PERSONAL INJURY

Navigating Rocky Road Of Municipal Liability

Careful crafting of pleadings critical to stave off immunity challenges

By KATHRYN CALIBEY

"It isn't the mountains ahead to climb that wear you out, it's the pebble in your shoe."
— Muhammad Ali

Pleading an action against a municipality or municipal employee, agent or official is fraught with pebbles that can lead to the proverbial end of the road. In many cases, municipal governments and their agents are immune for acts performed as part of their official duties. Successfully pleading a cause of action turns on whether the complaint asserts acts or omissions falling outside the cloak of immunity. To properly frame a cause of action, it is imperative to recognize the underlying general principles that govern claims against municipalities and their employees or officials.

The immunity that attaches to municipal officers or employees is qualified under common law and extends only to discretionary acts or omissions. The identifying feature of discretionary behavior is that it involves the exercise of judgment. Although discretionary acts or omissions are generally clothed with immunity, three narrow exceptions exist.

A municipal officer or employee is subject to liability for discretionary duties if: (1) the conduct involves malice, wantonness, or, intent to injure; (2) a statute provides a cause of action for the failure to enforce certain laws; or (3) it is apparent to the public officer that his or her failure to act will likely subject an identifiable person, or a narrowly recognized class of persons, to imminent harm.

The immunity afforded to municipalities has been statutorily codified in Connecticut General Statutes §52-557n. Under the statute, municipalities are liable for damages caused by acts and omissions of the governmental agency or its employees, officers, and agents acting within the scope of their official duties. This abrogation of governmental immunity for the municipal agency is far from absolute. Two important statutory exceptions to liability exist for acts or omissions that constitute criminal conduct, fraud, actual malice and willful misconduct, and, for negligence that occurs in the performance of discretionary duties.

Kathryn Calibey

Properly pleading a municipal liability action is particularly important because immunity challenges are raised early and are often determined by the pleadings. Several recent appellate cases provide some direction for pleading a claim against an individual or municipality to insulate the action against being stricken or having summary judgment entered at the outset.

Generally, claims against the municipality and individual employees, officials or agents are plead in separate counts. The count against the municipality asserts statutory liability and those against the individuals sound in common law negligence. It is not fatal, however, to assert the claims together. In *Coe v. Board of Education Town of Watertown,* 300 Conn. 112 (2011), the Supreme Court held that although Conn. Gen. Stat. §52-557n does not authorize suit against individual employees, a common law negligence claim against municipal individuals can be asserted within the framework of a §52-557n claim against the municipality.

Ministerial Duties

If at all possible the claims against either the municipality or an individual should be pleaded to establish negligence arising from ministerial (non-discretionary) duties. As exemplified by *Bonington v. Town of Westport,* 297 Conn. 297 (2010) and *Kastancuk v. Town of East Haven,* 120 Conn. App. 282 (2010), pleading ministerial duties necessarily requires carefully worded allegations. Allegations that solely employ word choices that imply discretion — such as "possibly," "potential," "inadequate," "unreasonable" — are generally insufficient to establish ministerial duties. Ministerial duties arise from a specific prescribed legal or statutory source, including written standards, protocols, regulations, rules or procedures.

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Kathryn Calibey practices at RisCassi & Davis P.C. in Hartford, where her focus is on appeals and complex legal issues.

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PERSONAL INJURY

Experts Are Important In Liquor Liability Cases

Qualifications of toxicologists, security personnel can vary widely

By JAN C. TRENDOWSKI

In 2003, the damage cap in the Dram Shop Act increased from $20,000/$50,000 per incident to a $250,000 global cap. Cases which previously weren't worth bringing all of a sudden were often the primary source of recovery in many auto collision cases.

As the frequency of claims increased, more suits were tried rather than settled. Further, the injuries from alcohol-fueled collisions and assaults tend to be horrific, and the trials are high-stakes ventures. Trying a liquor liability suit is complex and is more and more reliant on expert witnesses to establish and dispute different aspects of the liability issue.

Further, while liquor liability trials have traditionally focused solely on the amount of alcohol served, the focus now is more on preventative measures and training for both service employees and security staff. The following are the types of experts who have been appearing more frequently in Connecticut liquor liability cases:

Toxicologists: Toxicologists have been retained for years to interpret blood alcohol readings, particularly to explain and translate whole, serum, and metric test results. Two newer areas of opinions are "reverse extrapolation" and "behavioral signs." Unlike a criminal case, a blood alcohol reading alone is insufficient to establish intoxication in a civil case. *Coble vs. Maloney,* 34 Conn. App. 655 (1994).

A toxicologist is generally necessary in all but the most egregious cases to opine as to the level of intoxication at the time of last service. All toxicologists are not alike, however. Understand that while we are dealing with the relatively narrow area of the effect of alcohol on the human body, the field of toxicology encompasses all aspects of the effects of chemicals on the body. Further, most toxicologists are not employed in alcohol-related areas. The first, most obvious, step in evaluating the toxicologist is to run them on Google and see where they've been and what they've written. Many toxicologists work in testing the effect of medicines or industrial chemicals on the human body and have little, if any, experience with the effects of alcohol. In a recent case, the plaintiff's toxicologist had written and done extensive research in toxicology, but all on the effect of dust on carpet cleaners.

There is also a significant distinction between research and clinical toxicologists. As we are generally talking about outward signs, a toxicologist affiliated with a poison center or emergency room will have a greater practical basis to explain the effects of alcohol on behavior than one who never left a lab.

Finally, as regards reverse extrapolation, i.e., how did a person look at the time of service based on a blood test taken several hours later, is the toxicologist using a curve or straight-line analysis? You will find that medical toxicologists will testify that outward signs and blood alcohol levels rise, peak, and decline over time after consumption, while a research toxicologist will use a straight line analysis by simply deducting drinks metabolized from drinks consumed and describing signs for a person at that level. Drink volume, rate of consumption, absorption rates, and metabolic rates are all critical factors in determining a patron's intoxication level at any particular point in time.

Further, a toxicologist who is experienced with alcohol testing can discuss the difference between forensic and serum blood testing, urine tests versus a breathalyzer, and vitreous fluid versus metric testing.

Security Expert: There is some debate as to what credentials qualify a security expert. The subject matter in a liquor liability case is the sufficiency of staffing and training for a particular locale. I have seen qualifications range from ex-police and military personnel who can evaluate environmental design factors to an electrician who worked part time in a bar five years prior to the trial. That same electrician stated on direct that he did not consider himself an expert in security, but was allowed to testify as an expert anyway.

There is some debate as to what credentials qualify a security expert. I have seen qualifications range from ex-police and military personnel to an electrician who worked part time in a bar five years prior to the trial.

Common credentials for a qualified security expert include Certified Protection Professional (CPP) and a Certification in Patron Management (CPM). As the level of training at establishments lags behind classic security training, a security expert will almost always testify that security was deficient. The defense position benefits from the lag, however, as while there are many security experts, few have the knowledge and experience applicable to liquor establishments. An expert with the educational and training background, along with the "hands-on" experience with liquor establishments is preferred over a generalist. An excellent starting point for a security analysis in any particular case is the book, "Premises Liability Litigation," by Chris McGoey.

Is a security expert necessary? Decisions across the country are split on the issue. In the District of Columbia, a security expert is legally required to establish both the standard of care and the breach of the standard of care. See *Varner vs. District of Columbia,* 891 A.2d 260 (2006) and cases cited therein. In Connecticut, there is no appellate or trial court decision *requiring* the use of a security expert, though several decisions apparently considered such experts to be helpful.

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In *Service Road Corporation vs. Quinn,* 1996 Ct. Sup 3799, the court based its decision in part on a security expert's testimony that the placement of security cameras was "absurd." In *Burban vs. Hill Health Corp.,* 2006 Ct. Sup. 22302, the court refused to grant the defendant's motion for summary judgment, again relying in part on the fact that the plaintiff's security expert had testified that the plaintiff was in a particularly vulnerable position at the time of an assault which should have been foreseen.

Finally, in *Rodriguez vs. Bridgeport,* 2002 Ct. Sup. 12140, the court held against the plaintiff on an assault claim, stating that, "The court has no idea how large a security force would be necessary to better protect students from acts of isolated violence, and it cannot guess at that number. The plaintiffs have produced nothing to establish what the proper standard of care is so that a court could evaluate whether the standard has been met or violated."

Safe Alcohol Service Expert: Safe alcohol service training programs have been around since the 1980s. The national programs are referred to by acronym, such as TIPS (Training Intervention Procedures for Servers), TAM (Techniques of Alcohol Management), SMART (Server and Manager Alcohol Responsibility Training), etc. Additionally, some of the larger restaurant chains use various in-house programs.

This is the one expert, however, who can pull the toxicological and security testimony together. A qualified standards expert can discuss house policy, the types of outward signs a server should be looking for, the amounts of alcohol in particular drinks, and what type of procedures should be in place. Note that a factor as simple as drink size can have a profound effect on the alcohol analysis. A generic martini may contain as little as 2 ounces and as many as 9 ounces of liquor depending on the server, glass size, etc.

The service standards experts themselves tend to run the gamut, from bartenders who have simply taken one or more of the courses (servers), to people who teach the programs (trainers), to people who train the trainers (master trainers). There also are those experts who have actually created national programs or have the experience of having a liquor license in their own name.

Safe Service experts will evaluate written service guidelines, testify on the necessity for training, and render an opinion on whether the server's actions were within the standard of care for the hospitality industry. Whether or not the expert has ever trained others and, indeed, whether they've ever taken a program themselves, is significant. A number of service experts also tend to be trained in other fields, such as state liquor agents, security personnel, or restaurant management, which does not necessarily translate into service knowledge.

Like many attorneys, I locate experts through a variety of sources, the main source being the internet. Various attorneys' groups, such as the AACJ and DRI (Defense Research Institute), along with their Connecticut counterparts, the Connecticut Trial Lawyers Association and the Connecticut Defense Lawyers Association, have expert referral services. Non-referral expert companies, such as Robson Forensic (www.robsonforensic.com) and others will often evaluate a particular case if requested to determine what experts, if any, would be helpful. ■

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PERSONAL INJURY

Economic Damages: Capturing The Full Value Of Injury

Connecticut unusual in offering compensation for loss of life's enjoyment

By ELIZABETH I. TYLAWSKY and JOSEPH DeCUSATI

Life, a right so valuable that it is deemed inalienable in our Declaration of Independence and protected by force of law in our Constitution.

For centuries, from the Babylonian Code to the institution of the English court system, man has attempted to quantify life, to place a value on it and to compensate for its loss and diminution. The loss of life's enjoyment and pleasure, together with lost earning capacity, medical expenses and lost household services, encompass economic damages. Within the United States, the concept of restitution for the loss of life or decline in life's enjoyment, absent lost income, is rarely permitted in wrongful death claims and is only partially recognized in non-fatal injury claims. In contrast, Connecticut statutes explicitly permit such recovery, with case law supporting and expanding the methodologies for such computations.

Connecticut General Statute §52-572h, which governs negligence actions and damages recoverable for personal injury and wrongful death claims, defines economic damages as, "[C]ompensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity excluding any non-economic damages…" with recoverable economic damages meaning those damages as determined by the trier of fact, reduced accordingly by collateral sources, such as insurance benefits, reimbursement contracts or other set-offs, credits or comparative negligence.

Damages resulting from lost earning capacity are explicitly recoverable under Connecticut statute. Case law further expands upon the accepted methodology of damage calculations, supporting the inclusion of employer-provided fringe benefits in computations of lost future earnings, while also maintaining that income taxes are properly deducted. Connecticut has further recognized and accepted that future losses should be discounted to present value, while asserting that consideration of inflation is permissible by the trier of fact.

Of a more vague nature is the determination of work life and life expectancy. The courts have provided no firm guidance on these determinations; giving wide discretion to expert witness testimony and leaving conclusions as to correct methodology in the hands of the trier of fact.

Medical expenses have traditionally been recoverable as economic damages within Connecticut. The 1992 case *Seymour v. Carcia*, 221 Conn. 473 (1992) expanded upon recovery, with the Connecticut Supreme Court ruling that expert testimony opining that lifelong medical care would be necessary, together with evidence of the treatment received since the date of the accident, life expectancy and past lost earnings, was sufficient to provide a basis for a jury to estimate loss of future earnings and, thus, to award future economic damages. To avoid damage estimates that are speculative in nature, in practice, attorneys have retained life-care planners to estimate future medical expenses, which are then present-valued by a financial or economic expert.

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Joseph DeCusati

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Unique Concept

Loss of household services is a unique concept proffered by Connecticut courts which have suggested restitution in wrongful death claims for destruction of the ability to carry on life's activities. In *Chase v. Fitzgerald*, 132 Conn. 461 (1946) and *Moffa v. Perkins Trucking Company*, 200 F. Supp. 183 (D.Conn.1961), the loss of the decedent's activities as a wife and homemaker and evidence of the decedent's "family activities" including home and yard maintenance and time spent with the children were, respectively, admissible to show evidence of destruction of life's activities.

Although competing viewpoints suggest such damages are not available where the decedent is unmarried or single without children, damages for loss of household services has been considered a viable economic damage claim in Connecticut for more than half a century.

Connecticut has long been recognized as one of the first to permit recovery for the lost enjoyment of life without accompanying lost earning capacity, interpreting state statutes to allow an estate to recover such damages in *Katsetos v. Nolan*, 170 Conn. 637 (1976). This landmark decision led to the Illinois case of *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) which was the first to permit expert witness testimony, with the judge ruling that such testimony rose above the level of speculation and "…enabled the jury to perform its function in determining the proper measure of damages…"

In addition, the concept of "hedonic damages" was first coined by expert witness Stanley V. Smith through his testimony in the *Sherrod* case. "Hedonic," as related to the value of life, was defined by Smith as "the larger value of life, the life at the pleasure of society…the value including economic, including moral, including philosophical, including all the value with which you might hold life…" The concept of hedonic damages was thus born and has since begun its expansion into courtrooms across the country.

Several Categories

In Connecticut, the loss of enjoyment of life was extended to include personal injury claims in the 2001 consolidated actions of *Hamernick, et al. v. Bach, et al.* and *Carney, et al. v. Schultz, et al.*, 64 Conn.App. 160 (2001).

Here, the jury, in returning a verdict, divided the award into several categories, which included past and future loss of enjoyment of life's activities. The defense, unsuccessfully, argued that the jury should have considered only economic and non-economic damages as defined by Connecticut statutes. The court, in reviewing the legislative history of Connecticut's applicable statutes and relevant tort reforms, determined that the statutes did not prohibit the expansion of damage categories beyond the two defined and thus, such an award was proper.

The use of experts in economic damage claims has progressed significantly, with testimony in hedonic damage claims considerably advanced since the 1993 landmark decision of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) which gave wide discretion to courts to admit expert testimony. The *Daubert* ruling, which requires an expert's conclusions to be as a result of proper scientific methods, overruled the prior *Frye* test, a much more rigid requirement, which allowed expert testimony only if the expert's opinions were generally accepted as conclusions in the scientific community.

The use of several experts, such as testimony by a physician or psychiatrist opining as to the percentage of physical movement or mental state that has been reduced, combined with the testimony of a financial or economic expert as to present value of such percentage losses, continues to be of significant assistance to conclusions drawn by fact finders. Together with the more expansive *Daubert* test, damage claims, particularly hedonic damages, have begun to become more accepted theories of recovery.

Connecticut's statutes and their interpretation by the courts continue to evidence recognition that traditional measures restricted to financial damages do not fully capture the value of loss experienced in personal injury and wrongful death actions. From remuneration for future lost earning capacity to the loss of life's enjoyment and pleasure, future economic damages are fully encompassed within Connecticut's statutes and supporting case law.

Together with expert witness requirements, the measures invoked by state statutes and supporting case law combine to present assistance to fact finders in reaching their conclusions and full compensation to plaintiffs who have been wrongly injured. ■

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Terminology Essential In Litigating Ankle Injury Claims

Different types of accident can result in a variety of ligament damage

BY BRANDON SWARTZ

The ankle is among the most frequently injured joints in the body. According to often-cited statistics, there are 25,000 ankle sprains per day in the United States. As a result, ankle injuries are fertile ground for personal injury attorneys.

As one insurance defense attorney once said to me: "Serious ankle injuries are big claims." The ankle is a very complicated joint and, therefore, in order to properly cross-examine the defense medical expert concerning an ankle injury, it is imperative that the plaintiff's attorney understand the terminology properly.

There are many injuries that a plaintiff can sustain to the ankle, including fractures, nerves injuries, cartilage injuries, wound injuries and ligaments injuries. Due to limited space, this article will only address ligament injuries.

Although a person can sustain a serious ankle ligamentous injury in any number of ways (such as a crush accident from a high-impact motor vehicle accident), the most common scenario is a twisting injury while walking or a twisting injury after falling from a height. As the average layperson knows, the actual event itself does not have to be severe to cause a serious ankle injury. The ankle can be twisted in two directions — inwardly or outwardly.

When the ankle rolls outward and the foot rolls inward it is called an inversion injury, which is the far more common type of injury. When the ankle rolls inward and the foot rolls outward is called an eversion injury.

In an inversion injury, the plaintiff is likely to experience damage to the lateral ligaments in the ankle. These are the ligaments on the outer side of the ankle. The lateral ankle ligaments are the anterior talofibular ligament (commonly referenced as the ATF ligament), the calcaneofibular ligament and the posterior talofibular ligament (commonly referred to as the PTF ligament). In an eversion injury, the plaintiff is likely to experience damage to the medial ligaments in the ankle. These are the ligaments on the inner side of the ankle, also known as the deltoid ligament complex.

When cross-examining the defense medical expert, the plaintiff's attorney should always point out the consistency between the description of the plaintiff's event and the biomechanics of the particular injury. For instance:

Question: "Doctor, isn't it true that the plaintiff described his ankle rolling outward when he stepped on the broken concrete?"

Answer: "Yes."

Question: "And isn't it true that you would otherwise expect to see an injury to the ATF ligament in such an event just as the MRI showed?"

Answer "Yes."

Sometimes, this line of questioning is obvious because the doctor may concede an injury to this ligament, however, other times the doctor may be claiming the abnormal finding on the MRI pre-existed the traumatic event, and this line of questioning may be very effective.

Additional terminology the plaintiff's attorney must be familiar with concerns the clinical examination of the ankle and the terms used by the physician when writing his or her report. In virtually all defense medical exams of the ankle, the defense expert will test for mobility, gait and stance. When testing the mobility of the ankle, the defense expert will test for supination and pronation. Supination is a combination of inversion, adduction and plantar flexion motions. Pronation is a combination of eversion, abduction and dorsiflexion motions. In both instances, the physician is essentially testing for laxity or extra looseness in the ankle indicative of a ligament injury. When testing gait, the physician will say that either the plaintiff walked with an antalgic gait or a normal gait. An antalgic gait is a limp as opposed to a normal gait which is walking without a limp.

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A common scenario exists in which the plaintiff undergoes an abnormal MRI study of the ankle and yet the defense medical expert will try to assert that despite any abnormalities on the MRI study, the clinical examination was essentially normal.

The plaintiff's attorney needs to be able to challenge the breadth of the defense expert's clinical examination. For instance, to test for clinical evidence of an ATF tear, the examining physician will perform something called an anterior drawer test.

The test is performed by comparing the laxity of the injured ankle in the ATF ligament to the area of the contralateral ankle or opposite ankle in the area of the ATF ligament. The test is generally considered abnormal if there is more than 3 mm to 5 mm of difference between the two ankles.

The plaintiff's attorney should be prepared to ask whether the doctor actually considered these relative measurements. However, the plaintiff's attorney should also know whether the test is a fair test for this particular client. For instance, if the plaintiff has had a previous severe injury to the opposite ankle, it is not fair to compare that ankle to the injured ankle in performing the test or, if the plaintiff injured both ankles in the accident, it is not fair to consider the test.

These are just some examples of ways that a plaintiff's attorney can perform an effective cross-examination in an ankle ligament injury case. ■

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Negligence allegations arising from the breach of such duties should be specifically alleged. The courts have found that it is not sufficient to allege that a general protocol, law or rule governed an individual's conduct. Instead, to assert a ministerial duty the allegation should refer to written directives that "mandate a particular response to specific conditions." As the Supreme Court noted in *Benedict v. Town of Norfolk,* 296 Conn. 518, 520 n.4 (2010), "municipal acts that would otherwise be considered discretionary will only be deemed ministerial if a policy or rule limiting discretion in the completion of the act exists."

Smart v. Corbitt, 126 Conn.App.788, cert. denied, 301 Conn. 907 (2011), illustrates that simply alleging that the defendant police officers conduct was governed by "police protocol" did not sufficiently allege a ministerial duty, especially when the protocol was based solely on testimony regarding what the officers were trained to do.

In comparison, a properly plead cause of action for breach of ministerial duties was found in *Kumah v. Brown,* 127 Conn. App. 254, cert. granted on other grounds, 300 Conn. 943 (2011). In *Kumah,* the plaintiff's complaint alleged that the actions and omissions of the town's agent were "ministerial to the extent that there existed prescribed standards, regulations, rules and/or procedures requiring that town firefighters and other municipal officials perform their duties in securing a traffic accident scene in a prescribed manner without the exercise of discretion."

It is well recognized that ministerial duties often follow a discretionary determination by a municipal employee or official. In *Bonington,* the Supreme Court indicated that to overcome qualified immunity in such situations the complaint must contain allegations showing that the official made a discretionary determination that triggered the ministerial duty.

Alleging that a separate statute eliminates the governmental immunity defense can also overcome a challenge to the action. For example, in *Silano v. Board of Education City of Bridgeport,* 129 Conn. App. 682 (2011), the plaintiff, relying on a statute governing claims for injuries to students being transported to school (§52-557), alleged injury arising out of the harassment of a student on a school bus. The Appellate Court found that the statute governing injuries sustained on school buses eliminated the defense

The courts have found that it is not sufficient to allege that a general protocol, law or rule governed an individual's conduct.

of governmental immunity without resorting to statute §52-557n.

Sometimes it is just not possible to allege a breach of a ministerial duty. When this situation arises the only way to establish liability is on the basis of one of the recognized immunity exceptions. The recent appellate cases of *Smart* and *Merritt v. Town of Bethel Police Department,* 120 Conn. App. 806 (2010), instruct that it is important for the plaintiff to allege a sufficient basis for attaching an exception to governmental immunity. So for example, in *Merritt,* the Appellate Court found that the complaint did not adequately allege facts to establish an identifiable victim known to the police officer. Similarly, in *Smart,* the complaint did not allege that the firefighter "knew" that the plaintiff's decedent was inside a burning house. In *Haynes v. City of Middletown,* 122 Conn. App. 72, cert. granted, 298 Conn. 907 (2010), the Appellate Court held that to prevail on a governmental immunity exception it must be either plead in the complaint or as a matter of avoidance to a special defense. The Court found that filing a general reply is not enough. *Haynes* is currently pending in the Supreme Court. Whether or not a general denial will be found sufficient to raise immunity exceptions, the better practice is to specifically allege them.

The overall lesson from the recent cases involving governmental immunity is that one cannot be too careful when crafting a complaint against a municipality, its employees or officials. Specificity in alleging either a breach of a ministerial duty or an exception to a discretionary duty is the rule of the road. Successful pursuit of municipal liability cases rests on removing pleading pebbles that can trip up your case. ■

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