ten beers and who repeatedly confronted Oxner with his inaccurate belief that Oxner was a coworker from his work site, although Oxner repeatedly denied this and told Maimaron that he was a state trooper.⁷

Later that night, after a heated exchange between Maimaron and Oxner in the parking lot outside the lounge, Oxner demanded to see Maimaron’s identification. Maimaron declined and was turning to leave when Oxner hit him on the side of his head and grabbed his shoulder. Fearing for his safety, Maimaron sprayed Mace (which he was licensed to carry) into Oxner’s face and then ran down the street. Oxner chased Maimaron, held out his badge, identified himself as a police officer and told him to stop because he was under arrest. Roche caught up with Maimaron and struck him from behind, knocking him to the ground. Maimaron raised his head, trying to get up, at which point Oxner slammed him down, hitting his head onto the pavement. Quincy police officers arrived in response to a call from Oxner and a bystander. Oxner identified himself as an off-duty officer and told them he had been assaulted by Maimaron with Mace and that an “unknown white male” helped subdue Maimaron by tackling him. Maimaron suffered extensive, permanent injuries, as well as emotional and psychological distress.⁸

Oxner filed charges against Maimaron for assault and battery by means of a deadly weapon and for assault and battery on a police officer. Nevertheless, after an investigation by the United States Attorney’s office, charges were brought against Oxner and a plea agreement with the office of the attorney general was reached. Under the agreement, Oxner pleaded guilty to assault and battery of Maimaron and to filing a false written report by a public officer. Thereafter, a trial board of the state police determined that Oxner had violated

1. 449 Mass. 167 (2007).

2. MASS. GEN. LAWS ch. 258, §§ 1-13 (2006). The act provides for a limited waiver of sovereign immunity 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 office or employment, in the same manner and to the same extent as a private individual under like circumstances.” In those instances of negligence where sovereign immunity has been waived, the public employee is clothed with individual immunity. *Id.* § 2. Sovereign immunity is retained as to intentional torts and civil rights violations, leaving public employees exposed to individual liability. The act allows for defense and indemnification with respect to such intentional torts and civil rights violations under circumstances specified in sections 9, 9A, and 13.

3. *Maimaron*, 449 Mass. at 169-70.

4. 402 Mass. 687 (1988).

5. The Tort Claims Act applies to “public employers,” defined as the commonwealth and any county, city, town, educational collaborative, or district, including 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 Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike 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.

MASS. GEN. LAWS ch. 258, § 1 (2006).

6. Separate indemnification provisions are provided for claims and suits for intentional torts and civil rights violations against members of the state police force, *id.* § 9A, other public employees, *id.* § 9, and employees of some cities and towns under a local acceptance provision. *Id.* § 13.

7. *Maimaron*, 449 Mass. at 169.

8. *Id.* at 170-71.

several state police administrative rules and regulations. Oxner was suspended without pay for four months and required to complete ethics training. The Norfolk County district attorney's office subsequently entered a *nolle prosequi* on the criminal complaint Oxner had filed against Maimaron.⁹

Maimaron brought an action in the superior court against Oxner, several other state troopers and the commonwealth under the Tort Claims Act.¹⁰ He also claimed his civil rights guaranteed by state¹¹ and federal¹² law had been violated, claiming that Oxner had committed the intentional torts of assault and battery, malicious prosecution, false arrest and abuse of process in making the seizure and arrest. Oxner sought representation and indemnification from the commonwealth during the course of the underlying litigation, but the commonwealth repeatedly denied his requests.

The commonwealth settled all of Maimaron's claims other than those against Oxner. The commonwealth then declined Oxner's entreaty for a defense in binding arbitration to which Oxner had agreed. The binding arbitration resulted in an award and judgment against Oxner, including attorney's fees, in Maimaron's favor. Unable to satisfy the judgment, Oxner assigned to Maimaron his right to indemnification of the judgment by the commonwealth pursuant to the Tort Claims Act.¹³

II. THE FINDINGS OF THE ARBITRATOR IN THE UNDERLYING CASE

The arbitrator, in addressing the civil rights, assault and battery and false arrest claims, found that Oxner was at all relevant times acting within the scope of his employment as a state police officer and under color of state law. He determined that Oxner, in attempting to arrest Maimaron, was following state police rules and regulations that provide that a state police officer is subject to recall 24 hours a day and is instructed to take immediate enforcement action for violations of law observed. The arbitrator concluded that Oxner violated Maimaron's civil rights under the Fourth Amendment to the United States Constitution by committing the torts of assault and battery and false arrest; that Oxner never intended to injure Maimaron during the arrest; and that Oxner did not act in a "malicious or wanton" manner. On the basis of the arbitrator's findings and conclusions, a superior court judge entered judgment for Maimaron in the amount of \$363,682, together with attorney's fees and costs of \$69,243.52.

III. THE INDEMNIFICATION AWARD

After the assignment of Oxner's indemnification rights under the Tort Claims Act, Oxner and Maimaron each brought separate

actions against the commonwealth, later consolidated. Oxner sought to recover attorney's fees and costs that he incurred defending the underlying action and in pursuing reimbursement of those fees and costs. He alleged that the commonwealth had violated its duty to defend under the Tort Claims Act. Maimaron, as assignee, sought indemnification of the amount of the judgment entered against Oxner in the underlying action, together with interest and the attorney's fees and costs of recovering the same. A superior court judge granted summary judgment in favor of Oxner and Maimaron. The court awarded damages to Maimaron in the amount of \$363,682, together with attorney's fees for litigating the underlying and instant action in the amounts of \$69,243.52 and \$29,951.88 respectively. Attorney's fees were awarded Oxner for litigating the underlying and instant actions in the amount of \$84,879.¹⁴

The judge ruled that the commonwealth had violated its mandatory duty to defend Oxner in the underlying action and, therefore, was bound by the arbitrator's findings. The commonwealth was precluded from arguing that Oxner was not acting within the scope of his official duties or that his conduct was willful, wanton or malicious for purposes of the statutory exceptions to its indemnification obligation.

The commonwealth appealed and the SJC transferred the case on its own motion to determine whether the commonwealth was obligated, under section 9A of the Tort Claims Act, to defend Oxner in the underlying action and to indemnify Maimaron (as assignee) in connection with the judgment Maimaron obtained against Oxner. The SJC agreed that the commonwealth violated its duty to defend Oxner under the Tort Claims Act, but concluded that summary judgment in favor of Maimaron was "inappropriate on the issue whether the commonwealth was obligated under § 9A to indemnify Maimaron (as assignee) for the underlying judgment because triable issues of fact exist concerning the applicability of the exclusions in § 9A, namely, whether Oxner's conduct had occurred outside the scope of his official duties, and whether Oxner had acted in a willful, wanton, or malicious manner" for purposes of those exclusions as opposed to the purposes of the underlying civil rights and tort violations.¹⁵

IV. DUTY TO DEFEND

The SJC treated the issue of the duty to defend as strictly a matter of statutory construction, finding, as it had previously in *Pinshaw*,¹⁶ that the commonwealth had a mandatory obligation to provide legal representation to state police officers. The result was mandated by the plain language of the first paragraph of section 9A of the Tort Claims Act. "Its language, 'shall provide for the legal representation

million dollars arising out of any claim, action, award, compromise, settlement or judgment resulting from any alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law; provided, however, that this section shall apply only where such alleged intentional tort or alleged act or failure to act occurred within the scope of the official duties of such police officer.

No member of the state police or an employee represented by state bargaining unit five shall be indemnified for any violation of federal or state law if such member or employee acted in a willful, wanton, or malicious manner.

MASS. GEN. LAWS ch. 258 § 9A (2006).

14. The judgment was amended to add a provision for "interest as provided by law" in response to a motion by Maimaron seeking accrued prejudgment and post-judgment interest.

15. *Maimaron v. Commonwealth*, 449 Mass. 167, 169-70 (2007).

16. *Pinshaw v. Metropolitan District Commission*, 402 Mass. 687, 700. (1988).

9. *Id.* at 171.

10. MASS. GEN. LAWS ch. 258 § 9A (2006).

11. MASS. GEN. LAWS ch. 12 § 11I (2006).

12. 42 U.S.C. § 1983 (2000).

13. The Tort Claims Act provides

If, in the event a suit is commenced against a member of the state police or an employee represented by state bargaining unit five, by reason of a claim for damages resulting from an alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law, the commonwealth, at the request of the affected police officer, shall provide for the legal representation of said police officer.

The commonwealth shall indemnify members of the state police or an employee represented by state bargaining unit five, respectively, from all personal financial loss and expenses, including but not limited to legal fees and costs, if any, in an amount not to exceed one

of said police officer,' imposes a mandatory obligation ... when (1) a request for legal representation is made by the affected police officer; and (2) a lawsuit is brought against the officer alleging an intentional tort or a violation of civil rights."¹⁷

The SJC rejected the commonwealth's contention that language in the second paragraph of section 9A of the Tort Claims Act¹⁸ conditioned the commonwealth's duty to defend.¹⁹ The focal point of the paragraph is indemnification and to read its exceptions as applying to the mandatory duty to defend "would undermine the statute's purposes"²⁰ of encouraging police service in the face of the frequent occupational hazard of civil rights and intentional tort claims and, indeed, violations.²¹ Once again relying on its decision in *Pinshaw*, the SJC emphasized that the exceptions to the statute "[permit] the Commonwealth, if it is later determined that the police officer acted outside the scope of his official duties or acted in a willful, wanton, or malicious manner, to seek reimbursement of legal expenses."²² The court did not address the largely illusory ability of a governmental entity to obtain such reimbursement from an individual at a later time after having paid defense costs.²³

The SJC also held that the commonwealth had waived an argument that the case was governed by a state police regulation providing that payment of legal fees and litigation costs be made only at the conclusion of the underlying litigation because the argument had not been raised in the trial court. The waiver made little difference as the SJC stated, "to the extent this regulation conflicts with the statute, the statute governs."²⁴

V. DUTY TO INDEMNIFY

Under the Tort Claims Act, the commonwealth is required to indemnify a member of the state police

from all personal financial loss and expenses, including but not limited to legal fees and costs ... arising out of any claim, action, award, compromise, settlement or judgment resulting from any alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law.²⁵

There are two exclusions: (1) where the alleged act did not occur "within

the scope of the official duties of such police officer"; and (2) where the police officer "acted in a willful, wanton, or malicious manner."²⁶

The superior court judge declined the commonwealth's request to litigate whether either of the two exceptions to indemnification applied. The judge relied upon the rule, applied frequently in insurance cases, that an "indemnitor, after notice and an opportunity to defend, is [if it refuses to defend] bound by material facts established in an action against the indemnitee."²⁷ Focusing upon the materiality of facts found by the arbitrator, the SJC distinguished between the findings material to a determination of liability for civil rights violations under 42 U.S.C. § 1983 in the underlying action and those material to the two exclusions applicable to indemnification under section 9A of the Tort Claims Act. Acting under color of state law for purposes of violating section 1983 was not "precisely parallel" to acting within the scope of employment under the Tort Claims Act, the court said.²⁸ An officer may be acting under color of state law where he is "clothed with the authority of state law"²⁹ under section 1983, even if he is not acting within the scope of his employment, because he may have "misused" or "abused" the authority given to him by the state.³⁰

The scope of employment issue bespeaks a narrower inquiry and, in certain cases, would allow a fact finder to conclude that an officer who is acting under color of state law for purposes of section 1983 is not acting within the scope of his employment for purposes of indemnification under section 9A of the Tort Claims Act. The validity of these latter points is reinforced by Maimaron's concession that he cannot advance an argument of issue preclusion or collateral estoppel.³¹

Although the arbitrator had concluded that Oxner was acting within the scope of his employment and that his conduct was not willful, wanton or malicious, the SJC held that these findings were not necessary to a determination under either 42 U.S.C. § 1983 or General Laws chapter 12, section 11I,³² and that they were not based upon a discussion of the standards governing indemnification exceptions set forth in the *Pinshaw* decision.³³ Findings by the arbitrator that Oxner was subject to recall 24 hours a day, that he displayed his police badge and that he issued an official command to stop in

government may defend and settle under a reservation of rights and later, by separate action, seek a determination as to whether the public employee is obligated to reimburse under one of the exceptions (or, to continue the analogy, exclusions) to the government's obligations.

24. *Maimaron*, 449 Mass. at 174-75. Cf. *McCoy v. Kingston*, 68 Mass. App. Ct. 819, 827-28 (2007) (upholding local policy providing that "no special counsel will be paid unless the Board of Selectmen approves the appointment of that counsel prior to any costs being incurred" in community that accepted section 13 and denying indemnification to employee who engaged private counsel without seeking or obtaining prior approval).

25. MASS. GEN. LAWS ch. 258 § 9A (2006).

26. *Id.*

27. *Id.* at 175 (quoting *Miller v. U. S. Fid. & Guar. Co.*, 291 Mass. 445, 449 (1935)).

28. *Id.* at 178.

29. *Id.* (citing *Monroe v. Pape*, 365 U.S. 167, 184 (1961), *overruled in part by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978) (overruling *Monroe* case "insofar as it holds that local governments are wholly immune from suit under § 1983").

30. *Id.*

31. *Id.*

32. A similar distinction was made in *Sharrow v. State*, 628 N.Y.S. 878 (App. Div. 1995).

33. *Maimaron*, 449 Mass. at 178-79.

17. *Maimaron*, 449 Mass. at 173 (quoting MASS. GEN. LAWS ch. 258, §9A(2006)).

18. MASS. GEN. LAWS ch. 258 § 9A (2006) ("this section shall apply only where such alleged intentional tort or alleged act or failure to act occurred within the scope of the official duties of such police officer") (emphasis added).

19. *Maimaron*, 449 Mass. at 174.

20. *Id.*

21. See *id.* ("mandatory indemnification 'evidences the Legislature's determination that intentional torts and civil rights violations arise frequently in the scope of police work, and that indemnification of officers against such claims encourages police service.... The same applies equally to the duty to defend provision.") (quoting *Pinshaw*, 402 Mass. at 696). Note, however that the SJC recognizes that its decision in *Filippone v. Mayor of Newton*, 392 Mass. 622, 629 (1984), makes little distinction between the mandatory defense provision for state police officers in MASS. GEN. LAWS ch. 258, § 9A and provisions such as MASS. GEN. LAWS ch. 258, § 9, allowing for permissive indemnification of other kinds of public employees. There the SJC stated that such a permissive indemnification policy "would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal and only later, if at all, reimbursed" by the public employer. *Filippone*, 392 Mass. at 629.

22. *Maimaron*, 449 Mass. at 174.

23. Nor does the court discuss what, if any, remedies the governmental entity might have if settlement emerges as the best and most cost effective manner of defending the lawsuit. Presumably, using the court's analogy of the governmental entity's role to that of an insurer under such statutory provisions, the

seeking to arrest Maimaron, were sufficient to establish that Oxner was acting “under color of State law” under section 1983 and with “threats, intimidation and coercion” under General Laws chapter 12, section 11I, neither of which incorporate an element of scienter.³⁴

Such findings, however, were not sufficient to compel a conclusion that Oxner was acting within the scope of his employment or that his conduct was not “willful, wanton, or malicious” within the meaning of the Tort Claims Act.³⁵ Oxner’s actions under color of state law could be found to have been carried out unlawfully and with excessive force, both abuses of authority capable of bringing Oxner’s “under color of State law” conduct outside the scope of his employment and potentially egregious enough to warrant imposition of punitive damages under both federal³⁶ and state³⁷ law.

The *Pinshaw* case linked the “willful, wanton, or malicious” conduct exclusion with egregious conduct that would warrant imposition of punitive damages, thus providing “a bright line test for precluding indemnification where punitive damages are awarded in the underlying action.”³⁸ Absence of an award of punitive damages, “unlike a verdict awarding them, does not establish facts that are binding in future litigation.”³⁹ The arbitrator’s conclusion that Oxner had not acted willfully, wantonly, or maliciously did not, on the existing record “preclude a finding that Oxner took himself outside the coverage of §9A, when he confronted, and viciously attacked,

Maimaron outside the lounge” by conduct that was “‘egregious’ (and therefore punitive) in the sense described by the *Pinshaw* case.”⁴⁰ In sum, the court concluded that both the scope of employment and willful, wanton, or malicious exclusions “involve the need for a fact finder to ascertain Oxner’s state of mind. Summary judgment, when an actor’s state of mind is relevant, is strongly disfavored.”⁴¹

A final observation suggests a desire by the court to reinforce the methodology it had recommended in *Pinshaw*. The commonwealth should have defended Oxner under a reservation of rights⁴² (and litigated the indemnification issue later), all as explained in *Pinshaw*. . . . The Commonwealth also could have sought a declaratory judgment in advance of the arbitration to determine whether it was obligated under § 9A to defend Oxner. This procedure is utilized in insurance cases . . . and we discern no reason why the procedure would not have utility in this type of case.⁴³

The possible significance of these words for other governmental entities is worthy of note. Not all such entities are subject to mandatory defense obligations in the circumstances addressed in the *Maimaron* case. For instance, section 9 of the Tort Claims Act provides for discretionary indemnification of other types of employees of the commonwealth and employees of any county, city, town, educational collaborative, and district⁴⁴ and includes exceptions where an employee was not acting within

34. *Id.* at 179-81 (citing *McKay v. Hammock*, 730 F.2d 1367, 1373 & n.5 (10th Cir. 1984) (explaining state of mind or intent not part of action under 42 U.S.C. § 1983 unless action is based on constitutional provision that itself incorporates element of scienter) and *Redgrave v. Boston Symphony Orchestra, Inc.*, 300 Mass. 93, 98-99 (1987) (Massachusetts Civil Rights Act remedy for deprivation of secured rights occasioned by threats, intimidation, or coercion contains no requirement that defendant’s actions be willful or hostile)).

35. *Id.* at 179.

36. *Id.* at 180 (citing *Pinshaw v. Metropolitan District Commission*, 402 Mass. 687, 697 (1988) (citing *Smith v. Wade*, 451 U.S. 30, 39-40 nn.8, 56 (1983)) (“malice,” “wanton,” and “willful” interpreted as terms which constitute a standard for punitive damages “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”).

37. *Id.*

38. *Pinshaw*, 402 Mass. at 697.

39. *Id.*

40. *Maimaron*, 449 Mass. at 180.

41. *Id.* at 181. It appears, however, that the court’s reliance on *Pinshaw*’s standards would also allow application of the exceptions to indemnification on the basis of an objective standard as to unlawful, excessive or egregious conduct. See *Pinshaw*, 402 Mass. at 698, n.15.

42. This approach has been endorsed in other jurisdictions. In *Dixon v. Holden*, 923 S.W.2d 370, 380-81 (Mo. App. 1996), the Missouri Court of Appeals quoted *Hassan v. Fraccola*, 851 F.2d 602-04 (2d Cir. 1988), and stated in dicta that the “better practice” in interpreting the language of its state legal expense fund statute that “any defense...of any claim...shall be conducted by the attorney general...” would be to read that statute as “allowing little discretion to refuse to defend an employee, and to treat ‘the State’s role, in reviewing the request to defend... much like that of an insurer reviewing a complaint to determine if a defense must be provided.’” Where the attorney general “still has good faith questions as to coverage, he may participate in the trial on behalf of the employee-defendant on a reservation of right basis.” *Dixon*, 923 S.W. 2d at 381; see also *Sharrow v. State*, 628 N.Y.S.2d 878, 880 (App. Dir. 1995) (“[t]he Attorney-General’s role is similar to that of an insurance company which must decide if a defense is owed under its policy”); *Giordano v. O’Neill*, 517 N.Y.S.2d 41, 42 (App. Dir. 1987); *Abrams v. Abrams*, 473 N.Y.S. 2d 931, 934 (Sup. Ct. 1984) (if the complaint contains an allegation that the state employee committed a wrongful act within the scope of his public employment, “a defense must be provided, irrespective of the actual facts or ultimate factual determination...much like that of an insurer reviewing a complaint to determine if a defense must be provided”). The California Tort Claims Act has built the concept of a reservation of rights into its statutory provisions.

Government Code Section 825 permits the employing entity to reserve the right to refuse to pay a judgment until it is established that the employee’s acts were in fact within the scope of employment. See Cal. Gov. Code § 825(a) (2008).

43. *Maimaron*, 449 Mass. at 182.

44. The statute provides that

[p]ublic employers may indemnify public employees, and the commonwealth shall indemnify persons holding office under the constitution, from personal financial loss, all damages and expenses, including legal fees and costs, if any, in an amount not to exceed \$1,000,000 arising out of any claim, action, award, compromise, settlement or judgment by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law, if such employee or official or holder of office under the constitution at the time of such intentional tort or such act or omission was acting within the scope of his official duties or employment. No such employee or official, other than a person holding office under the constitution acting within the scope of his official duties or employment, shall be indemnified under this section for violation of any such civil rights if he acted in a grossly negligent, willful or malicious manner. For purposes of this section, persons employed by a joint health district, regional health district or regional board of health, as defined by sections twenty-seven A and twenty-seven B of chapter one hundred and eleven, shall be considered employees of the city or town in which said incident, claim, suit, or judgment is brought pursuant to the provisions of this chapter.

MASS. GEN. LAWS ch. 258, § 9 (2006).

“Public employers” are defined as

the commonwealth and any county, city, town, educational collaborative, or district, including 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 Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, or any other independent body politic and corporate. With respect to public employees of a school

the scope of his official duties or employment or “if he acted in a grossly negligent, willful or malicious manner.”⁴⁵ Unlike section 9A, no separate paragraph of section 9 addresses the provision of legal representation. Yet the SJC in *Maimaron* quoted with approval from *Filippone v. Mayor of Newton*,⁴⁶ a section 9 case, stating that

public indemnification of public officials serves in part to encourage public service.... This policy would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pre-trial activity, trial, and appeal and only later, if at all, reimbursed.... At the conclusion of litigation... [i]f an exception to indemnification applies, the public employer might then recover from the official those sums expended for legal services on his or her behalf.

To be sure, this statement was made in support of a voluntary decision to pay for legal defense of a public official. It seems a strong endorsement of provision of a legal defense by a public employer, however, where even the local acceptance provision allowing municipalities to impose upon themselves a mandatory indemnification obligation as to “municipal officers, elected or appointed,”⁴⁷ exempts intentional violation of civil rights from its mandatory provisions.⁴⁸ Presumably, the advancement of litigation costs (and their later recoupment) as set out in the *Filippone* decision, will similarly apply in cases where later indemnification may be denied under the Tort Claims Act because the public employee intentionally violated a plaintiff’s civil rights.

Certainly other jurisdictions seem to draw a distinction between mandatory obligations imposed upon the state and permissive authority granted to local governments. The Supreme Court of New Jersey, for instance, has acknowledged that the New Jersey Tort

Claims Act⁴⁹ draws a bright line between state and local obligations to indemnify, mandating indemnification of “State employees” while “merely encouraging the local public entities to indemnify” local public employees.⁵⁰ The Supreme Court of Michigan has gone so far as to say that a city council’s discretionary decision to deny reimbursement was conclusive and not subject to judicial review, absent a showing that the council had exercised its discretion in an unconstitutional manner, “where the statute empowers [that] governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency’s exercise of that discretion or the judiciary’s review of that exercise.”⁵¹

CONCLUSION

The provisions of section 9A of the Tort Claims Act may be the best place to begin the analogy of government as insurer. It is the strongest of the indemnification provisions appearing in the statute. It affects both the narrowest category of employees — law enforcement — and the largest governmental entity in the commonwealth — the commonwealth itself, perhaps the governmental entity most likely to be self-insured. Unlike some of its counterparts, its provisions read somewhat like an insurance policy, at least in terms of addressing separate duties to defend and indemnify. The analogy may be useful as applied to provisions governing indemnification options of a more discretionary nature applicable to public employees subject to lesser risks in their employment and public employers of a more diminutive size and budget. Room for interpretation still remains open in these areas, however, as cash-strapped communities struggle to balance both their budgets and the need to support good faith actions of public employees in performing their official duties.

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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.

Id. § 1.

“Public employees” are defined as

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.

Id.

45. *Id.* § 9.

46. *Filippone v. Mayor of Newton*, 392 Mass. 622, 629 (1984).

47. The statute provides that

[a]ny city or town which accepted section one hundred I of chapter forty-one on or before July twentieth, nineteen hundred and seventy-eight, and any other city which accepts this section according to its charter, and any town which accepts this section in the manner hereinafter provided in this section shall indemnify and save harmless municipal officers, elected or appointed from personal financial loss and expense including reasonable legal fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or judgment by reason of any act or omission, except an intentional violation of civil rights of any person, if the official at the time of such act or omission was acting within the scope of his official duties or employment.

This act shall be submitted for acceptance to the voters of each town at an annual town meeting in the form of the following question which shall be placed on the official ballot to be used for the election of town officers at said meeting:—‘Shall the town vote to accept the provisions of section thirteen of chapter two hundred and fifty-eight of the General Laws which provides that the town shall indemnify and save harmless municipal officers, elected or appointed, from personal financial loss and expense including reasonable legal fees and costs, if any, in an amount not to exceed one million dollars, arising out of any claim, demand, suit or judgment by reason of any act or omission except an intentional violation of civil rights of any person under any law, if the official at the time of such act or omission was acting within the scope of his official duties or employment?’ If a majority of the votes in answer to said question is in the affirmative, said provisions shall thereupon take full effect, but not otherwise.

MASS. GEN. LAWS ch. 258, § 13(2006).

48. Under the exception to MASS. GEN. LAWS ch. 258, § 13(2006), indemnification for an intentional violation of civil rights remains a discretionary decision of the public employer under Mass. Gen. Laws ch. 258, § 9(2006) even when a public employer has accepted § 13. The Appeals Court has also recognized that, even where a municipality has imposed mandatory indemnification upon itself for intentional torts of public employees by local acceptance of § 13, the municipality may still impose reasonable procedural requirements to screen the processing of requests for indemnification in order to retain a degree of control over indemnification expenses, or to minimize its own liability.” *McCoy v. Kingston*, 68 Mass. App. Ct. 819, 827-28(2007) (upholding local policy providing that “no special counsel will be paid unless the Board of Selectmen approves the appointment of that counsel prior to any costs being incurred” in community that accepted § 13 and denying indemnification to employee who engaged private counsel without seeking or obtaining prior approval).

49. N.J. Stat. Ann. 59:1-1 to 12-3(2006).

50. *Wright v. State*, 778 A.2d 443, 457-58 (N.J. 2001).

51. *Warda v. City Council of the City of Flushing*, 696 N.W.2d 671, 678 (Mich. 2005).