

RISK MANAGEMENT FOR LOCAL OFFICIALS

SECOND EDITION

HOW TO AVOID BEING SUED

David N. Grubb



NEW JERSEY
SAFETY INSTITUTE



Risk Management for Local Officials

How to Avoid Being Sued

Second Edition

This book is a part of an ongoing program to acquaint local officials with Risk Management principles. It is designed to provide a general understanding of the legal principles pertaining to governmental operations. Seek the advice of your local government's attorney to evaluate any case or circumstance.

Model Safety Policy

The (employer name) will provide a safe and healthy work environment and shall comply with all applicable safety and health regulations. The (employer entity) is equally concerned about the safety of the public. Consistent with this policy, employees will receive periodic safety training and will be provided with appropriate safety equipment. Employees are responsible for observing safety rules and using available safety devices including personal protective equipment. Failure to do so constitutes grounds for disciplinary action. Any unsafe condition, practice, procedure, or act must be immediately reported to the supervisor or department head. Any on-the-job accident or accident involving (employer entity) facilities, equipment or motor vehicles must also be immediately reported. The (employer name) has established a Safety Committee that meets on a regular basis to recommend solutions to safety problems. Employees are encouraged to discuss safety concerns with their Safety Committee representative.

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Since 1990, David Grubb has been a Senior Partner of PERMA Risk Management Services and until 2024 Executive Director of the Municipal Excess Liability Joint Insurance Fund (MEL). He started his risk management career in 1971 at Lipton Tea before joining A&P Supermarkets as Director of Insurance and Pension Investments.

Elected to the Park Ridge Borough Council in 1977 and as mayor in 1984, Grubb chaired the committee that established the first New Jersey municipal JIF and was elected the JIF's first Chairman. In 1986, Governor Thomas Kean appointed Mayor Grubb as a Deputy Insurance Commissioner to manage the state's response to the mid-1980s insurance crisis. He also chaired the National Association of Insurance Commissioners (NAIC) Workers' Compensation and the Environmental Liability Committees.

After the end of the Kean Administration in 1990, Dave Grubb and Jim Kickham acquired PERMA and built the MEL program into the largest municipal pool in the country. Dave re-entered local government in 1994 when he was elected to two terms on the Ridgewood Village Council. He also founded the non-profit New Jersey Safety Institute.

A long-time friend and supporter of the New Jersey League of Municipalities, Grubb was a recipient of the League's Distinguished Public Service Award in 2022.

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MEL Joint Insurance Fund Member Savings

Member Joint Insurance fund	Established	JIF Savings (millions)	JIF Membership	Individual JIF Member Savings (millions)
Bergen	1985	\$322.5	38	\$8.5
South Bergen	1986	\$285.5	23	\$12.4
Atlantic	1987	\$462.9	39	\$11.6
Camden	1987	\$252.1	38	\$6.6
Mid-Jersey	1987	\$198.1	13	\$15.2
Morris	1987	\$297.8	45	\$6.6
Ocean	1987	\$367.0	31	\$11.4
PMM	1987	\$99.8	4	\$24.9
Monmouth	1988	\$319.5	41	\$7.8
Burlco	1991	\$132.7	28	\$4.7
TRICO	1991	\$363.6	36	\$10.1
NJ Utility Authorities	1991	\$210.1	74	\$2.8
NJ Self-Insurers	1992	\$79.3	5	\$15.9
Suburban Metro	1992	\$122.4	11	\$11.1
NJ Housing Authorities	1994	\$136.5	90	\$1.5
Suburban Municipal	1994	\$88.6	10	\$8.9
PAIC	1997	\$139.9	21	\$6.7
Central Jersey	1998	\$179.6	16	\$11.2
First Responders	2009	\$40.9	34	\$1.2
	Totals	\$4 Billion	601	Average \$6.6 Million

How to Avoid Being Sued

Risk Management for Local Officials



■ 43% Workers' Compensation ■ 29% Liability ■ 24% Property ■ 2% Cyber ■ 2% Environmental

Introduction

Employee, liability, and property claims and related insurance cost New Jersey government over \$1.5 billion each year. This includes the state, counties, authorities, and municipalities. Had it not been for the widespread adoption of risk management beginning in the mid-1980s, that figure would easily be double.

Risk management has been especially important for municipal government. It is estimated that the Municipal Excess Liability JIF (MEL) and its 19-member joint insurance funds (JIFs) have saved the taxpayers \$4 billion since 1985.

New Jersey local government is now facing the most serious insurance crisis in 40 years. Over the last 5 years since 2020, property/casualty insurance budgets have increased 44% as compared to the 23% increase in the consumer price index over the identical period. This is a worldwide trend that has been complicated in New Jersey by court decisions and legislative actions.

Workers' Compensation (43% of the total): While the accident rate has improved over the last five years, workers' compensation costs have still increased 30%. New Jersey now has the highest workers' compensation premium rates in the country.

- Judges are permitting injured workers to reopen their cases years and decades after their accidents.
- The State compounded this problem by changing the pension system that until 2021 paid most non-medical costs of some workers permanently disabled on the job. Under the new rules, workers' compensation is now the primary payer.
- New Jersey adopted a law that requires workers' compensation judges to presume that COVID is work related for emergency workers. As a result, New Jersey experienced the second highest workers' compensation cost for COVID in the country.

Liability (29% of the total): Liability costs have increased 27% since 2020 because of the New Jersey Supreme Court decision in *Gonzalez v. Jersey City* in 2021. Judges are now reluctant to dismiss cases that lack merit. This increases defense costs and the risk of a run-away jury award. A recent amendment in the sexual molestation statute of limitations has also increased liability costs.

Property (24% of the total): Premiums (fire, flood, etc.) increased 107% in five years because of the higher frequency of natural disasters worldwide. New Jersey experienced Hurricane Irene in 2011, Superstorm Sandy in 2012, and Hurricane Ida in 2021. Property insurance premiums are also rising because of the jump in construction costs.

Cyber (2% of the total): Premiums increased 585% over the past five years. Organizations without strong cyber risk controls are finding it difficult to purchase insurance coverage.

Environmental (2% of the total): Premiums increased only 15% due to successful loss control efforts.

Two recent cases demonstrate how expensive claims have become.

- A jury found the State negligent in a case involving a woman who had been sexually molested 30 years earlier while in foster care. The woman was awarded damages of \$25 million.
- A jury awarded \$21.5 million to four homeowners whose houses were flooded during a microburst. The total property damage was less than \$500,000 and there were no injuries. The lion's share of the award was for inconvenience. The municipality is appealing.

History

Prior to 1911, governmental entities only needed fire insurance because government could not be sued for negligence under the doctrine of sovereign immunity. This changed with the adoption of the *Workers' Compensation Statute*. This act effectively required most governmental entities to buy workers' compensation policies because they were not large enough to self-insure. In 1925, New Jersey public entities also became liable for auto accidents.

In 1970, the N.J. Supreme Court overturned sovereign immunity and invited the legislature to define when a public entity should be liable. The legislature responded by enacting *Title 59, the Tort Claims Act*. Other court decisions also made public entities liable for civil rights issues and environmental damages.

What Is Risk Management?

The concept of risk management dates to the mid-1950s when large corporations combined insurance, claims management and safety into a single department. The idea was better coordinate these three functions to reduce costs. The term "risk management" was coined in 1955 by Wayne Snider a Professor of Insurance at Temple University.

The risk management revolution for New Jersey local government was led by the early Joint Insurance Funds that were established in the mid-1980s. Since then, JIFs have reduced employee accident rates by over 65% and property/casualty costs for their members by at least half.

At the same time, other insurance related costs have been cut to the lowest in the country. These other costs include administration, general legal, safety, claims adjusting expense, and fees to insurance agents. The average of these other costs for MEL member JIFs is less than 20% as compared to 31% for commercial property casualty companies.

Joint Insurance Funds

Joint Insurance Funds are governmental entities that are governed by member appointed commissioners who make all decisions. One of the advantages of being a governmental entity is that JIFs are exempt from taxation. While JIFs are not insurance companies, they are closely regulated by the New Jersey Department of Banking and Insurance and the New Jersey Department of Community Affairs.

In 1981, ten towns in northern Bergen County studied the idea of creating the first JIF. When the Pascack Valley Mayors Association contacted the Department of Insurance, it was informed that the legislature must first adopt an enabling statute. By late 1983, both the New Jersey School Boards Association (NJSBA) and the New Jersey League of Municipalities (NJLM) successfully lobbied for this legislation. The Department's of Insurance and Community Affairs then promulgated the necessary regulations.

Municipalities and schools took different approaches. The School Boards Association created a large statewide JIF that currently insures 375 school districts. Rather than create a similar large program, the League of Municipalities encouraged local groups to form their own JIFs. The Pascack Valley Mayors Association in Bergen County established the first municipal JIF effective New Year's Day in 1985.

Later that year, the liability insurance market for governmental entities crashed because of the increase of lawsuits against public entities. Insurers were especially concerned about environmental liability. During this crisis, the Bergen County Municipal JIF became the model for numerous other municipal groups that formed similar local pools around the state. In a New York Times article dated February 23, 1986, the N.J. Department of Insurance predicted that the Bergen model could save New Jersey taxpayers between \$50 and \$100 million per year. This is exactly what occurred.

When excess coverage became unavailable to cover large claims, the Bergen JIF proposed the creation of a "Super JIF" made up of numerous JIFs and self-insurers. The idea was based on a concept commonly used by large corporations with captive insurance companies. This resulted in the establishment of the Municipal Excess Liability JIF (MEL) by the Atlantic County Municipal JIF and the Morris County Municipal JIF at the beginning of 1987. Over the next two years, seven other JIFs, including the original Bergen pool, joined the MEL.

With reasonably priced excess insurance available from the MEL, the now 19 MEL affiliated JIFs expanded into one of the largest self-insurance pooling programs in the country.

Organizing a Local Government Risk Management Program

To achieve long term results, a risk management program must be structured so that everyone is involved.

- **Senior Management:** The program must start with the governing body taking an active part. Management communicates its priorities by what it monitors. The status of the risk management program should be a monthly topic on the governing body's workshop agenda. Members of the governing body should also complete periodic risk management training. The MEL offers this annual training across the state and gives towns and authorities a discount for each of its governing body members that complete the training. The training changes each year and includes topics such as employment practices, ethics, land use liability, cyber risk management, and protecting children from abuse.
- **Safety Committee:** Risk control is coordinated by the safety committee. The program should be collaborative, including representatives from management, collective bargaining units and non-union employees.

- **Risk Management Consultant:** Unlike other states, most New Jersey local governments are too small to have an in-house risk management department and depend on an appointed risk management consultant, often a local insurance agent. These professionals are responsible for numerous risk management functions that are detailed in JIF By-laws. Among their responsibilities are participation on the safety committee, review of exposures, completion of underwriting surveys, assistance in claims processing, and review of contracts. Risk managers are selected in accordance with the public contracts law including “pay to play” regulations. In most JIFs, the fees are about half of the commissions paid by commercial insurance companies.

Coverage

Another advantage of the risk management revolution is improved coverage. Before the advent of the JIFs, local governments went through the time-consuming process of purchasing numerous insurance policies from different insurers including workers’ compensation, general liability, police professional liability, auto liability, and property. With JIFs, these policies are combined into a single master program. This reduces work and eliminates the possibility of different insurers arguing over which one is responsible for a claim.

To solve the problem of lack of environmental coverage, thirteen JIFs established the New Jersey Municipal Environmental Risk Management Fund. This “E-JIF” provides the most extensive pollution liability coverage available to local governments anywhere in the country. The E-JIF also saves taxpayers tens of millions by conducting a comprehensive environmental risk control program and limiting legal costs.

Emerging cyber threats and increased exposures led to the creation of the New Jersey Cyber Risk Management Fund in 2023, which is available to all 19 MEL JIFs. Based on the E-JIF, the “Cyber JIF” provides both coverage and risk control services to help members.

Commissioner Control

An important factor in the success of the JIFs is that they are controlled by their commissioners. Each member appoints one of its elected officials or employees to serve as a Fund Commissioner. The commissioners meet monthly to decide the Fund’s business. Over 300 local officials participate monthly in the governance of their local JIFs. As a result, they are continually exposed to the importance of safety and claims control.

Over the MEL’s history, there have been numerous commissioner initiatives. For example:

- When New Jersey substantially increased safety training requirements, the MEL established a Safety Institute that currently trains over 70,000

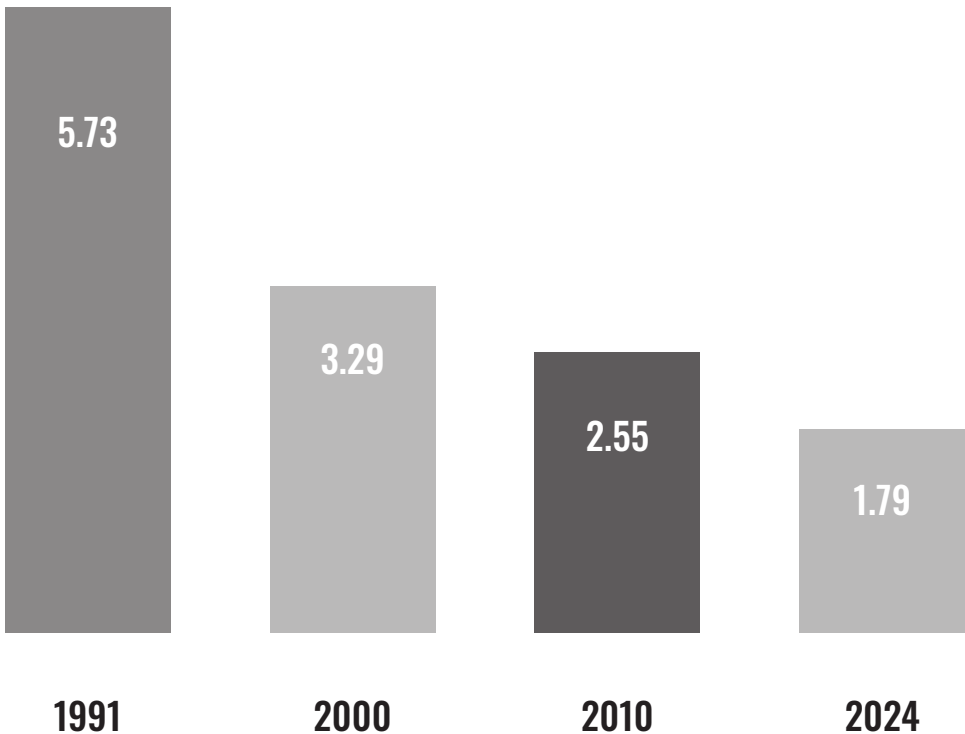
MEL member employees each year. For details visit NJMEL.org and MELSafetyInstitute.org.

- After a devastating fire struck the Edison DPW garage two days before a major snowstorm, adjusters for the Central Jersey JIF found a fleet of heavy trucks available for lease in another state. The replacement equipment arrived in Edison just hours before the storm.

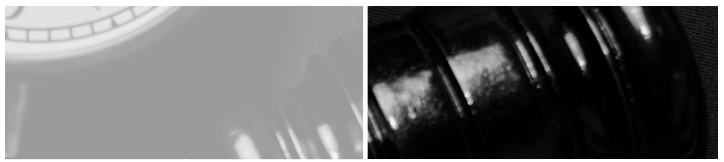
Conclusion

Local Government risk management is becoming more complicated with new exposures such as environmental liability and cyber security. Fire and flood claims have also grown dramatically because of a higher frequency of storms and higher construction costs. The largest cost drivers are still employee related including workers' Compensation and employment practices. Because 85% of the final cost is claims, member involvement each month in the governance of their JIFs is critical in the dramatic reduction of the accident rate and savings of non-claim costs.

MEL Members Accident Frequency Lost Time Accidents Per 100 Full-Time Employees



CHAPTER 1



Most of the material in this chapter is from John Geaney’s, *New Jersey Workers’ Compensation Manual*, 2024 edition.

Background

43% of the cost of local property/casualty claims in local government is workers’ compensation. The first principle of controlling workers’ compensation cost is that effective safety programs can dramatically lower accident rates. Since 1991, JIF members have reduced their accident rates by an average of over 65%.

Unfortunately, the cost of workers’ compensation has increased 30% since 2020, because of a series of legislative, judicial, and administrative decisions. New Jersey now has the highest workers’ compensation rates in the country.

History

Until the beginning of the 20th century, employees injured on the job were forced to sue their employers for negligence under common law. These suits were routinely delayed for years, and most were ultimately unsuccessful due to the numerous defenses available to an employer. This left workers and their families dependent on charity.

In 1911, New Jersey became the first state to adopt a permanent Workers’ Compensation Law where benefits are provided for traumatic injuries and occupational disease. The N.J. Supreme Court defined “accident” as an “unlooked for mishap or untoward event that is not expected or designed.” (*Dudley v. Victor Lynn Lines*, 1960). Occupational disease involves injuries caused by repetitive activity or exposures over time.

Under the “Grand Bargain,” workers’ compensation coverage is no-fault. The petitioner must establish that the injury occurred during work (time concept) and

arose out of work (causation concept). The petitioner does not need to prove that the employer was negligent or contributed to the cause of the accident to receive benefits. Workers' compensation is the employee's "sole" recourse against the employer, and the employee can't sue the employer for negligence unless the employer intentionally caused the accident. Recent court decisions have held that if the employer deliberately violates a safety standard that creates the substantial certainty of an accident, this will be considered as an "intentional wrong" opening the door to tort litigation. Fortunately, these cases are very rare. While injured employees may no longer sue their employers, they may still sue other parties that may be negligent.

Who is considered as an employee under the Workers' Compensation Act?

As a general principle, workers' compensation covers anyone hired as a "regular" employee but not a "casual" employee. To be covered, an employee must have a job that is regular, periodic, or recurring. If there is any doubt, the court will usually grant coverage.

The courts have found that independent contractors are covered by an employer's compensation policy if the employer exercises effective control over the independent contractor as if the contractor was an employee or if the employer has a long-term economic dependency on the independent contractor. The Act also provides that any contractor placing work with a sub-contractor is responsible for workers' compensation claims if the sub-contractor fails to purchase insurance (*DaSilva v. JDDM Enterprises, 2018*). It is good practice to make sure all independent contractors have in-force workers' compensation policies.

Volunteers are not employees and are normally not covered under the Act. However, there is a special provision that makes some governmental volunteers eligible for workers' compensation coverage. Specifically included are elected and appointed officials, Board of Education members, volunteer firefighters, first aid or rescue squad workers, and reserve or auxiliary police officers (*N.J.S.A. 34:15-43*).

For volunteer firefighters and rescue workers "in the line of duty" also means "participating in any authorized construction such as installation, alteration, maintenance or repair work upon the premises, apparatus, or other equipment owned or used by the fire company, first aid or rescue squad." It also means, "participating in any authorized public drill, showing, exhibition, fund raising or parade."

Under State Law, prisoners and individuals performing court ordered community service are not covered for workers' compensation (*N.J.S.A. 59:7A-1*).

When during the workday is an employee covered?

As a general principle, coverage begins when an employee arrives at the employer's premises and ends when the employee leaves. This includes the parking lot if it is designated by the employer for employee use, otherwise it is the entrance. However,

just because an injury occurred on the employer's premises does not automatically mean that it is compensable. For example, there is no coverage for an employee who is injured in an attack that was triggered by a personal dispute that had no connection to the employee's duties (*Joseph v. Monmouth County, 2015*).

Employees are not covered while commuting to their regular workplace but are covered while traveling on business to places other than their regular workplace. If they leave from home, and do not go to their regular place of employment first, they may be covered when the route deviates from their normal commute. These cases are very fact sensitive (*Keim v. Above All Termite and Pest Control, 2023*). There are special provisions relating to first responders since they are not "on duty" 24 hours a day for purposes of workers' compensation. When there is a call out, volunteer first responders are covered when traveling from home to the station to pick up emergency vehicles, or when responding directly to the scene. All career and volunteer responders are eligible for workers' compensation if they are injured in an emergency that happens in their jurisdiction while "off duty" even if not specifically called out. Coverage also applies if they come upon an emergency outside of their regular jurisdiction.

There is often confusion when employees are injured in car accidents. The courts have ruled that an employee is only covered by workers' compensation while on the employer's business. There is no coverage under workers' compensation if the employee is on personal business when an auto accident occurs, even if the employee is driving an employer-owned vehicle (*Brunell v. Wildwood Crest Police Department, 2003*). In this situation the employee is covered by both the employer's and the employee's auto insurance policies. Further, an employee is also covered by workers' compensation while operating a privately owned vehicle on the employer's business. The coverage trigger is being on the employer's business.

Normally, employees are covered while in the employer's lunchroom but not when going off premises to eat (*Ward v. Davidowitz, 1983*). However, employees who are away from their normal worksite on business may be covered for "minor deviations" from their routes (*Nemchick v. Thatcher, 1985*). For example, if an employee is out of the office on business there is coverage if the employee slips in a restaurant parking lot while going to lunch. These cases are very fact sensitive.

Occupational Disease Claims

Occupational disease claims involve injuries or illnesses caused by repetitive activity or exposures. The petitioner must show that the disease is due to causes and conditions that are characteristic of a particular trade, occupation, process or place of employment, and the contribution of work to the disease was material (*N.J.S.A. 34:15-31*). Claims under this portion of the statute include various muscular/skeletal issues and hearing loss. New Jersey compensation courts also accept claims for Post-Traumatic Stress Disorder (*Brunell v. Wildwood Crest Police Department, 2003*) and Lyme disease (*Raimondi v. Morris County Park Police, 2013*).

Under a 1979 amendment to the Act, claims for heart attacks are more difficult to establish. The petitioner must show that the heart attack or stroke was caused to a material degree by on-the-job work effort or strain more than the wear and tear of daily living. In 1995, the N.J. Supreme Court ruled that to be compensable, heart disease must also be: (1) due in a material degree to causes which are characteristic to a particular occupation; (2) the work exposure exceeds the exposure caused by the workers' personal risk factors such as smoking; and (3) the employment substantially contributed to the development of the disease (*Fiore v. Consolidated Freightways*, 1995). This means that without the exposure, the disease would not have developed to the extent that it caused the employee's incapacity to work (*Dietrich v. Toms River BOE*, 1996).

Under a special provision in the statute, a heart attack or stroke suffered by an on-duty police officer or fire fighter is presumed to be compensable. The presumption can be rebutted by the preponderance of the evidence that the condition is unrelated to an on-the-job exposure. As a practical matter, this means almost all on-duty police and fire fighter heart attacks and strokes receive at least some compensation. In 2003, this concept was extended to emphysema contracted by firefighters (*Lindquist v. Jersey City*, 2003).

Under legislation adopted in 2019, cancer diagnosed in a firefighter is also presumed to be job related if the firefighter has at least seven years of experience on the job. The presumption covers both career and volunteer firefighters and expires when the firefighter reaches age 75. As with the case of heart attacks, the presumption can be rebutted by the preponderance of the evidence that the cancer is unrelated to firefighting.

Under the same legislation, public safety workers are also eligible for the presumption when exposed to communicable diseases such as COVID-19. Specifically:

“If in the course of a public safety worker’s employment, the worker is exposed to any pathogen or biological toxins ... related to ... epidemics, including airborne exposure, then all care or treatment of the public safety worker, including testing, diagnosis, surveillance or other services and all time during which the public safety worker is unable to work while receiving the care or treatment, shall be compensable ... If it is ascertained that the public safety worker has contracted a serious communicable disease or related illness there shall be a presumption that any injury, disability, chronic or corollary illness or death ... is compensable ... but this presumption may be rebutted by the preponderance of the evidence that the exposure is not linked to the occurrence of the disease.”

“A Public safety worker includes, but is not limited to, a member, employee, or officer of a paid, partially-paid, or volunteer fire or police department, force, company or district, including the State Police, a Community Emergency Response Team approved by the New Jersey Office of Emergency Management,

or a correctional facility, or a basic or advanced medical technician of a first aid or rescue squad, or any other nurse, basic or advanced medical technician responding to a catastrophic incident and directly involved and in contact with the public during such an incident, either as a volunteer, member of a Community Emergency Response Team or employed or directed by a health care facility.”

Post-Traumatic Stress Syndrome (PTSD)

In recent years, there has been a substantial increase in Post-Traumatic Stress Syndrome claims (PTSD) involving public safety workers as the medical profession comes to understand this long-term problem. New Jersey was one of the first states to recognize these claims as compensable under workers' compensation. In *Brunell v. Wildwood Crest* (2003), the N.J. Supreme Court ruled that the normal two-year statute of limitation for a traumatic injury did not apply. And, that PTSD was more analogous to an occupation disease claim where the statute of limitations is two-years from when the employee knew that medical issues were caused by the occupational exposure such as witnessing a violent event. The court wrote that:

“There is nothing about a single, traumatic event, standing alone, that would preclude a worker from filing an occupational disease claim, so long as the claimant otherwise met the relevant statutory standards. Indeed, the worker is free to file both claims.”

Special Coverage Issues

- **Recreational or sports events:** A 1979 amendment to the Act substantially limited the type of recreational events that qualify for compensation. Specifically, to be compensable the recreational or social activity must be a regular incident of employment and produce a benefit to the employer beyond improvement in employee health or morale. For example, a volunteer firefighter would not be eligible for workers' compensation if injured at a baseball game unless the game was a fundraiser for the Department (*Dowson v. Lodi, 1986*).
- **Horseplay:** The Act specifically provides coverage for employees who did not instigate or take part in the horseplay (*N.J.S.A 34:15-7*). Even the instigating party is covered under some circumstances, so long as the horsing around was neither extensive nor serious (*Wasik v. Bergenfield, 2003*).
- **Intoxication:** Under the Act, an employee cannot collect if the accident was caused solely by the employee's intoxication (*N.J.S.A 34:15-7*). As a practical matter, the courts almost always find at least one other cause so that this provision is rarely enforced.
- **Hernias:** The Act requires that claimants report hernias within 48 hours after the occurrence excluding weekends or holidays (*N.J.S.A. 35:15-12(c) (23)*). This limitation only applies to inguinal hernias (*Potter v. Jersey City, 2012*).

Benefits Available to Injured Workers

Necessary Medical Care: The law allows the employer (or the employer's insurer) to contract with a managed care organization to provide medical treatment. This is a critical control to prevent abuse.

Temporary Disability Payments: Employees off from work receive compensation in the amount of 70% of the employee's earnings up to the state-average weekly wage which is annually established by the N.J. Department of Labor. There is a seven-day waiting period before becoming eligible, but once this is satisfied the injured employee is paid for the waiting period. Emergency workers are not subject to the minimum seven-day waiting period. This benefit is not subject to federal and state income taxes or Social Security taxes. Under the law, temporary disability benefits stop when the doctor certifies that the employee has reached "maximum medical improvement" (MMI) even if the employee still cannot return to work. At this point, the employee is evaluated for an indemnity award. If there is any doubt about the ability of an injured employee to perform a particular job, the employer will arrange for a functional capacity evaluation. However, even if the employee fails the examination, the Temporary Disability Payments still terminate when the employee reaches MMI.

There are special provisions concerning the weekly rates awarded to governmental volunteers. Elected and appointed officials receive at least the minimum rates unless they receive salaries at a higher rate. Volunteer firefighters, first aid, rescue squad volunteers, ambulance drivers, special reserve or auxiliary police receive the maximum rate for benefits (*N.J.S.A. 34:15-43*).

In lieu of temporary disability benefits, many local government employees receive their full salaries for up to one year when they are off from work because of a job-related injury or disability (*N.J.S.A. 11A:6-8 and 18A:30-2.1*). In these cases, the JIF reimburses the member an amount equal to what the injured employee would otherwise have received in workers' compensation temporary disability.

Indemnity Awards: Employees also receive compensation for permanent disabilities. This is computed as a percent of a body part, or in some cases a percent of the whole body. The rating for an indemnity award has no bearing on the actual ability of an employee to return to work. In many cases, an employee is awarded a substantial percentage of a certain body part and is still fully capable of passing a functional capacity evaluation.

Claims Issues

- **Coordination of workers' compensation with state pensions:** Except in rare circumstances, Accidental Disability Pensions are reduced by the amount paid by workers' compensation to prevent "doubling up." Before this changed in 2021, the pension was primary, and workers' compensation was supplementary. This change has significantly increased workers' compensation costs for local government.
- **Coordination of workers' compensation with social security disability:** Until age 62, the amount of the Social Security disability benefit, or the workers' compensation benefit, is reduced depending on the type of award. Social Security also recovers from workers' compensation any payments it makes under Medicare for injuries and illnesses related to compensable claims. For cases involving total and permanent disability benefits, New Jersey employers receive the offset, not the Social Security Administration.
- **Workers' compensation courts:** The New Jersey Department of Labor administers the Act and employs judges to hear cases. Workers' compensation courts do not have juries. The regular court system only becomes involved when a decision is appealed.
- **Reopening Claims:** Under the Act, an injured worker is entitled to seek additional benefits within two years of the last compensation payment where the petitioner can show increased incapacity that is causally related to the initial claim. Until recently, "reopeners" were relatively rare. Today, it is not uncommon for claims to reopen four or five times over several decades. This change has significantly increased workers' compensation costs.
- **Section 20 settlements:** A Section 20 settlement is often used where a claim is not clear cut. Section 20 settlements cannot be reopened unless there is fraud or misrepresentation. However, even if both parties agree the judge is not compelled to approve the settlement. Section 20 settlements will only be granted by the court if there is an issue of jurisdiction, liability, causal relation, or dependency. Even with these restrictions, Section 20 is an important tool to resolve difficult cases.
- **Second Injury Fund:** Depending on the circumstances, the Second Injury Fund may pay a portion of an indemnity award if the employee was injured in an earlier accident. The fund was established to encourage employers to hire employees who were previously injured. The fund only participates in claims for total and permanent disability benefits where the injured worker is unable to return to gainful employment. It is the

responsibility of the claims adjusters to make an application for Second Injury Fund reimbursement.

- **Subrogation:** If another party caused the accident, both the injured employee and the employer may collect damages from this third “at fault” party. Under the Act, the employee has one year to file the lawsuit. After that, the employer can file. If the suit is successful, the employer or the employer’s insurer usually receives two-thirds of the award up to the amount that was paid in worker’s compensation. The remainder goes to the attorney and the employee.
- **Retaliation:** NJSA 34:15–39.1 and court decisions provide that employers may not discharge, harass, or otherwise discriminate or retaliate against an employee on the basis of a health-related matter. The N.J. Supreme Court ruled in *Lally v. Copygraphics (1981)*, that an employee who is retaliated against for pursuing a workers’ compensation claim has recourse before both the Commissioner of Labor and Workforce Development and in civil courts.

Assisting the Claims Process

- **Use the most skilled physician:** Medical bills constitute over half of the cost of workers’ compensation. New Jersey permits the employer, or the employer’s insurer, to contract with a Managed Care Organization. This significantly reduces the cost of providing medical treatment. Management should interview the managed care coordinator and the claims adjuster to discuss claims procedures. Review the job descriptions and requirements of critical positions as well as procedures to release employees back to work as soon as reasonable.
- **Maintain contact with the injured employee:** The worst thing that can happen is for an injured employee to sit at home without periodically hearing from the supervisor. It’s management’s responsibility to periodically contact the injured worker and express support.
- **Return the employee back to work as quickly as possible:** Management should work with the treating physician and the Managed Care Organization to identify what the employee can do on the job even before they reach maximum medical improvement (MMI). Depending on the circumstances, a transitional plan includes both specialized rehabilitation and transitional duty on the job. Some injured employees are not capable of immediately assuming full duties, even after reaching maximum medical improvement, and may need time to build up to their full responsibilities. Management should work with the treating physician and the Managed Care Organization to identify what duties the employee can do while recovering. Additional rehabilitation may be required to get the employee back into shape after the relative inactivity during the employee’s disability period.

According to a report authored by the American College of Occupational and Environmental Medicine, unnecessary and prolonged work absence can cause significant harm to a worker's well-being. Workers who are on extended disability often lose social relationships with co-workers, as well as the self-respect and self-esteem that comes from earning a living. For many workers, their job is part of their identity, and being kept away by illness or injury is a very stressful experience. Transitional duty programs, which allow a more accelerated return to work and provide significant support during recovery, can help employees reduce the stress and disruption that injuries or illness cause and lead to better recovery.

Workers Compensation Fraud

The adjuster should be informed of any suspicions so that an investigator can be assigned. While most public officials understand that employees may not be retaliated against for using workers' compensation benefits, problems occasionally arise when the employer suspects dishonesty or exaggeration and then allows this suspicion to affect treatment of the employee. The assertion of a fraudulent workers' compensation claim is not a protected activity and is potentially subject to criminal prosecution. However, a suspicion of fraud is vastly different from a judicial determination of fraud or even compelling evidence of fraud.

Suspicion is not sufficient to support a termination or any other adverse employment action. Work collaboratively with the workers' compensation adjuster to pursue any evidence of fraud. Do not act against the employee prematurely based on your suspicions no matter how strong they may be.

The filing of a workers' compensation claim does not immunize an employee from adverse employment action for other legitimate reasons. The primary defense against a workers' compensation retaliation claim is also the primary defense against all employment practices retaliation claims: the employer would have made the same move notwithstanding the employee's engagement in a protected activity. As with all contemplated personnel decisions potentially affecting employees, especially those with protected status, you should consult your employment attorney to vet proposed actions before they are implemented.

Selected Case Law

Kossack v. Bloomfield (1960)

Facts: A police officer was injured at home while cleaning his service revolver. There was no provision in the department's policies that specified where or when officers were to maintain their firearms.

Decision: The court ruled that the petitioner was covered because he had a duty to keep the service revolver clean and serviceable and "was unquestionably fulfilling the duties of office."

Comment: For the same reason, police departments are often held liable for injuries to other people from service revolvers that are accidentally discharged when an officer is at home.

Perry v. State Police (1998)

Facts: A State Police officer was required to use a state car to report to work. The morning after a winter storm, she slipped while shoveling snow away from the car.

Decision: In a decision upheld by the N.J. Supreme Court, the petitioner was denied workers' compensation because she: (1) was simply traveling to her normal place of work; (2) was not responding to an emergency; and (3) her activities would have been the same if she was using her own vehicle instead of a state vehicle.

Comment: There is no coverage under workers' compensation just because the employee was injured while using an employer owned vehicle unless the employee was on duty.

Mabee v. Borden (1998)

Facts: The employer was having difficulty with a labeling machine and installed a bypass switch so that the machine could be operated without a guard. The injured employee, who received workers' compensation, also sued the employer arguing that the employer's actions were an intentional wrong, therefore the employee was not barred from suing the employer.

Decision: The court decided that the employee's suit was not barred by the workers' compensation sole recourse rule because the employer installed the bypass switch and created the "virtual certainty" of an injury.

Comment: The court also ruled that the legislature intended such exceptions to be rare and fact sensitive.

Crank v. Palermo (1999)

Facts: An authority commissioner was injured in an auto accident while a passenger in an authority owned vehicle. She was on authority business but argued that she was not an employee because she was not paid. Therefore, she argued that she could sue the authority for the negligence of the authority employed driver.

Decision: The court ruled that she was an employee for purposes of workers' compensation under the special provisions of the law. Therefore, the workers' compensation sole recourse rule barred the commissioner from suing the authority.

Peterson v. Alpine (2001)

Facts: An off-duty police officer was directing traffic at a Bell Atlantic worksite. He filed for workers' compensation from the town which then argued that Bell Atlantic should pay the claim.

Decision: The court ordered both the town and Bell Atlantic to split the workers' compensation because the officer was hired by the utility through the town.

Comment: In these situations, the courts look at whose interests are served by the employment (*Domanoski v. Fanwood, 1989*). Clearly, Bell Atlantic benefited from the officer's work and paid the town for the officer's services even if the utility did not exercise direct control.

Capano v. Bound Brook Relief Fire Co. (2003)

Facts: A 93-year-old life member of a volunteer fire department fell while putting a log into a fireplace at the firehouse.

Decision: The court ruled that the firefighter was entitled to medical coverage for a hip replacement that otherwise would have been paid by Medicare. The firefighter was also awarded temporary disability for lost income even though he was long retired.

Comment: In the opinion, the court invited the legislature to correct the overly broad statutory language that resulted in this decision. To date, the legislature has not taken up this issue.

Jumpp v. Ventnor (2003)

Facts: A municipal water department operator stopped along his route to pick up his personal mail and was injured at the post office.

Decision: The court denied this workers' compensation claim because going to the post office on personal business was deemed as more than a minor deviation.

Wasik v. Bergenfield (2003)

Facts: The petitioner engaged in horseplay with another sanitation worker who became offended and struck the petitioner.

Decision: The court found that the petitioner's actions were neither extensive nor serious and the other employee overreacted. Therefore, the petitioner was entitled to workers' compensation even though he was the instigator of the sequence of events that resulted in the altercation.

Lindquist v. Jersey City (2003)

Facts: A career firefighter who was a heavy smoker applied for workers' compensation when diagnosed with emphysema.

Decision: The N.J. Supreme Court ruled that he was entitled to compensation even though he was not able to clearly establish causation. The court wrote that: "We reemphasize that it is not necessary for the firefighter to prove that the firefighting was the most significant cause of his disease. Rather, he need only show that his employment exposure contributed in a material degree to the development of his emphysema."

Comment: Under legislation adopted in 2019, cancer is now also presumed to be job related if the firefighter has at least seven years of experience on the job. The presumption is rebuttable that the cancer is unrelated to firefighting and expires when the firefighter reaches age 75.

Stango v. Lower Township (2003)

Facts: A police officer witnessed the fatal shooting of a fellow officer and shortly afterwards started having flashbacks and bad dreams. He continued to work and did not report these symptoms because he did not consider them to be serious. Six years later, he suffered an intense flash back after a balloon unexpectedly popped at a party. He then told his superior about the problem and was referred to the department's employee assistance program. He also filed for workers' compensation but was denied because he reported the issue six years after the incident.

Decision: The Supreme Court ruled that the employee was entitled to workers' compensation because it was not until the later flashback that the officer realized that the symptoms were serious enough to require treatment.

Comment: The courts will extend the statute of limitation in Post Traumatic Stress Disorder (PTSD) cases because the onset of disabling symptoms is often delayed.

Joseph v. Monmouth County (2015)

Facts: A nursing supervisor was attacked in the lunchroom by a co-employee because of a dispute over a "susu" (type of pyramid scheme).

Decision: An Appellate Court ruled that the supervisor was not entitled to workers' compensation because the attack was wholly unrelated to his employment.

Minter v. Mattson (2018)

Facts: During a heavy snowstorm, the town told an employee that it was critical that he come to work. During the commute the employee was injured in a vehicle accident.

Decision: While workers' compensation coverage does not usually begin until the employee reaches the workplace the "going and coming" limitation does not apply if the employee is required to travel in dangerous conditions.

Martin v. Newark Public Schools (2019)

Facts: The employee injured his back in an employment related auto accident and was prescribed an opioid to relieve pain. After six years, the employer refused to continue paying for the opioid, arguing that the prescription was palliative and not helping to improve the patient's functioning.

Decision: The court ruled that an employer is not required to pay for pain relievers indefinitely, and there may be a point that the pain or disability experienced by the worker is insufficient to warrant the expense of active treatment.

Kocanowski v. Bridgewater (2019)

Facts: A volunteer firefighter slipped on ice while fighting a fire and received medical benefits and a permanency award, but not temporary disability benefits because she was not employed. She appealed.

Decision: The N.J. Supreme Court ruled that the statute that makes volunteer firefighters automatically eligible for the maximum weekly compensation also applies to volunteers, even if they are unemployed or retired.

Hager v. M&K Construction (2020)

Facts: A construction worker suffered a serious back injury in 2001 and went through years of treatment. In 2016, a pain specialist recommended medical marijuana. The insurer argued that this was not appropriate treatment because marijuana is an illegal substance under federal law.

Decision: The court ruled that the employer is required to pay for medical marijuana when prescribed in a workers' compensation case. Since the employer is not required to process, manufacture, or distribute marijuana, there is no conflict between the *Federal Controlled Substances Act* and *New Jersey's Medical Marijuana Law*.

Matthews v. PFRS (2022)

Facts: A police officer was injured while helping EMTs move a 250-pound patient. All parties agreed the officer was permanently and totally disabled and was entitled to workers' compensation. When the officer applied to PFRS for an accidental disability pension the board rejected his application.

Decision: The court ruled that PFRS was correct because the officer's injuries were not the result of an unexpected event, they were incurred when the officer performed an orderly and expected aspect of his employment. The workers' compensation system is meant to be an injured public worker's primary (and often only) recourse.

Eckert v. Camden (2023)

Facts: A Captain in a career Fire Department was injured while responding with two "probationary firefighters." The Captain was hit in the head by a fire hose that had not been properly connected to the hydrant. The captain sued, claiming that the department failed to adequately train the new fire fighters, and that under the city's policies no more than one probationary firefighter was to be assigned to any crew. The Captain received workers' compensation and decided to sue the town for negligence.

Decision: The court ruled that the Captain was barred from suing for negligence because his sole recourse was workers' compensation, unless he could prove that the city committed a willful violation that created a high likelihood of a serious accident. The court decided that the injured Captain did not meet this high standard.

Comment: This was an important case because employee accident costs will increase dramatically if the workers' compensation sole recourse principle is undermined.

CHAPTER 2



EMPLOYEE SAFETY

Background

Local government is responsible for many of the more hazardous functions in our communities. It is sobering to realize that the typical police officer, firefighter, or DPW worker, has a higher chance of being injured on the job than an underground miner or construction worker.

Effective safety programs can dramatically reduce accident rates. Since 1991, JIF members have reduced their accident rates by an average of over 65%. Consistent safety efforts achieve results, and management establishes the priorities and sets the example.

Modern employee safety programs emerged in the 1920s when worker's compensation insurance became widespread. In 1931, Herbert Heinrich (1886-1962) Superintendent of Engineering for the Traveler's Insurance Company wrote a groundbreaking thesis that stated the frequency of accidents was directly related to the frequency of unsafe acts and unsafe conditions. After studying thousands of accident reports, he concluded that over time, the accident rate will drop proportionally if management addresses these issues.

In 1970, President Nixon signed the *Occupational Safety and Health Act (OSHA)* to assure safe and healthy working conditions. Since OSHA was adopted, the employee accident rate has dropped 53%. OSHA codified safety standards into law that had previously been adopted by various national organizations over the preceding decades. OSHA also hired inspectors and used its authority to fine violators.

In 1985, Governor Kean signed the *New Jersey Public Employees Occupational Safety and Health Act (PEOSHA)* that gave the Department of Labor and Workforce

Development responsibility for on-the-job safety in the governmental sector. In some areas, N.J. PEOSH standards are more stringent than federal standards. PEOSHA also has inspectors and conducts training programs.

There are six management strategies that make a substantial difference in any organization's safety record.

- 1. Monitor safety performance:** Managers communicate their priorities by what they monitor. Employers where top management closely follows the safety record experience dramatically fewer accidents than employers where top management is not aware of the accident rate. The risk management program should be a monthly agenda item on the governing body's workshop agenda. Of course, simply monitoring the accident rate does not reduce accidents by itself. However, when senior officials are aware of their safety performance they are far more likely to make sure the safety program receives the necessary support. Many JIFs compute member accident frequencies each month to benchmark their performance. This report should be periodically distributed to the member's governing body.
- 2. Empower employee involvement in the safety program.** Safety must include the grassroots and can't be solely top down. This begins with strong management support of the safety committee. Communicate to the workforce that everyone has the right to question something that appears unsafe, and that everyone must look out for each other. This includes the right to stop an operation if something does not seem right. The employee orientation available at NJMEL.org website emphasizes this message.
- 3. Require all personnel to complete a safety orientation and periodic refresher training:** Organizations where all personnel are up to date on their safety training average almost 50% fewer reportable accidents. For complete details about training programs offered to members visit NJMEL.org.
- 4. Discuss safety with employees at the start of each shift:** Organizations where supervisors and crew leaders discuss safety with their associates each morning average less than half the frequency of accidents. Managers and supervisors have the responsibility to make sure each operation is properly planned daily and that each employee is reminded of the critical safety procedures required.
- 5. Actively participate in accident investigations:** Management participation is often the missing element in accident investigations. When we say "participate" we do not mean simply read the reports – we mean get involved. Someone from management should go to the scene and drill down until the real causes are identified.

6. Monitor PEOSHA compliance: The *Public Employee Occupational Safety and Health Act (PEOSHA)* is enforced by the New Jersey Department of Labor and Workforce Development. Your JIF, or insurer, should periodically inspect local government facilities and audit compliance with PEOSHA regulations. These reports should be included in the monthly risk management report to the governing body.

Accident Facts

Municipal Accidents by Department



■ Public Works 46%	■ EMS 4%
■ Police 34%	■ Administration 3%
■ Fire 9%	■ Other 4%

Industry Rates per 100 Employees

Industry	LT Cases
Insurance & Finance	0.3
JIF Members	1.8
Wholesale, Retail Trade	2.3
Manufacturing	2.6
Mining	2.8
Construction	3.1
Transportation	4.0
State Government	4.3
Local Government	4.3
All Employers	2.3

Police Department Accidents



■ Lifting 25%	■ Assaults 12%
■ Motor Vehicle 17%	■ Other 31%
■ Slips & Falls 15%	

Fire Department Fatalities



■ Heart Attack 43%	■ Burns 7%
■ Trauma 32%	■ Other 8%
■ Asphyxiation 10%	

Public Works Employee Accidents



■ Trash Collection 38%	■ Vehicle Repair 9%
■ Streets 24%	■ Water & Sewer 7%
■ Buildings & Grounds 16%	■ Other 6%

Utility & DPW Employee Accidents



■ Lifting 48%	■ Struck By 10%
■ Slips & Fall 18%	■ Other 24%

Safety Committee

The safety committee plans and implements the risk control program. The committee should be collaborative, including representatives from management, collective bargaining units, non-union employees, and the risk management consultant.

Research has shown that organizations with a higher percentage of their workforce on safety committees have lower injury and illness rates. Front-line workers have the most experience with how a task is performed and can help identify hazards that others may overlook. An effective safety committee taps into this knowledge. Large organizations create subcommittees, often by department, to encourage broader participation.

Safety committees with strong and visible upper management support are more likely to make a meaningful impact on workplace safety. To be effective, the committee leader must facilitate the meeting without dominating it or allowing someone else to. The Committee Chair should focus on encouraging participation among all members. Effective committee heads also establish basic ground rules and ensure meetings do not get out of control. Use detailed agendas to make meetings more effective.

Training

One of the major responsibilities of the safety committee is to monitor attendance of training programs. Since 2003, when the MEL Safety Institute was created, the accident frequency has dropped in proportion to attendance at the safety courses. Currently, the MEL provides 82 courses to members at no additional cost. The MEL also:

- Maintains the training record of each employee and volunteer. These records should be periodically reviewed to make sure training is up to date.
- Offers an extensive library of free online videos that can be used at safety committee meetings.
- Provides basic management skills training designed for personnel coming up through the ranks. This training is conducted several times each year throughout the state. Talk to your JIF's safety director to register eligible employees.

Common Exposures

The most common accident types for all local governmental employees include body mechanics such as lifting, slips and falls, and motor vehicle. All employees should complete a basic new employee orientation available on-line in the MEL's Learning Management System. There are specific programs for lifting including a special program for first responders who are exposed to difficult situations. There are additional on-line training programs addressing slips and falls. Local

governments may also have large vehicle fleets, including an average of two vehicles for every three employees. Vehicle fleet safety resources are available at NJMEL.org.

Public Works

Work on roads and around heavy equipment is especially dangerous. Police officers and firefighters receive extensive training from county academies, but there are no county academies for DPW workers.

To fill this void, the MEL provides public works training through the MEL Safety Institute. Much of this training is on-line, but classroom instruction and on-site demonstration remain important for some exposures where there are serious consequences of safety lapses.

To better understand public works, many communities have newly elected officials spend a morning or afternoon with the DPW as a part of their orientation. Public works are varied and highly seasonal with roads, athletic fields and landscaping the focus during the spring and summer, leaves in the fall, and snow during the winter. Some public works departments are responsible for garbage collection, and many towns also operate water and electric utilities.

Public works employees are also exposed to “crush” accidents that can occur out in the community while repairing streets or in the garage or the DPW yard. Each year, over 100 public works employees are killed in work zone accidents nationwide. All public works personnel must receive periodic training concerning work zones and the Manual for Uniform Traffic Control Devices.

Other issues that lead to fatal accidents include trenching and confined space entry. It’s also critical that DPWs maintain an orderly garage and yard. The MEL produced an award-winning video, “Don’t Get Caught in the Crush Zone,” that can be viewed at NJMEL.org.

Police

Great strides have been made over the past few decades to improve the safety of police officers. In 1973, the number of police officers killed in the line of duty peaked at 279. By 2023, that figure had been reduced to 135. Fifty were feloniously killed while 75 died in accidents and of COVID-19. Felony gun shots accounted for 145 officer fatalities in 1973, 34 in 2013, and 47 in 2023. Vests and training are making a difference despite the rise in gun violence. Unfortunately, the number of police officers killed by guns has started to rise again over the last decade as the number of guns on the street have increased.

One third of the safety professionals retained by the MEL are retired police command officers who have a unique understanding of the safety issues in police agencies, and the ability to relate to their peers. Every two years, the MEL conducts risk management seminars around the state for almost 1,000 police command officers.

The MEL also has a close working relationship with the New Jersey State Association of Chiefs of Police (NJSACOP) and is collaborating to implement the national “Below 100” program in New Jersey. The objective of this program is to reduce the annual line of duty police fatalities to under 100. This effort involves extensive training to teach the five tenants of law enforcement safety:

- Wear Your Belt.
- Wear Your Vest.
- Watch Your Speed.
- WIN – What is Important Now?
- Remember: Complacency Kills!



Police Accreditation is another strategy to reduce law enforcement accidents. A recent study found that accreditation produces a 615% return on investment. Accreditation begins with the agency adopting a clear statement of professional objectives followed by an evaluation of the agency’s policies and procedures. The agency also evaluates its training program to make sure training is current and documented. When the procedures are in place, a team of experienced command officers verify that the standards have been implemented. Several organizations, including the Chief’s Association, provide accreditation programs. The MEL offers a premium discount to communities that have accredited police agencies.

School Crossing Guards

Police agencies are responsible for school crossing guards. This has become one of the most dangerous occupations in local government. Forty years ago, half of our children walked to school. Today, only 15% walk. As a result, school zones are clogged with more traffic than they were designed to handle. This congestion is compounded by motorists who are often in a hurry when they drop off or pick up their children.

In 2006, the MEL worked with the N.J. Association of Chiefs of Police to produce a comprehensive crossing guard safety training program including the videos, “Street Smart is Street Safe,” and “School Zone, Danger Zone.” Another video, “Walk the Walk,” discusses how communities can create a comprehensive pedestrian safety program including walking routes to school. All these videos are available at NJMEL.org. In recent years, Rutgers University has assumed the responsibility to develop training for crossing guards, and the MEL is one of the prime sponsors of the program.

Fire Departments

Heart Attacks: In 2007, the National Institute for Occupational Safety and Health (NIOSH) issued an alert that sudden cardiac death represents the most common cause of on-duty firefighter fatalities. The report concluded that 39% of fatalities involving career firefighters, and 50% involving volunteers, are due to sudden cardiac death. The higher incidence among volunteers is because volunteers tend

to be older: 43% of the heart attacks involved firefighters over 55, and one-sixth involved firefighters over age 65.

In the United States, heart attacks are the number one cause of death, striking at least 600,000 Americans each year. In half of the cases, the first symptom is death. A recent New England Journal of Medicine study by Dr. Stefanos Kates of Harvard University concluded:

“Firefighters do not have a higher risk of heart disease compared to the general population, but the sudden exertion of their work can trigger a heart attack in the same way shoveling snow can lead to a heart attack in someone else. Firefighters may begin their careers in better shape than others, but as they grow older they may acquire risk factors, such as high blood pressure and cholesterol as well as weight gain.”

Every department should offer ongoing heart screening in addition to a comprehensive safety training program. The New Jersey Civil Service Commission includes a section on physical examinations for firefighters on the nj.gov/csc website.

Cancer: Firefighters are 9% more likely to be diagnosed with cancer and 14% more likely to die from cancer than the general U.S. population. Firefighters have significantly higher risks of respiratory (lung and mesothelioma), gastrointestinal and kidney cancer. Specifically, they are two times more likely to have mesothelioma than the general population and have a 129% increased risk of dying from it. Firefighters also have a 62% higher risk of having esophageal cancer.

In 2018, the International Association of Fire Chiefs’ Volunteer & Combination Officers Section (VCOS) and the National Volunteer Fire Council (NVFC) released the “Lavender Ribbon Report” that outlines eleven actions that fire departments should implement to reduce cancer-related risks.

1. Wear full personal protective equipment (PPE), including self-contained breathing apparatus (SCBA), during the entire incident, salvage and overhaul.
2. All entry-certified personnel should be provided with a second hood so that they always have time to wash their contaminated hood and have another one available for calls.
3. After leaving atmospheres that are immediately dangerous to life and health (IDLH), stay on air and immediately begin gross decontamination of PPE using soap and water. Place PPE in a sealed bag and place the bag in an exterior compartment of the apparatus, or store in a large storage tote in personally owned vehicles.

4. Immediately use wipes to remove as much soot as possible from exposed areas like the neck, face, arms, and hands. Remember to always keep wipes in all apparatus.
5. Change clothes as soon as possible after an event. Wash clothes immediately or store them in a trash bag until washing is available.
6. Shower within the hour or ASAP.
7. PPE should be stored in the apparatus floor and not in living quarters.
8. Decontaminate and regularly clean the apparatus seats, SCBA, and interior with soap/water or wipes — especially after scenes where personnel were exposed to products of combustion.
9. Firefighters should be strongly encouraged to get annual physical examinations.
10. Firefighters should never use tobacco.
11. Fully document all fire or chemical exposures in the incident and personal reports.

Emergency Vehicles

In recent years, accidents involving emergency vehicles have increased dramatically. In 2010, there were 131 fatalities involving emergency vehicles: 86 police, 31 ambulance, and 14 fire. In 2022, there were 224 accidents involving emergency vehicles: 149 police, 40 fire, and 35 ambulance.

- 56% were occupants of a non-emergency vehicle.
- 25% were pedestrians.
- 16% were emergency responders.
- 69% of these deaths resulted from multi-vehicle crashes.

To address this issue, the MEL offers a comprehensive program including:

- Policies and Procedures from MEL Model Police & Fire Accreditation Programs.
- S:ERVE on-line simulator training.
- National Safety Council N.J. Defensive Driving Program.

Office Safety

Each year, approximately 1% of all office employees suffer a disabling on the job accident. While this is only one quarter the rate for other governmental occupations, it is still serious enough that PEOSHA requires that every office

worker must receive safety training. The MEL has an on-line training program in the Learning Management System (LMS) that meets this requirement.

Almost half of office related accidents involve slips and falls. The MEL's video "Smart Moves to Avoid Falling Down" addresses this issue. Administrative and managerial employees are also injured in vehicle accidents while traveling to appointments. All personnel who operate vehicles on business, either employer or employee owned, must be included in the vehicle safety program and be included in driver license checks and periodic training.

PEOSHA Compliance

All employers have a general duty to maintain a safe and healthy work environment. Under a state plan approved by the Federal Department of Labor, the N.J. Public Employer Occupational Safety and Health Administration (PEOSHA) enforces Federal OSHA Standards for public entities, and in some cases, adopts standards that are more stringent. PEOSHA has the power to inspect facilities and issue fines where it determines that its standards have been violated. While many inspections are random, PEOSHA also responds without notice to employee complaints. All employee bulletin boards must have a notice that explains employee rights under PEOSHA.

The most common citations are a failure to: (a) maintain the required records; (b) adopt written safety policies; and (c) provide adequate training. Local governments must pay special attention to: confined space entry requirements; procedure to lockout of machinery and vehicles while being repaired; temporary traffic control at work sites and emergency incidents; work in confined spaces or excavations; and work on elevated surfaces. Other major regulations concern indoor air quality, blood borne pathogens, and the proper control of chemical hazards.

Reporting Requirements: PEOSHA requires public employers report fatalities to the state by calling the hotline or fax line within 8 hours of the occurrence. Employers must also report work related hospitalizations, amputations, or loss of an eye within 24 hours. Employers are required to maintain a log of work-related injuries and illnesses. The summary log must be completed by February 1 every year, and posted on the employee bulletin board in each department for three months until April 30.

Written safety plans: The start of a safety culture is a strong set of written policies and procedures. Copies of these policies must be available to employees and included as a part of employee training programs. The MEL maintains model policies that can be downloaded from NJMEL.org. Specifically:

1. Exposure Control (Blood borne Pathogens).
2. Hazard Communication and New Jersey Right to Know.
3. Fire Prevention.
4. Emergency Action Plan.
5. Personal Protective Equipment and Job Hazard Assessments.

6. Respiratory Protection.
7. Indoor Air Quality.
8. Control of Hazardous Energy (Lock Out/Tag Out).
9. Reporting and Recording of Occupational Injuries.
10. Confined Space Entry Permit System.

Training: The written policies must form the basis of training programs. Public employees do not work in a controlled and static environment, like a factory, so training programs must focus on specific exposures for each worker. Even the best written policies can't anticipate all situations faced by workers.

Two training concepts are critical. First, adults learn best when the information can be immediately applied. Short and targeted daily safety messages, often referred to as "chunk learning," about that day's work are very effective. Second, is team building where information can be communicated up and down the organization. Leaders must encourage workers to share insights and concerns with their boss and each other.

A training plan should start with meeting the regulatory minimum standards. PEOSHA emphasizes that training must be provided on all significant equipment and vehicles, and documentation must be available for inspectors.

Conclusion

The single most important thing any official can do is to place the risk management program on the discussion agenda each month and request a management report on the program's status. The management team and workforce will adjust their priorities based on what the governing body decides to monitor.

CHAPTER 3



THE TORT CLAIMS ACT (TITLE 59)

Much of the material in this chapter was contributed by John S. Fitzpatrick (1943-2015) who drafted portions of *Title 59* when he served as a N.J. Deputy Attorney General from 1969-1976. Later, he was a senior member of the MEL’s defense panel.

Background

The decisions of local government impact everything that happens in a community. Almost any accident could result in a lawsuit against local government in the absence of some reasonable limitation. Private entities can limit the scope of their activities — government does not that option (*NJSA 59:1-2*).

Government was protected by sovereign immunity until 1959, when the N.J. Supreme Court ruled that governmental employees could be sued for failure to perform ministerial duties but not for discretionary activities. Over the next eleven years, the court struggled to determine what discretionary activities should have immunity, but finally invited the legislature to adopt a *Tort Claims Act* (*Willis v. N.J. Department of Conservation, 1970*). The resulting *Title 59* is based on the California Tort Statute and incorporates the concept of “modified governmental immunity.”

Enacted in 1972, NJSA 59 provides governmental entities and employees with immunity to civil suit unless a separate law establishes liability.

- Approximately 60% of liability claims against government entities arise out of common accidents and are filed under *Title 59*.
- Another 30% are civil rights cases filed under various federal and state civil rights and employment practices laws (See later Chapters).
- The remaining 10% involve environmental issues brought under various “Super Fund” laws (Chapter 12).

Immunities

Discretionary Immunity: Under Section 2 of *Title 59*, all New Jersey public entities and employees enjoy broad immunity for the exercise of governmental discretion. Discretion begins with legislative powers vested in the State legislature, County Commissioners, municipal governing bodies, and Boards of Education. Specifically:

“A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature (N.J.S.A. 59:2-3 b).”

For example, suppose: (1) that traffic increased in an area after it was rezoned for high density housing; (2) the increased traffic caused an increase of pedestrian accidents; and (3) one of the injured pedestrians alleged that the accident would not have occurred but for the rezoning. Under *Title 59*, the town is protected from suit because zoning authority is discretionary and eligible for legislative immunity.

Legislative immunity will not protect the town if the council violates civil rights when it exercises its legislative powers. For example, suppose: (1) a minority contractor was the low bidder to construct a new firehouse; (2) the bids were rejected; and (3) the contract later awarded to a local contractor after several additional rounds of bidding. Legislative immunity would not protect the council from a lawsuit alleging the minority contractor’s rights were violated.

All local officials should have a basic understanding of civil rights laws along with employment practices, land use, and ethics which are all discussed in this book.

Section 3 of *Title 59* extends discretionary immunity to officials and employees including special immunities for:

- Good faith enforcement or failure to enforce any law (*N.J.S.A. 59:3-3*).
- Issuance, denial, suspension or revocation of permits or orders, or the failure to do so (*N.J.S.A. 59:3-6*).
- Failure to inspect, or negligent inspection of property (*N.J.S.A. 59:3*).

Without these immunities, public entities and their employees would continually be sued for accidents happening in town, based on the theory that these accidents would not have occurred if local government had enforced its laws more effectively. However, there is an important exception.

“Nothing in the act shall exonerate a public employee from liability if it is established that his conduct was outside of the scope of his employment or constituted a crime, actual fraud, actual malice, or willful misconduct (N.J.S.A. 59:3-14).”

Therefore, it is possible that the public entity is immune under *Title 59* but individual officials or employees themselves are not immune. The public entity's immunity can also be nullified by Federal and State civil rights laws that supersede *Title 59*. In one notorious case, a gay couple who lived next to a firehouse was harassed late one night by firefighters returning after a dinner. While normally just the firefighters would be liable, the court ruled that the town was also responsible because the discrimination occurred under the "color of law." The jury awarded the couple \$2.84 million (*DeVries and Carter v. Secaucus*, 2004).

Recreational Immunity:

"A public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition (N.J.S.A. 59:2-7)..."

While there is no obligation to provide supervision, a municipality, employee, or even a volunteer can be sued for negligent supervision when it is provided. The law does provide a special immunity to volunteer athletic coaches, managers, or officials for non-profit sports teams if they have completed a one-time safety orientation course, usually provided by Rutgers University. Towns should require all coaches, referees, and other officials to submit certificates of training completion and maintain these records.

Law Enforcement Immunity: When drafting *Title 59* in 1972, the Attorney General's task force recognized that public entities could be swamped with lawsuits unless law enforcement immunities were carefully drafted. As a result, there is no requirement that a municipality even maintain a police department (*N.J.S.A. 59:5-4*). This immunity prevents crime victims from alleging that the crime would not have occurred had the police been better staffed and funded.

In recent years, there has been increased public scrutiny of police use of force and police interaction with minority citizens. Unlike other states, the New Jersey Attorney General has the authority to establish standards by regulation without legislative approval. As a result, New Jersey has been the acknowledged leader in adopting police reforms. In New Jersey, qualified police immunity is more limited than in other states. Specifically:

"A public employee is not liable if he acts in good faith in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment (N.J.S.A. 59:3-3)."

Notice that this immunity is not limited to police and protects all governmental employees who are involved in law enforcement. For example, this immunity protects municipal clerks, construction code officials, fire inspectors, and anyone else who enforces laws.

However, to be eligible for the immunity, a law enforcement official must act “in good faith,” which means: “honesty of purpose and integrity of conduct without knowledge, either actual or sufficient to demand inquiry, that the conduct is wrong (*Marley v. Palmyra*, 1983).” Conduct will be considered as “good faith” if it is objectively reasonable (*Leang v. Jersey City BOE*, 2008). Even if the conduct fails to meet this standard, public employees can still benefit from the good faith immunity if they can show “subjective good faith” at trial which means that they honestly believed that they acted in accordance with law (*Bombace v. Newark*, 1990).

Hypothetically, let’s say an officer sees someone speeding but decides not to make the stop. Two blocks later, the motorist runs a red light and has an accident. The officer has immunity in this situation so long there is no bad faith. However, let’s say the officer knew that the speeding motorist was an off-duty police officer. A jury could easily decide that the officer’s failure to stop a fellow officer was bad faith.

Also notice that the immunity does not apply to liability for false arrest or false imprisonment. Officers must have “probable cause” and cannot violate someone’s civil rights or use excessive force. Officers also have an affirmative duty to intervene if a fellow officer is violating someone’s civil rights or using excessive force (*Jones v. City of Hartford, Conn.*, 2003).

In recent years, many police agencies have successfully completed an accreditation process to improve their policies and procedures along with related training. There are several accreditation programs that also provide model policies to make the process easier. The MEL gives a premium discount to accredited departments.

Many police liability cases are auto accidents. Under *Title 59*, police officers have immunity when responding to an emergency as long as they are not driving in a reckless fashion (*N.J.S.A. 59:3-3 and N.J.S.A. 59:5-2*). Even with this immunity, police agencies are now curtailing high-speed pursuits because of the danger to both the public and the officer. It is important to avoid high speeds for relatively routine calls such as burglar alarms.

Accidents on Public Property

The area of *Title 59* most frequently litigated concerns accidents on public property. To prevail, a plaintiff must establish all the following:

- The claimant was using public property with reasonable care for its intended purpose.
- The public property was in a dangerous condition.
- The public entity had actual or constructive notice of the dangerous condition that caused the accident.
- The action or inaction of the public entity or employee was palpably unreasonable. The courts have defined palpably unreasonable to mean,

“Actions or inactions that no prudent person would approve (*Kolitch v. Lindedahl, 1985*).”

Design Immunity: A major issue faced by local government is that standards constantly change making it unrealistic and nearly impossible to keep everything up to date. The legislature recognized this problem and provided a broad immunity for injuries resulting from obsolete designs if they were properly approved when first built, or subsequently updated. This “design immunity” is important because most streets were designed years ago using standards that are not consistent with modern practice. This immunity applies to any public project, not just roads. For example, this immunity also applies to drainage. Once design immunity is triggered, it remains in force even if safety standards subsequently change.

To take advantage of immunity, the governmental entity must establish that the design was in fact approved by the governing body, or other appropriate authority, before construction started. Approval must also be granted before any change orders are implemented. This should be done by resolution to create a permanent record of the action.

Derivative Immunity: Design immunity has been expanded to include derivative immunity to contractors of the immune public entity. Without derivative immunity, the design immunity protection would be meaningless because most projects are completed by contractors.

Scarce Resources: Another issue is that many communities have lost some or all of these records over the years. Fortunately, *Title 59* also recognizes that governments do not have the resources to immediately go back and redo everything. *Title 59* also recognizes that governments have limited resources. The Act provides that:

“A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether or not to utilize or apply existing resources...unless a court concludes that the determination of the public entity was palpably unreasonable (N.J.S.A. 59:2-3d).”

This means that local government can take a reasonable amount of time to correct deficiencies. To take advantage of this immunity, local government should enact by resolution or ordinance an orderly infrastructure repair and replacement program. Each year, the five and ten-year capital budgets should update all of these infrastructure projects.

Sidewalks and Curbs: Most communities have miles of sidewalks and curbs and it is simply not possible to repair every defect. Under legislative immunity, a community has no obligation to make these improvements, but subject to the immunities discussed below, does have an obligation to provide maintenance once installed.

- **Residential Homeowners:** Under common law, homeowners have no legal responsibility to maintain sidewalks or clear snow in front of their property. Even if an ordinance requires homeowners to repair sidewalks or clear snow, the immunities still protect them from liability in the event of an accident (*Lodato v. Evesham, 2006*).
- **Commercial Properties:** Commercial owners do not have the same immunities as homeowners and can be held liable for accidents on the sidewalks in front of their establishments. Rental units are considered as commercial properties.
- **Local Government:** Government enjoys common law snow and ice immunity, except where the government entity, such as a Housing Authority: (1) owns rental property (*Bligen v. Jersey City Housing Authority, 1993*); or (2) employees are injured on the job. However, local government may be held liable for accidents caused by sidewalk and curb defects where: (1) the injured party shows that the defect was known or should have been known; and (2) the defect was serious enough that the failure to make a repair was “palpably unreasonable.” Local government may also take advantage of the scarce resource immunity. If the governing body enacts a sidewalk repair program over time the legislature meant for the town to have immunity during implementation. Municipalities may also minimize their exposure by establishing a shade tree commission (See *Petrocelli v. Sayreville Shade Tree Commission, 1997*).
- **Streets and Crosswalks:** *Title 59* immunities almost eliminate lawsuits against public entities for pedestrian accidents except in situations where the injured person is struck by a government vehicle. The decision to establish a crosswalk is discretionary and the design of the crosswalk is eligible for design immunity. Once established, a crosswalk must be maintained but is eligible for the same immunities as a sidewalk.

Cases involving potholes are also rare. In the winter, motorists must expect potholes. At other times, potholes have the same immunities as defects on sidewalks. In 2008, the N.J. Supreme Court admonished the lower courts that *Title 59* does not require counties and municipalities to establish what would amount to a roving pothole patrol (*Polzo v. Essex County*).

Drainage: The “Scarce Resource” Immunity is also important in drainage cases. The New Jersey Department of Environmental Protection requires all towns to enact a Stormwater Management Plan. All stormwater outfalls should be mapped, including those on private property even if the municipality lacks an easement.

Unimproved Property: As a general principle, there is immunity for accidents caused by natural conditions, but no immunity for accidents caused by man-made hazards. Specifically:

“Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach (N.J.S.A. 59:4-8).”

However, do not use this immunity as an excuse to ignore hazards on unimproved property. Sometimes judges will not grant the immunity even when the hazard was naturally created. In one case, a couple was walking along a path through town-owned woods during a windstorm with gusts up to 50 mph. A large branch came down from a tree, killing the woman. While the case should have been thrown out under unimproved property immunity, the judge ruled that the town should have posted a warning or closed the path.

Other Provisions

Fire Department and Ambulance Corps: There is a special immunity for fire departments and ambulance corps while “rendering in good faith any such services.” Without this provision, the town would be sued after every fire claiming that the damage was more severe because the fire department failed to arrive fast enough or did an ineffective job. Although very rare, first responders can be held responsible for conduct that is deemed “willful or wanton (*N.J.S.A. 2A:53A-13*).”

Products Liability: No judgment may be entered against a public entity based on a theory of strict liability, warranty or products liability. This immunity is especially important for utility authorities and municipalities providing water or electric service (*N.J.S.A. 59:9-2 b*).

State of Emergencies: The declaration of an emergency, or the failure to do so, is a legislative function and is entitled legislative immunity (*Southland Corp. v. Edison, 1986*). Special immunities also apply when the Governor declares a state of emergency so long as the public entity and its officials, employees or volunteers acted “in good faith.”

N.J.S.A. App. A:9-52 provides that: “Neither the State nor any political subdivision of the State under any circumstances, nor the agents, officers, employees, servants or representatives of the State or any political subdivision thereof, including all volunteers, in good faith carrying out, complying with, or attempting to comply with, any order, rule or regulation promulgated pursuant to the provisions of this act, or performing any authorized service in connection therewith, shall be liable for any injury or death to persons or damage to property as result of any such activity.”

Verbal Threshold: To prevail under *Title 59*, the plaintiff must demonstrate both permanent “loss” of a body function and monetary losses of over \$3,600 (*N.J.S.A. 59:9-2d*).

Collateral Source Rule: This provision reduces the amount of any award against local government by the amount the claimant can collect from other insurance.

For example, you park your new car on the street and it is totaled by a town truck. If your car is covered by insurance, the maximum you can recover from the town is your deductible (*N.J.S.A. 59:9-2e*).

Sewage Backups: No elected official wants to receive a call at 3:00 a.m. that sewage is backing up into a resident’s basement. The town has no responsibility if the blockage is in the lateral between the street and the residence. Under some circumstances, the town may have responsibility if the blockage is in the main line if the town had notice of the problem. An example would be if the blockage occurred in the past with some frequency. You should know how your town responds to sewer back-ups. Most towns have arrangements where they can call out an emergency contractor to quickly clean up the sewage. After that, the adjusters will sort out who is responsible for replacing the damaged property.

Statute of Limitations: Under *Title 59*, there are strict time limits to file claims and then institute a lawsuit. Every year, there are cases that are barred because the attorney failed to file a notice of claim within 90 days or file the lawsuit within two years of the incident. The time to file notice of claim on behalf of a minor does not begin until the minor’s 18th birthday. The deadline to file a lawsuit is two years later when the individual turns 20. Under legislation enacted in 2019, the statute of limitations to file claims for sexual assault has been significantly expanded (*Chapter 5*).

Punitive Damages: While barred in most *Title 59* cases, punitive damages are permitted in civil rights, sexual molestation, and environmental liability suits (*N.J.S.A. 59:9-2c*). Under New Jersey law, punitive damages cannot be covered by insurance except in rare situations (*City of Newark v. Hartford Accident and Indemnity, 1975*).

Litigation Risk Control

Every local government should establish clear responsibilities for litigation risk control. Specifically:

- **Record Keeping:** Maintain a permanent file that lists each facility or infrastructure in the community. A copy of this file should be maintained in a secure records retention facility. Include:
 1. Date of construction and when the facility was updated along with the plans.
 2. Documentation of plan approvals by the governing body or other appropriate authority.
 3. Budget decisions concern allocation of scarce resources including critical infrastructure such as sidewalks, curbs, drainage, and road resurfacing.
- **Reporting:** Adopt procedures for citizens to report hazards, log all reports and record corrective action. Many local governments have installed software that tracks reports of hazards and the actions taken to correct

these defects. This information should also be included in the permanent facilities files.

- **Inspections:** Institute a system of regular inspections of all public property and monitor the results.
- **Litigation:** Monitor the status of all outstanding lawsuits.
- **Ordinances and Resolutions:** Periodically review all ordinances and resolutions to be sure they are consistent with the latest case law. Also review all proposed ordinances to consider risk management issues.
- **Employment Practices Risk Control:** Update the Employee Practices Risk Control Program every two years including the Employment Practices Manual, the Employee Handbook and training for officials, managers, supervisors (Chapter 4).
- **Child Abuse:** Implement a comprehensive child abuse prevention program (Chapter 5).
- **Freedom of Speech:** Institute procedures to protect the public's first amendment rights and the *Open Public Meetings Act* (Chapter 6).
- **Land Use:** Arrange to have all members of Planning and Zoning Boards trained to minimize land use liability (Chapter 7).
- **Americans with Disabilities Act (ADA):** Designate an ADA Coordinator and coordinate compliance with *Title II*. Also investigate any complaints of inaccessibility (Chapter 8).
- **Insurance Coverage:** Review coverage issues with the Risk Management Consultant and review the insurance provisions of contracts with vendors (Chapter 9).
- **Special Events and the use of public facilities:** Review the insurance and safety procedures put in place for special events such as parades and fireworks. Also review the use of public facilities by other organizations and individuals. Resources available at NJMEL.org.
- **Environmental Liability:** Monitor compliance with EPA regulations including reporting requirements (Chapter 12).
- **Ethics:** Oversee compliance with the *Local Officials Ethics Act* (Chapter 14).
- **Community Safety:** Coordinate with the Safety Committee on other community safety issues (Chapter 17).

Conclusion

Title 59 is complicated, which means that you will need the advice of your local government's attorney and the professionals retained by your joint insurance fund or insurer. The immunities granted by *Title 59* can be an effective tool to substantially reduce litigation exposure as well as provide public entities with the support to undertake programs and projects. However, it is critical that local government create and maintain documentation of their efforts to address dangerous conditions. Local government should also document significant discretionary decisions including plans and allocation of budget resources.

Selected Case Law

Rodgers v. Passaic Housing Authority (1976)

Facts: An infant visiting her grandmother was burned on uninsulated piping used to heat the apartment. The unit was built in the early 1950s and subsequently the safety standards changed.

Decision: The court ruled that once design immunity is triggered it remains in force.

Suarez v. Dosky (1980)

Facts: The driver of a car involved in a minor one vehicle accident on an interstate asked the investigating officer for a lift to a phone booth. This was before cell phones. The officer told the motorist to walk up the next exit ramp to a gas station. The officer then left the scene believing that the motorist could handle the situation. Unfortunately, while walking on the ramp one of the children with the motorist was killed by a passing car. The agency argued that the officer's decision was shielded by the police powers immunity.

Decision: The Appellate Division ruled that law enforcement immunity does not apply to negligence in the performance of ministerial duties. This was not a question of enforcing or not enforcing a law. The responding officer had a ministerial duty to protect the children.

Comment: In this early decision, the courts clarified that law enforcement immunity was limited to the actual enforcement of laws. In a 2010 case, the court reached a similar decision when it held that police officers were negligent in performing ministerial duties because they failed to look for the driver of a van that was wrecked on a guardrail. The undiscovered driver died several hours later in the wooded area just off the roadway (*Ojinnaka v. Newark, 2010*).

Freytag v. Morris County (1981)

Facts: The county allowed people to toboggan down a path in a county park. The county knew that people were using the path as a toboggan run and knew that at some point someone moved rocks to create a border down the path. One of the tobogganers hit a rock and was injured.

Decision: The court ruled that unimproved property immunity still applied even though the rocks had been moved because the rocks didn't change the general unimproved character of the area.

Comment: Contrast this decision to *Troth v. State (1989)*, where a boater went over the dam spillway deep in a wooded park area. The N.J. Supreme Court found the state liable for not adequately protecting the spillway even though the area around the dam was otherwise unimproved property. The distinction is that rocks are a natural material and a rock border along a path does not make the path an improved property. However, a dam is not a natural structure and is not eligible for the immunity. These cases are very fact sensitive.

Shuttleworth v. Conti (1984)

Facts: An intersection accident occurred when a motorist failed to stop because foliage covered the stop sign. The town argued that it was eligible for immunity because it lacked the resources to trim all foliage around town.

Decision: The court ruled that the allocation of scarce resources immunity did not apply because leaving stop signs obscured was palpably unreasonable.

Comment: This decision only applies to vegetation in the immediate area around the stop sign. In *Johnson v. Southampton (1978)*, a case involving the encroachment of vegetation onto the road, the court found immunity and wrote: "The limited ability to make observations on either side of the road caused by trees and vegetation simply served as a warning that due care must be maintained." Also see *Morrison v. Lumberton (1999)*, and *Sopko v. Logan Township (2007)*.

Klatch v. Lindedahl (1985)

Facts: A motorist lost control of his vehicle at a dangerous curve that lacked a warning sign. The plaintiff was also able to show that the speed limit was entirely too high and there had been numerous accidents over the years. Therefore, the town was on notice but failed to act.

Decision: The N.J. Supreme Court held that discretionary immunity applies to the placement of permanent traffic signals and signs, as well as the establishment of speed limits.

Comment: Without this immunity, public entities would be sued in almost every vehicle accident, alleging that a sign would have prevented the mishap or the speed limit should have been lowered. However, once a sign is erected, it must be maintained. Further, the Act specifically provides that public entities can be held liable for failure to place emergency warnings. For this reason, police should carry temporary warning signs in the trunks of their patrol cars.

Thompson v. Newark Housing Authority (1987)

Facts: A child died in a fire at a high-rise apartment building that lacked smoke detectors. The Housing Authority argued that it was eligible for design immunity because the plans had been approved before smoke detectors became mandatory.

Decision: The N.J. Supreme Court ruled that design immunity did not apply in this case because the question of smoke detectors had not even been considered at the time of construction and therefore there was no discretionary act to provide immunity.

Comment: While design immunity attaches in perpetuity, the courts will sometimes bypass the immunity if the legislature has enacted new safety standards. For example New Jersey mandated in 1999 that playgrounds be upgraded to comply with the standards promulgated by the Consumer Product Safety Commission.

Johnson v. Essex County (1987)

Facts: A downstream property owner sued both the township and county, alleging that they permitted upstream development and installed drainage pipes that caused the drainage pipe running under the plaintiff's property to deteriorate, resulting in the settlement of her property. The plaintiff was previously never advised that there was a pipe under her property.

Decision: The court ruled the public entities were not liable because they were entitled to both design immunity and immunity for their approval of permits to improve upstream property. The public entities had good records to justify design immunity.

Comment: Documentation is critical. Maintain a file on each facility or infrastructure in the community. A copy of this file should be maintained in a secure records retention facility.

Morely v. Palmer (1989)

Facts: An officer responded to a call that an intoxicated person was in the middle of a major road. While the officer determined that the person was indeed intoxicated, he decided to take no further action and returned to his

regular patrol. Three hours later the intoxicated person crossed the road a quarter of a mile away and was killed by a passing truck. The person's family sued, claiming that the accident would not have happened if the officer had taken the person into custody.

Decision: The court ruled that the determination of whether the person met the criteria requiring custody was discretionary and therefore is entitled to immunity.

Bombace v. Newark (1991)

Facts: Four children died in a tragic fire at a privately owned apartment. The fire was caused by a portable heater that was being used because of the lack of central heating in the apartment. The family sued the city on the theory that the building inspector mishandled a complaint that the smoke detectors were inoperative.

Decision: The N.J. Supreme Court ruled that the city and the inspector were protected under law enforcement immunity because they had not acted in bad faith.

Comment: Without this decision, construction code officials and fire inspectors would be sued in every fire or whenever other building defects caused accidents on the theory that inspections were negligent. This decision is also frequently cited when the courts define "bad faith."

Levin v. Salem County (1993)

Facts: A young man dove from a county owned bridge into a river, struck his head on a sandbar, and suffered a broken neck. The bridge was an improved property and not eligible for the unimproved property immunity. The county had known for years that people often dove from this bridge, but did not place any warnings and made no effort to stop the practice.

Decision: The court ruled that the county was not liable because the injured party must establish that the property was being used for its intended purpose. Bridges are not intended to be diving platforms.

Comment: While public entities have a duty to station lifeguards at pools, generally, they do not have an obligation to station lifeguards or otherwise post signs at beaches, lakes, and other places where people may swim. When a town acts to provide protection, appropriate warning signs should be posted. Further, while a municipality can be held liable for a lifeguard's negligence, that liability does not extend to natural hazards such as shifting sands and rip tides.

Fagen v. Vineland (1994)

Facts: A suspect stole a vehicle and was chased by police until the suspect crashed into another motorist. The chase did not follow Attorney General guidelines.

Decision: Liable. Normally, *Title 59* section 5-2 gives the police immunity if a third party is injured because of a police pursuit even if the chase did not follow the Attorney General guidelines. However, the town can be sued in Federal court if the town failed to properly train the officers on pursuit guidelines. Federal law supersedes the state immunities under *Title 59*.

Comment: While it goes against instinct, sometimes it is better to end a chase before the public or the officer is injured.

Kneipp v. Tedder (1996)

Facts: A husband and wife were stopped by the police as they staggered home one night from a bar. The police allowed the husband to proceed because there were unattended children at home, but detained his wife briefly. She was so intoxicated she could barely stand. After they released her, she started to walk home, but didn't make it. She was only a block from her home when she passed out in the cold and suffered serious brain damage before she was found.

Decision: A federal court held that the officer was responsible for the woman's injuries under the "state created danger" theory. This is an example of federal law superseding state law. A key factor in this decision is the fact that the police took the woman into custody, sent her husband home, and then released her knowing that she was extremely intoxicated. There would have been no liability except for the fact that they had retained her. Once they intervened, they had responsibility for her safety.

Petrocelli v. Sayreville Shade Tree Commission (1997)

Facts: The Plaintiff was injured when her bicycle struck an uneven sidewalk caused by the roots of a shade tree. She sued the town and the shade tree commission.

Decision: The court ruled that when the town establishes a shade tree "commission" both the town and the commission become immune from lawsuits alleging a failure to maintain trees.

Garrison v. Middletown (1998)

Facts: The plaintiff, who was 16 at the time, injured his knee playing football in the town parking lot adjacent to the train station. The edge of the pavement was one and a half inches lower than the adjacent gravel. The police knew the

plaintiff and his friends often played football in the parking lot, but ignored the situation.

Decision: The N.J. Supreme Court ruled that the town was entitled to immunity because a municipal parking lot was not a ballfield, and was not being used for its intended purpose.

Comment: The 1972 Attorney General's Task Force specifically warned the courts about adopting novel causes of action. On several occasions, the N.J. Supreme Court has reviewed cases to remind the lower courts to stop ignoring the clear immunities in *Title 59*. This case is one example.

Jones v. Hartford (2003)

Facts: At 4 a.m., the plaintiff was a passenger in a car that was stopped by police because it met the description of vehicle that had been reported hijacked at gun point. The report ultimately proved to be a hoax. One of the officers roughed up and injured the plaintiff even though the plaintiff did not resist. Fellow officers did not intervene.

Decision: The court ruled that the fellow officers were not eligible for immunity and were liable because they have an affirmative duty to protect a citizen's civil rights.

Lodato v. Evesham (2008)

Facts: A senior citizen tripped on a broken sidewalk in a residential zone. The town knew the sidewalk was in serious condition, but did not have an orderly plan to fix sidewalks. Instead, the town passed an ordinance that required homeowners to fix sidewalks at their expense.

Decision: The court found that the municipality was liable and could not transfer its liability to homeowners by simply passing an ordinance.

Comment: In residential areas, homeowners have a common law immunity and the entity that owns the road is responsible for the sidewalk, in this case the municipality. Passing an ordinance making homeowners responsible for sidewalk repair does not supersede the homeowner's common law immunity. The town can go to court to require the homeowner to repair the sidewalk, but the town remains liable if it is not repaired.

Morello v. Monmouth County Sherriff's Department (2015)

Facts: While executing a child support warrant, a Sherriff's officer discovered the plaintiff sitting in a car smoking what appeared to be marijuana. When asked if he had any more drugs, the plaintiff said he had a loaded handgun in

his waist band. The plaintiff also said that he carried the gun because he was involved in gang activity and feared retaliation. The officer confiscated the weapon, but failed to ask if the plaintiff had a permit. Later the charges were dropped when it turned out the plaintiff had the proper license to carry. The plaintiff then sued for false arrest.

Decision: The N.J. Supreme Court unanimously ruled that when a plaintiff proves to be innocent, the officer can still defend against a claim alleging false arrest by establishing that probable cause existed, or if probable cause did not exist, that the officer in good faith believed that there was probable cause.

Stair v. NJ Transit (2016)

Facts: The plaintiff slipped on black ice while walking at a train station. While N.J. Transit had cleared snow on the platform the previous day, the plaintiff contended that it had failed to keep the platform in a safe condition.

Decision: In an unpublished decision, the court ruled that N.J. Transit was eligible for common law snow and ice immunity. The court wrote that: “By their very nature, snow-removal activities leave behind ‘dangerous conditions.’ We can conceive of no other governmental function that would expose public entities to more litigation if this immunity was abrogated.”

Comment: In another case, a town was granted immunity even when it plowed snow onto the sidewalk. However, a municipality’s broad snow and ice immunity does not apply to employees injured by slips and falls in municipal parking lots because they are eligible for workers’ compensation. Housing authorities do not enjoy common law snow and ice immunity because they are considered commercial landlords.

Banks v. Winslow (2018)

Facts: A pedestrian was struck by a vehicle while walking along a roadway on a rainy night. Over the years, there had been numerous pedestrian accidents along that stretch of roadway. The pedestrian sued the town for not installing sidewalks.

Decision: An Appellate Court ruled that the town was entitled to discretionary immunity for not installing sidewalks. The court also found that the town was entitled to plan and design immunity.

Comment: Without these immunities, municipalities would be sued every time there is a pedestrian accident.

Lee v. Brown (2018)

Facts: A city Fire Inspector discovered improper wiring in an apartment building's electrical panels and notified the electrical department. Over the next five months, there were numerous correspondences but no action to correct the problem. Four residents died when the building caught fire, and the families sued the city for failure to enforce its regulations.

Decision: The N.J. Supreme Court ruled that both the town and the inspector were qualified for absolute law enforcement immunity.

Comment: This is a critical decision because many fires involve code violations. Without this immunity, towns would be constantly sued claiming that its inspectors failed to find and act on hazards.

Gonzales v. Jersey City (2021)

Facts: Two officers responded to a one-vehicle accident on a bridge and called a tow truck. They also offered to take the driver home. The driver refused the offer and called a friend to pick him up. After the officers left, the stranded driver walked onto the road and was killed by a passing car. The deceased driver's family sued when it was determined the deceased had a blood alcohol level of .209%. They contended that the police should have placed the deceased into protective custody. The officers testified that the deceased did not appear to be intoxicated, and that they were entitled to immunity under the *Intoxicated Persons Act*. The Superior Court agreed and the deceased's family appealed.

Decision: The N.J. Supreme Court ruled that the officers were not entitled to immunity under the *Intoxicated Persons Act* because they did not think the deceased was intoxicated. Therefore, the issue was whether they should have left the scene before the deceased's ride arrived. The court then ruled that this was a jury decision and remanded the case to Superior Court for a trial.

Comment: As a result of this case, it became very difficult to have cases dismissed on summary judgment before trial. When *Title 59* was enacted in 1972, the legislature's intent was for cases such as this to be dismissed. Having to try more cases significantly increases legal bills. In next year, the N.J. Supreme Court clarified this issue in *Stewart v. NJ Turnpike Authority (2022)*.

Smith v. North Wildwood (2021)

Facts: The plaintiff and his daughter walked in the water along the beach adjacent to an inlet when he fell into an underwater gully and drowned. The estate alleged that the gully was caused by seawall construction at the inlet. The Superior Court granted a summary judgment dismissing the case and the plaintiff's estate appealed.

Decision: The Appellate Court upheld the lower court’s decision. The decision noted that while nearby properties, such as the “unifying seawall” were improved properties, the subject beach and submerged tidelands were unimproved properties. The decision further explained that: “The beach and tidelands remain in their natural state affected by natural conditions including their tides, migration of sands, currents, storms including Superstorm Sandy, and the winds, to name a few.”

Comment: This case reaffirmed the importance of the unimproved property immunity to shore communities.

Stewart v. New Jersey Turnpike Authority (2022)

Facts: The driver of a motorcycle lost control while crossing a newly reconstructed overpass and was severely injured along with his passenger. The motorist and passenger sued the Parkway and the construction company, alleging that the accident was caused by a defect in the overpass. The superior court granted summary judgment dismissing both the Turnpike Authority and contractor. The Appellate Court then reinstated the case on the grounds that there was a genuine fact issue about whether there was a dangerous condition on the overpass, and this must be decided by a jury.

Decision: The N.J. Supreme Court ruled that the Superior Court Judge was right in granting the summary judgment to both the authority and the contractor. The Supreme Court concluded that there was insufficient evidence to establish what caused the accident, so that the question of the possibility of a dangerous condition was moot. The court wrote that in *Title 59* cases: “The failure to prove one element of a negligence claim under the *Tort Claims Act* is fatal.”

Comment: In its decision, the Supreme Court reaffirmed the basic principles of *Title 59* and instructed the lower courts that it is still proper to grant summary judgments notwithstanding its ruling the previous year in *Gonzales v. Jersey City (2021)*. The Supreme Court also reaffirmed the concept of derivative immunity where the contractor is immune if they followed the plans approved by the contracting public entity.

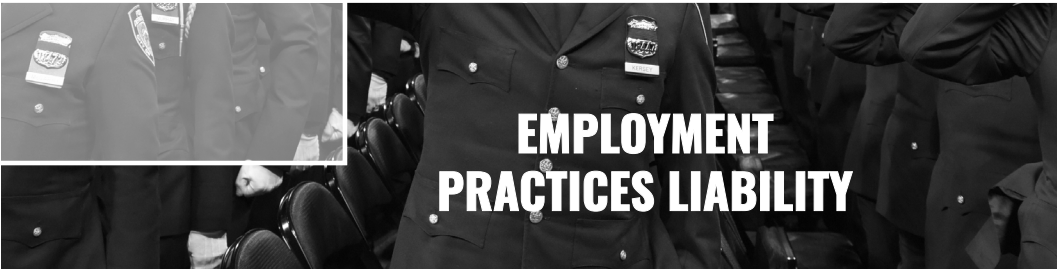
Vannote v. Hoboken Housing Authority (2023)

Facts: The plaintiff broke his ankle sliding into second base when his cleats were caught on what he claimed was a six-foot ripped seam in the artificial turf. The turf was inspected several times a week and no one noticed the tear prior to the accident. The field was also regularly maintained by an outside firm specializing in artificial turf fields. The Trial Judge granted summary judgement concluding that the Housing Authority did not have notice of the hazard and that the tear, if it existed, was not large enough to presume that the authority had constructive notice. The plaintive appealed, contending that these issues should be decided by a jury and not the judge.

Decision: The Appellate Court upheld the Superior Court judge and specifically cited the Supreme Court’s decision in *Stewart v. New Jersey Turnpike Authority* (2022) decided the previous year. In particular, the Appellate Court criticized the plaintiff’s attorney and expert for failing to present ”facts” that could lead a reasonable juror to conclude that the Authority’s actions, or inactions, were “palpably” unreasonable.

Comment: Prior to this decision, most appellate judges took the position that the “palpably unreasonable” issue should be decided by a jury. In *Vannote*, the Appellate Court upheld the lower court judge’s decision on this question as was intended when the legislature adopted *Title 59*.

CHAPTER 4



Background

There has been a dramatic increase in lawsuits alleging workplace discrimination and harassment in recent years. Employees are no longer willing to accept employment related “bad behavior” and now look to the courts for relief. There is a distinct difference in employment cases between the public and private sectors because many public sector cases include allegations of political discrimination. Under federal law, the adage, “To the victor belong the spoils,” no longer applies except for a few confidential managerial positions such as the Manager or Executive Director.

In one case a new Mayor decided to replace the town’s 59-year-old clerk with a 37-year-old political supporter. The municipal attorney advised the Council that they could proceed because the existing clerk lacked tenure. This was very poor legal advice. A public entity can’t discriminate against someone based on politics or age just because they lack tenure.

The reality is that any major personnel action without well-documented performance issues will probably result in litigation. You need to make sure all the “I’s” are dotted, and “T’s” are crossed. Many local governments need to significantly improve their performance appraisal programs. Too often, an employee had been rated “outstanding” year after year until receiving the first unsatisfactory appraisal just before being terminated. You are going to lose every time if you don’t build the file and follow the appropriate procedures.

In another example, a police officer with a history of poor performance was fired after he inappropriately threatened to use his revolver off duty. He had to be reinstated because the town failed to document the poor performance, and failed

to file the charges concerning the inappropriate use of the revolver until after the 45-day cut off to file charges.

Law Against Discrimination (LAD)

Fifty-three percent of employment cases in the public sector involve discrimination. The *New Jersey Law Against Discrimination (LAD)* was established in 1945 and was the first such statute in the country. Over the next 75 years, LAD was amended numerous times to add protections based on age, sex, disability, and sexual orientation. In *Crisitello v. St. Theresa School (2023)*, the N.J. Supreme Court reaffirmed that a plaintiff employee bears the initial burden of establishing a prima facie case of discrimination. Then the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the complaint about the employment decision. If the defendant employer provides such a reason, the plaintiff must then show that the defendant’s stated reason for the employment decision was in fact pretext for a discriminatory action.

For the first 45 years, relief in LAD cases was for the most part injunctive, in other words, a court order requiring the defendant to stop a discriminatory practice. Then in 1990, the Legislature amended the Act to include, “all remedies available in common law tort actions,” — in other words monetary damages.

The Act also allows “fee shifting” where the defendant must pay the plaintiff’s legal bills if there is any award. As a result, legal costs now represent approximately 70% of the total cost. In one case the plaintiff rejected a settlement offer of \$75,000 and was awarded only \$20,000 by the jury. The plaintiff’s counsel submitted a fee application of \$671,000 and eventually received \$450,000. In civil rights cases, there is no proportionality between the attorney fees and the jury award.

In the early years, most employment suits against local government involved equal opportunities. Women and other minorities were forced to use the courts to break into local government. We don’t see as many of these suits today because people have become more cognizant of the requirements of these laws. While overt racial or gender discrimination is rare in the public sector, disparate treatment is more common.

Today, we are seeing far more lawsuits arising from promotional disputes. Approximately two-thirds of these cases come from police departments. Almost every patrol officer dreams of eventually becoming Chief and may start litigation if another candidate with less seniority has been promoted. This is why a formal management succession plan is so important.

It is critical for elected officials to insulate themselves from charges of either favoritism or retaliation. To prevent these lawsuits, your community should:

- Adopt a Police Promotional Ordinance.
- Have an outside agency interview qualified candidates and provide an objective analysis.

- If your town is not civil service, have an outside agency also conduct a written test.

Wrongful Discipline

After discrimination, 33% of these claims involve discipline and termination disputes. Many of these cases allege violations of the *Conscientious Employee Protection Act (CEPA)*, or “whistleblower act.” CEPA was adopted in 1985 to prevent the so-called “Serpico” situation, where a governmental employee is fired or demoted in retaliation for focusing the spotlight on official activity that potentially harms the public.

Among other things, the Act provides that:

“An employer shall not take any retaliatory action against an employee because the employee discloses an activity, policy, or practice that the employee reasonably believes:

- *Is in violation of law, or*
- *Is fraudulent or criminal.”*

As in the case of LAD, fee shifting applies. However, the statute of limitations under CEPA is only one year as opposed to the LAD’s two-year statute of limitations. Under another provision, employers must display a notice about CEPA in English and Spanish on a bulletin board accessible to all employees, and must provide notice of the law annually to each employee.

The problem increasingly encountered by local government is that both CEPA and LAD are now used in the governmental sector as leverage to fight almost any otherwise legitimate job action. Any time an employee is terminated or disciplined you can be almost certain of a CEPA or LAD lawsuit. The fee shifting provisions have made these cases especially attractive to attorneys.

On the Job Harassment

Another issue concerns workplace harassment. In February of 2020, Rachel Wainer Apter, Director of the N.J. Division of Civil Rights released a study “Preventing and Eliminating Sexual Harassment in NJ,” and stated:

“A recent survey found that 81% of women and 43% of men have experienced some form of sexual harassment during their lifetime. This includes verbal, physical, and cyber harassment and sexual assault. Sixty-eight percent of women reported being sexually harassed in a public space, 38 percent at work and 31% at their residence. Sexual harassment affects people regardless of race, religion, gender, sexual orientation, gender identity or expression.”
. . . *“Because it is fueled by power imbalances, marginalized communities including women of color, immigrants, domestic workers, LGBTQ+ people and others are uniquely vulnerable to sexual harassment.”*

In 1993, the N.J. Supreme Court also made it easier to win harassment suits in its landmark decision in *Lehmann v. Toys R Us (1993)*. Theresa Lehmann was a supervisor in a purchasing department and was subject to numerous touching incidents, unwanted sexual advances, and inappropriate comments by her superior. She complained and was told to handle it herself and not to report it to the next level. She ultimately became fed up and went higher, but the bad behavior continued. At one point, she was offered a transfer, but she rejected that approach complaining that she should not be forced to change jobs because of her supervisor's bad behavior. She then resigned and sued.

In its decision, the N.J. Supreme Court ruled that an employer is responsible for sexual harassment committed by its supervisory employees unless it has an effective anti-harassment program. The key word here is "effective."

The *Lehmann* decision is not limited to sexual harassment and extends to all harassment in the workplace based on an employee belonging to a protected class. The principle applies to race, national origin, disability, and sexual orientation. Such harassment is actionable if it creates what a reasonable person would consider a situation sufficiently severe or pervasive to create an intimidating, hostile or offensive working environment. The old-fashioned office or locker room "give and take" has become a serious litigation problem.

In an unreported case, a female DPW worker was subject to constant sexually oriented jokes and complained to her supervisor. She was told that this was part of the job and to "suck it up." The supervisor's statement was simply wrong. Under current law, the employer can be held liable for harassment if the employer lacks an effective anti-harassment program.

In 2002, the *Lehmann* decision was clarified by the N.J. Supreme Court in *Mancini v. Teaneck (2004)*. This case concerned the first female police officer hired by the town who then suffered over 15 years of what the court described as "low level harassment," meaning no sexual advances or touching as in the *Lehmann* case, but rather a continuing pattern of sexually based jokes and slights. She complained several times over the years, but the town's actions were ineffective because the police department resisted change. For most of the period in question, the Chief opposed allowing women into the Department. Several years after the *Lehmann* decision, the officer became fed up and sued. A jury decided the case in her favor.

The Township appealed on grounds that the judge allowed the plaintiff's attorney to present evidence of several alleged incidents that occurred in the 1980s, before the commencement of the two-year statute of limitations under the LAD. The Township argued that allowing testimony on these earlier incidents prejudiced the jury's award.

However, the N.J. Supreme Court found that even low-level sexual harassment is actionable if a reasonable woman would believe that the working environment is

hostile, and the employer lacked an effective anti-harassment program. Further, the court ruled that if there was harassment during the period allowed under the statute of limitations, then prior activity can be also included as evidence of a “continuing tort.”

In *Mancini*, the officer received \$125,000 in compensatory damages, and \$500,000 in punitive damages plus interest. Her attorney received \$700,000 in fees. The town paid its own attorneys approximately \$1 million for a total of almost \$3 million. The town was not insured. Even if the town had been insured, the insurer cannot by law pay punitive damages. Employment Practices Liability policies also have substantial deductibles and co-payments and usually do not cover lost wages.

Family Medical Leave Act

The *Family Medical Leave Act (FMLA)* provides employees with the right to take 12 weeks of unpaid leave during any 12-month period for family or health-related matters. During this period, employees are permitted to utilize accrued paid vacation, paid sick or family leave benefits. Upon exhaustion of FMLA leave, employees are generally entitled to be restored either to their previous position or an equivalent position subject to some limitations. No employee is entitled to “any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave.”

Under various state laws, employees caring for a relative with a serious illness, unable to work because of a disability, or requiring protection in the wake of domestic violence are potentially entitled to additional benefits. All these laws prohibit retaliation based on an employee’s exercise of these rights. These issues are complicated, and employers should seek advice from an employment attorneys.

The FMLA provides employees with a limited right to restoration to a previous employment position. The FMLA does not protect employees against termination for a reason other than interference with rights under FMLA. An employee discharged during or at the end of protected leave for a reason unrelated to the leave has no automatic right to reinstatement. An employer can avoid liability if it can prove that it would not have retained an employee independent of the FMLA leave. However, extreme caution should be exercised whenever taking a personnel action that could adversely affect an employee who: is on FMLA leave, has taken FMLA leave, or has communicated an intention to take FMLA leave.

Employment Practices Risk Control

In *Lehman*, the court was instructive and established guidelines for what an employer must put in place to have an effective employment practices risk control program. Specifically:

- Written policies and procedures prohibiting discrimination and harassment in the workplace. The MEL has responded by developing a model

employment policies and procedures manual that is updated every two years and is available at NJMEL.org.

- Both formal and informal employee complaint procedures. This is included in the model manual.
- Training must be mandatory for management personnel and provided to all other employees. Every two years the MEL develops a training program specifically for managers and supervisors, and a special training program for Police Chiefs. The MEL also distributes an updated training program for non-managerial personnel. The program and instructor's guide is available online through the MEL Learning Management System and at NJMEL.org.
- A system to monitor compliance "to make sure the complaint structure is trusted." For example, it is good practice to ask employees about any instances of harassment during their annual personnel evaluation.
- An unequivocal commitment from senior management, not just words but action, demonstrated through consistent practice. This is why the MEL conducts seminars for elected officials each year.

The *Lehmann* requirement of an effective remedial program is not meant to be an automatic safe harbor. As the court wrote in its decision: "We do not hold that the absence of such mechanisms automatically constitutes negligence, nor that the presence of such mechanisms demonstrates the absence of negligence."

Selected Case Law

Moorestown v. Armstrong (1965)

Facts: A police officer was fired for conduct unbecoming after a series of incidents including an altercation with his wife where he threatened to kill the Chief and take his own life. The Civil Service Commission determined that he was guilty of the infractions but found that the penalty was too severe in comparison to penalties to other employees for similar offenses. The town appealed.

Decision: The courts held that police officers can be held to a higher standard because they carry weapons and have arrest powers.

Comment: You must still be very careful when instituting a major personnel action because the town can still be sued for disparate treatment between police officers, or for violating the *Conscientious Employee Protection Act*.

Gaines v. Bellino (2002)

Facts: A female corrections officer at a county jail was kissed against her will by her shift supervisor. She mentioned the incident to several other supervisors who suggested that she report the incident, but she was concerned about possible retaliation. There were several other incidents over the following years. Finally, senior management became aware of the situation because of another case involving this supervisor, who was then suspended and retired.

During depositions, the corrections officer admitted that she was aware of the county's strict anti-harassment policy and that she would be protected if she reported inappropriate activity. The county admitted that it had not provided training to managerial employees, but argued that the decision in *Lehmann v. Toys R Us (1993)*, specifically provided that an employer was not automatically liable just because one of the program's elements was missing. Further, under the U.S. Supreme Court decision in *Faragher v. Boca Raton (1998)*, an employer also has a defense if the employee unreasonably failed to take advantage of any preventative or corrective opportunities.

Decision: The N.J. Supreme Court held the county liable and emphasized that the lack of managerial training was especially significant. The court ruled that because the officer had reported the incident to people in management, they then had an obligation to take it higher even though the corrections officer herself did not do so.

Comment: When anyone in management is aware of a situation, they do not have the luxury of sitting on the problem.

Lakes v. Brigantine (2007)

Facts: A DPW worker complained when fellow employees started to shoot pigeons that were nesting in the garage. Management did not think the issue warranted serious consideration and fellow employees started teasing the complaining worker as "Pigeon Man." The worker complained about this harassment and sued under the *Conscientious Employee Protection Act*.

Decision: The court ruled that the town was liable because harassment from fellow employees could be considered as a form of retaliation under CEPA if the town failed to take appropriate steps to halt the harassment. After this ruling, the jury awarded the plaintiff \$250,000 for compensatory damages, \$400,000 for punitive damages, and fined the town another \$10,000.

Comment: Even the judge was shocked enough to reduce the compensatory award to \$100,000 and the punitive award to \$100,000.

Cutler v. Dorn (2008)

Facts: A Jewish officer sued under LAD because of a series of minor comments and jokes over the years. In some cases, the officer participated in the “give and take.” The judge then threw out the case and the officer appealed. The Appellate Division agreed with the lower court judge and ruled that the comments in question were only “breaking chops and teasing.” The issue then went to the N.J. Supreme Court.

Decision: The N.J. Supreme Court disagreed with the Appellate Division’s ruling that the comments in question were only “ribbing” and “breaking chops” and wrote that the Appellate Court’s statement: “undervalues these stereotypic references and demeaning comments” and “those isolated incidents could be viewed, in the aggregate, to create an objectively humiliating and painful environment.”

Comment: So-called “locker room talk” is now actionable. Management must make it clear that such conduct will not be tolerated and must act consistently to enforce its anti-harassment policy.

Groslinger v. Wyckoff (2009)

Facts: A police officer alleged gender discrimination and sexual harassment after her supervisor and several employees made caustic remarks when she could not continue work during a difficult pregnancy. The Town Administrator, who had a reputation for consistently enforcing the town’s harassment policies, investigated the complaints and found that the supervisor’s remarks were inappropriate, but also found no discriminatory intent. He disciplined the supervisor and ordered additional anti-harassment training.

Decision: The court granted a summary judgment dismissing the case because the town consistently implemented its anti-harassment program.

Winters v. North Hudson Regional (2012)

Facts: A long-time Fire Department Captain who was a frequent and vocal critic of workplace practices was terminated following proceedings involving separate disciplinary matters before the Civil Service Commission. Specifically, the Captain was terminated for violations of sick time rules. The Captain contended that the charges were in retaliation for his whistle blowing, but Civil Service rejected this claim. He then sued under CEPA.

Decision: The court ruled that once the employee lost the Civil Service Action in which he asserted retaliation as a defense, he was estopped from instituting action under CEPA for the same alleged offense.

“When an employee and employer engage the system of public employee discipline established by law and the employee raises a claim that employer retaliation at least partially motivated the decision to bring the charge or the level of discipline sought, both the employee and employer must live with the outcome, including its potential preclusive effect on related employment-discrimination litigation as a matter of the equitable application of estoppel principles.”

Vaticano v. Edison (2013)

Facts: The Deputy Police Chief alleged that he was not promoted to Chief because he supported the mayor’s opponent. He cited several exchanges with the mayor that demonstrated the mayor was aware of the Deputy’s Chief’s politics. Further, the two had clashed at a campaign event and the mayor subsequently promoted a less senior individual to head the police department. The Mayor countered that his decision was based on relative qualifications and not politics.

Decision: Upholding summary judgment, the Third Circuit Court decided that the town was not liable and wrote that that the plaintiff, “...may not rest upon mere allegations, general denials or vague statements to survive summary judgment.” The township won this case because it presented a well-documented basis for the Mayor’s chosen candidate.

Comment: These cases are very fact sensitive. Contrast this decision with another case where the mayor in a Commissioner Form of municipal government was found liable after he directed that all employees who had actively supported his opponent be terminated. The Mayor’s actions were so blatant that he had to invoke the 5th Amendment at a deposition.

Hahn v. Edison (2013)

Facts: A police department union representative alleged that his transfer from the County Narcotics Task Force to the Patrol Division was in retaliation for his advocacy as the union representative and therefore was a CEPA violation. Among his specific complaints was that the Mayor promoted his campaign supporters within the Police Department. He also objected to the placement of cameras in police cars and cited numerous minor complaints as examples of retaliation.

Decision: The court ruled that the town was not liable under CEPA because the officer was not blowing the whistle on official activity that harms or potentially harms the public. The court wrote that:

“A salutary limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee.”

Comment: Depending on the facts, the employee might still have had a cause of action if the suit was filed under other statutes that protect union activity.

Buonanno v. Elmwood Park (2014)

Facts: A construction official was laid off when the town voted to hire the neighboring town to perform this function. The official alleged that one of the council members violated the *Local Official Ethics Act* by voting on the consolidation because he was a builder active in the neighboring town and his work was inspected by that town's construction code official who was now going to be responsible for both towns.

Decision: The court ruled that the construction official must be rehired with back pay. The vote to eliminate the position was invalid because a council member inadvertently violated the Ethics Act by voting to retain the construction office of the town where he was active as a builder.

Comment: Many cases have been lost because of simple procedural errors. Anytime someone loses their position, you can expect them to look for any excuse to overturn the action.

Kownacki v. Saddle Brook Board of Education (2014)

Facts: A custodian alleged that his three-day suspension for failure to report an accident was really in retaliation for whistle blowing over the years on such issues as asbestos in the building. The lawsuit was filed just under one year from the date of the suspension, but the plaintiff attempted to introduce alleged acts of retaliation more than a year before the complaint was filed.

Decision: The Trial Judge ruled that the statute of limitations still applied because the custodian failed to show any linkage between the suspension and the whistle blowing that occurred several years earlier.

Comment: CEPA is not a lifetime exemption from discipline.

Aguas v. New Jersey (2015)

Facts: A female corrections officer alleged that she was sexually abused by her supervisor on several occasions. She reported her allegations to her Captain, but rejected a request to report the harassment in writing because she feared retaliation. She also declined an alternative suggestion that she participate in a group meeting. The New Jersey Department of Corrections (DOC) Equal Employment Division still investigated and concluded that officer's allegations were unsubstantiated. Two days later, the officer sued.

Decision: The N.J. Supreme Court concluded that the State’s anti-harassment program was adequate to meet the requirement for an affirmative defense. Specifically, the court wrote: “If no tangible employment action has been taken against the plaintiff, the defendant may assert the two-pronged defense: First, that the employer exercises reasonable care to prevent and correct promptly sexual harassing behavior; and Second, that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm.”

J.S. v. Englewood Cliffs (2015)

Facts: A long-time officer of Lebanese ancestry was involuntarily retired for chronic alcoholism after numerous attempts to help him through the problem. He fought the action contending that he was forced to retire because he reported infractions by superiors. He also claimed that he was protected under the ADA and that the town’s actions were motivated by his ancestry in retaliation for his having reported various legal violations.

Decision: The court upheld the town’s actions because the Police Department was able to document the reasonableness of its efforts to help the officer over an extended period of time, until it was obvious that the officer was not going to recover. The court also recognized that the other issues were a smoke screen to hide the real issue, the officer’s alcoholism.

Comment: This case demonstrates the importance of maintaining good documentation for personnel actions.

Smith v. Millerville (2016)

Facts: The director of operations at a rescue squad reported that he was having an affair with a volunteer and that he was commencing a divorce against his wife, another employee of the squad. After he was fired, he sued based on the provision in LAD that prohibits discrimination because of marital status.

Decision: The N.J. Supreme Court ruled that the squad was potentially liable because LAD’s protection based on marital status is not limited to being single or married, and extends to people who are separated or divorced.

Sauder v. Colts Neck (2017)

Facts: A member of a volunteer Fire Department, with 20 years of service, reported to an insurance company that the Department had made certain false statements in a claim involving embezzlement of the Department’s funds by another member. The Department brought the volunteer up on charges and terminated him in a 14 to 8 vote. The volunteer sued, contending that the Department’s actions violated CEPA. When the Department contended that CEPA only covers employees, the volunteer pointed to the fact that under the

law volunteer firefighters are covered by workers' compensation, and that they also receive LOSAP and uniform allowances.

Decision: The court ruled that for purposes of CEPA, volunteer firefighters are not employees.

Comment: Public safety volunteers are covered for workers' compensation because there is a specific provision that extends workers' compensation to volunteer them. However, CEPA has no such provision.

Meade v. Livingston (2021)

Facts: The long-time municipal manager disciplined the police chief for an incident at a school. The chief took offense at being disciplined by a woman and stated his objections to several council members. Finally, the Council became concerned about the conflict and decided to terminate the manager. The Council was advised that the Manager was an at-will employee and could be terminated without cause.

Decision: The N.J. Supreme Court decided that the *Law Against Discrimination (LAD)* supersedes the governing body's authority to terminate a manager without cause. The court cited the "cat's paw" theory of liability, in which a biased subordinate who lacks decision-making power, uses the decisionmaker, in this case councilmembers, as pawns to deliberately cause an adverse employment action against another employee, in this case the town manager.

Conclusion

The line between liability and non-liability is not always clear. These cases are very dangerous because of fee shifting and the reluctance of many judges to grant summary judgments. The N.J. Supreme Court has established specific guidelines for what an employer must put in place to have any real defense in employment related litigation.

It is not sufficient to merely have an anti-harassment program on paper. Each employer must also have a system to monitor compliance "and to ensure that the complaint structure is trusted." Senior management must demonstrate an unequivocal commitment that is backed up by consistent practice. The MEL provides the materials you need to put together an effective program at NJMEL.org. The MEL also offers premium discounts and lower deductibles for members who have implemented this program.

CHAPTER 5



LIABILITY FOR CHILD ABUSE

Background

Recent changes in the law have increased the potential liability to both governmental entities and officials personally. This issue has rocked many venerable institutions including churches, sports programs, youth organizations, and medical facilities. All local officials must address this problem as well. Under 2019 legislation, local public officials can be held personally responsible if they fail to act.

Who exactly is considered an abused or neglected child? Under New Jersey law, anyone under the age of 18 who is caused harm by a parent, guardian, or other person having custody or control of that minor (*N.J.S.A. 9:6-1*).

There are four common types of abuse covered by the statute:

1. **Neglect:** The failure to meet a child’s basic needs: physically, medically, or emotionally.
2. **Physical Abuse:** The intentional use of physical force that results in injury.
3. **Emotional Abuse:** The practice of behaviors that harm a child’s self-worth or emotional well-being.
4. **Sexual Abuse:** Engaging in sexual acts with a child including pornography.

The U.S. Department of Health and Human Services provides statistics on child abuse. The “Child Management Report – 2017” found that 75% of the cases involve neglect, 18% of victims are physically abused which includes sexual abuse, and psychological mistreatment accounts for 7%.

- In New Jersey, abuse reports involving 80,000 children are filed each year with child protective services.
- 50,000 children receive prevention and post-response services.

- 37% of all children are reported to child protective services by their 18th birthday.
- 55% of the perpetrators in these cases are females while males account for the remaining 45%. Some 30% of these abused children will later abuse their own children, creating a cycle of abuse that costs a staggering \$585 billion each year in the U.S.

Role of Government

The State takes responsibility for enforcing the law through the New Jersey Family Division courts in each county seat. These courts have broad powers and can take remedial action including the removal of children from dangerous situations.

- The Department of Children and Families, and especially the Division of Child Protection and Permanency, combine all state operations intended to safeguard children into a single, coordinated program working closely with the courts and law enforcement.
- The Department of Corrections operates adult prisons and youth correctional centers to deal with perpetrators, while individual counties operate youth detention centers and special purpose schools.

At the local level, education professionals have the most contact with children and are often the first to detect issues. Housing Authorities may encounter abused children as well, and municipalities operate recreational programs for children.

Police agencies assist in resolving reported situations, often acting as the first identifiers. In New Jersey, the law gives police broad authority to protect children, including the authority to remove them from their parents or caregivers without a court order if necessary to prevent imminent danger to a child.

Signs of Child Abuse

- Unexplained or unusual fractures, burns, bruises, or welts in any stage of healing on a child, particularly in a pattern or grouping that might reflect the shape of the object used.
- The timing of these injuries can be significant, especially if they appear after a weekend or vacation.

A child's behavior can also indicate potential abuse:

- Wariness of adult contact.
- Fear of parents or going home.
- Apprehension when other children cry.
- Extreme behaviors like aggression or withdrawal.

Other indicators include:

- Poor peer relationships.
- Begging or stealing food.
- The inability to stay awake in classes.
- Being unwilling to change for gym or participate in P.E.
- Preferring to remain withdrawn and immersed in fantasy.
- Acting in ways much too adult or too infant for their age.

Child abuse has long-term effects on victims. A lack of trust and difficulty with healthy relationships is common, as is a core feeling of worthlessness and low self-esteem. There may even be long-term trouble with regulating emotions that can lead to destructive behaviors.

Child Sexual Abuse

Peer-to-Peer is by far the most common form of sexual abuse, where one or more child or adolescent sexually abuses or inappropriately touches another. Legally, the abuser must be at least four years older to trigger the statute. The American Psychological Association reports this peer-to-peer abuse is driven by power and dominance, the same factors that drive bullying within this age group. In fact, bullying is often a precursor to sexual abuse, especially when there is a lack of supervision.

Adult-to-child abuse is thought out and planned, requiring access, privacy, and control. These three factors demand a very specific type of relationship and setting, meaning that 90% of juvenile sexual abuse victims know their abuser. The scope of the problem is massive: by age 18, one in four girls and one in six boys have experienced sexual abuse.

Statistics show that 88% of these molestations are attributed to individuals with pedophilia, defined as the sexual preference for or strong interest in children. It is important not to confuse the attraction of pedophilia with actual child molestation, as many pedophiles never act on their attractions.

Child sexual abusers are not always easy to spot. Though seven out of eight molesters are male, they match the general population in ethnicity, religion, education, and marital status. There is no stereotype, especially since abusers go to great lengths to blend in.

Only 10% of abusers molest children that they don't know, and 68% look no further than their own families for victims. In fact, 40% of abusers first begin molesting children before they themselves reach the age of 15 and the vast majority before the age of 20. These teenagers generally begin their acts of abuse on younger siblings. Abuse by strangers is very rare. As in other forms of abuse, cyclic patterns are common with 47% of child abusers admitting that they themselves were sexually abused as children.

While most abuse occurs within the family, molesters can also gain access to children through employment, or volunteer work with an organization that works primarily with children. This allows them both time alone with potential victims and the ability to build trust and credibility. Child abusers are often known and respected in their communities for dedication to children.

When it comes to a victim profile, it is important to remember that while there are characteristics that make some children more at risk, every child is in danger. Some specific characteristics that abusers look for:

- Passive, lonely, or troubled children, especially those who live with stepparents or single parents.
- The most vulnerable age is between 7 and 13 years old.
- Children from low socioeconomic backgrounds or rural areas are more likely to be victimized.

Molesters themselves have behavioral patterns that can be identified as “grooming” their victims. Sexual abuse is rarely violent. The molester’s goal is to build a manipulative relationship, often started by showing favoritism to build trust.

- Molesters often refer to their intended victims by pet names and use gifts to foster exclusivity and build a relationship while starting the practice of keeping secrets.
- The molester might begin to spend time with the victim outside of the regular program or schedule, contacting parents to become involved in a child’s life in some capacity, like babysitting. For this reason, many parents are shocked after abuse comes to light simply because the abuser seemed so good – too good to be true, in fact.
- Inevitably, the favoritism is not enough to keep the victim silent, and the abuser resorts to threats that often play off a child’s guilt over the sexual contact.

During the grooming process and abuse itself, victims often begin to show tell-tale signs including:

- Sexual behaviors or strong sexual language that is too adult for their age.
- Many children feel at fault after the abuse and begin to suffer guilt and depression, even resorting to self-harm.
- Look for cuts and scratches or other self-inflicted injuries.

Research shows that children often delay reporting sexual abuse. They should not be disbelieved just because they waited a long time to seek help.

Taking Action to Prevent Abuse

As a governmental official, you are legally required to report suspected child abuse. This requirement includes all governmental officials, employees, and volunteers.

In fact, unlike other states, New Jersey law specifically provides that: “Any person having reasonable cause to believe that a child is being subjected to abuse shall report this immediately.”

The Department of Children and Families maintains a hotline to report child abuse: **1-877-NJ-ABUSE (652-2873)**. Failure to report is a misdemeanor and could expose you to a lawsuit for damages. Fortunately, any person who, in good faith, reports suspected abuse or testifies in a child abuse hearing is immune to any criminal or civil liability that may result. You can choose anonymous reporting as well (*N.J.S.A. 9:6-8.13*).

When dealing with a child who might be abused, show calm reassurance and unconditional support.

- Avoid interrogation and leading questions. Let the child explain in their own words. Anything else could confuse and fluster a child, making it hard to continue.
- Understand that denial is a common reaction. Don’t display disbelief, shock, or disgust as this will shut down the conversation with the child quickly. Instead, be reassuring.
- Make sure the child knows that they did nothing wrong. Reassure them that this is not their fault and make sure they know that you take it seriously.
- If there is the possibility of violence against yourself or the child, get the appropriate professionals or agencies involved as soon as possible.

Personal Liability

The term “In Loco Parentis” is a legal doctrine that grants responsibility to an individual or organization to act in a child’s best interest. This makes individuals or organizations liable if the child is harmed while under their supervision. Examples of “in Loco Parentis” include: schools, daycare centers, recreational programs, and custodial correction facilities.

In the case of the sexual abuse of children, the legislature has extended the statute of limitations to age 55, or later under some circumstances. This means that officials who fail to implement reasonable controls can be sued personally years or decades after they leave office.

Before you become overly concerned, your governmental entity probably has arrangements for your defense and indemnification. However, you should talk with your municipal, board, or authority attorney to understand exactly how these defense and indemnification procedures work. Chapter 9 of this manual includes a discussion of insurance coverage and indemnification.

Risk Control

All governmental entities must have policies and procedures to deal with child abuse. A model policy and procedure can be found at NJMEL.org.

Background Checks: An effective program to protect children must start with background checks of all prospective employees and volunteers including:

- Fingerprint identification.
- Reference checks in both personal and professional capacities.
- The *Megan's Law* directory for New Jersey and any other state in which the applicant has lived.

The MEL's website lists qualified firms that perform these checks in a timely fashion. Written documentation should be kept for at least 65 years. Any negative or questionable results must be dealt with before the individual is hired or begins to work with minors, and no provisional hiring should be permitted. After hiring, an annual re-check of *Megan's Law* directories should be done to ensure no current employees have been added to the list. If there is an arrest or conviction, employees should be required to notify the appropriate Human Resources representative within 72 hours.

Training: Everyone must be trained, beginning with elected officials. The MEL provides a complete package of training programs including:

- Managers and supervisors.
- A special training course for police command officers.
- Programs for all other employees and volunteers.
- Volunteer coaches must also complete the Rutgers SAFETY Clinic Course that provides partial civil immunity under "The Little League Law."
- Records of all these trainings should be maintained for at least 65 years.

Other Policies and Procedures

- A written protocol for notifying the parents or guardian of a minor in case of an emergency, whether medical or behavioral, natural disaster, or any other disruption.
- Medical treatment authorization forms.
- A policy that forbids the release of children to anyone other than the parent, guardian, or other authorized adult.
- Policies that prohibit staff or volunteers from transporting children in their own vehicles without written authorization. Police agencies also must adopt specific procedures for the transportation of minors.
- Strong policies forbidding staff and volunteers from meeting with a child alone or in private.

- Guidelines that restrict images taken of children as part of an activity from being shared on social media, or any other platform without expressed consent from parents and guardians.
- Anti-Hazing and bullying policies that cover cyber bullying.
- Procedures for the monitoring of bathroom facilities.

Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.)

Police also have broad authority to protect people 18 and over who are subjected to domestic violence. This is important because children are often victimized in households where domestic violence occurs against spouses and others. Under the *Prevention of Domestic Violence Act*:

- A law enforcement officer must make an arrest when the officer finds “probable cause” that domestic violence has occurred. This holds even if the victim refuses to make a complaint.
- The Act is invoked in situations where the victim exhibits signs of injury caused by domestic violence, when a warrant is in effect, or when there is probable cause to believe that a weapon has been involved in an act of domestic violence.
- If a child is present, the officer must report the situation to the Department of Children and Families for further investigation. Domestic violence is not just about physical assault. Abusers often use psychological tactics to gain control over their partners, such as making threats to prevent a victim from leaving or contacting friends or the police.
- But even if these conditions are not met, an officer may still make an arrest or sign a criminal complaint if there is probable cause to believe acts of domestic violence have been committed. If there is no visible sign of injury but the victim states that an injury did occur, the officer must take other factors into consideration in determining probable cause.

Selected Case Law

J.H. v. Mercer County (2007)

Facts: A 24-year-old female detention center employee started a sexual relationship with a 17-year-old inmate at a county detention center. He was a very troubled young man who entered treatment with another agency after he turned 18 and was released from the county facility. Suit was filed to recover the medical bills. The county argued that while the molester can be held liable, the county itself has immunity from vicarious liability under *Title 59*.

Decision: The court ruled that both the county and the employee can be held liable. Further, under recent legislation, the County Board of Commissioners can now be held personally liable for failure to implement appropriate safeguards.

S.P. v. Newark (2012)

Facts: A police officer responded to a boarding house where one tenant claimed that another tenant groped her. The *Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.)* specifically mandates arrest where the officer finds that the victim exhibits signs of injury, or there is a restraining order or warrant, or a weapon was used. However, in this case the officer did not realize that there was a previous restraining order, and did not consider mere groping to be an injury by itself. Therefore, he did not make an arrest and later that day the woman was raped by the tenant. She sued alleging that her injuries were caused by the officer's failure to arrest the assailant under the Act.

Decision: The court ruled that while the officer was required to act upon finding any of the statutory triggers, the initial determination is still discretionary and therefore qualified for police immunity.

Schmotzer v. Rutgers (2017)

Facts: An 18-year-old member of the Rutgers Woman's Volleyball Team alleged she was coerced into a relationship by the coach and the university acted with deliberate indifference. Two years later she quit the program and sent an e-mail complaining of an "uncomfortable" environment within the program, but not specifically mentioning the sexual coercion. The Athletic Director never followed up and two years later she sued.

Decision: The court ruled that the athlete waited too long to bring suit. At that time, the statute of limitations for someone age 18 or older was two years.

Comment: Under recently enacted legislation, the statute of limitation for an adult sexual abuse victim is now seven years.

L.E. v. Plainfield BOE (2018)

Facts: A girl was pushed into the boy's bathroom where she was sexually assaulted. The lawyers for the Board argued, that while under *Title 59*, the perpetrator of a crime can be sued, the public entity itself has an immunity for failure to provide adequate police protection.

Decision: The court held in favor of the plaintiff ruling that Boards of Education have a duty to implement reasonable measures to prevent student-on-student assault. This includes the enforcement of a system of hall passes, maintaining supervision of students in class, and preventing free entry into school buildings.

G.A.H v. K.G.G (2019)

Facts: A 44-year-old privately employed EMT had a sexual relationship with a 15-year-old girl. He told a co-worker about the relationship, but not her age. He also showed the co-worker pornographic photos of her on his cell phone. He also drove the young woman in the ambulance, although the relationship did not happen during work hours. After five months, the teen informed her mother who notified police. The molester pleaded guilty and was jailed. Four years later, the girl sued alleging that the molester's coworker should have reported the situation to supervisors, and that the employer was vicariously liable for negligent hiring, training, and supervision.

Decision: The New Jersey Supreme Court ruled that the facts did not create a reasonable basis for the co-worker to believe that his colleague was in a sexual relationship with a minor. The Court pointed out that it is often difficult to know someone's age based on appearance alone, especially on the small screen of a cell phone.

W.S. v. Lawrence Twp. BOE (2023)

Facts: The plaintiff was an elementary school child who was sexually assaulted by his teacher. Legally under the *Tort Claims Act (Title 59)*, this claim "accrued" in 2016. The next year, the now 30-year-old applied to the court to file a late notice but failed to follow up when the motion was denied. The plaintiff refiled the suit in 2020 after the legislature extended the statute of limitations. The Superior Court still ruled against the plaintiff finding he still failed to file the Tort Claim Notice required. The plaintiff appealed.

Decision: The N.J. Supreme Court reinstated the case ruling the legislature's act of extending the statute of limitations for child molestation eliminated the need to file a tort claim notice before filing suit. The court agreed the initial decision to bar the suit in 2017 was correct at the time, but ruled that the 2019 statute "resuscitated" the earlier action.

Jones v. New Jersey (2024)

Facts: A 40-year-old woman had been placed in foster care system at age 5 after experiencing parental drug abuse and neglect. From 1990 to 1993, she suffered sexual abuse in three different foster homes by four separate perpetrators, two were later convicted. She sued under the 2019 statute that extended the statute of limitations in child related sexual abuse cases to age 55 or in some cases even longer.

Decision: A jury awarded \$25 million to the plaintiff and found the State of New Jersey 99% liable.

Comment: Juries tend to award large sums in child related sexual molestation cases.

CHAPTER 6



FIRST AMENDMENT LIABILITY (SPEECH)

“A people who mean to be their own governors, must arm themselves with the power knowledge gives.” — President James Madison

Some of the material in this chapter was provided by Fred Semrau, the MEL Fund attorney.

Background

Title 59 does not protect public entities from liability for civil rights violations. This chapter discusses a wide range of First Amendment issues that can result in liability suits. These actions primarily seek plaintiff attorney fees to pursue the action.

The First Amendment was adopted in 1789 and provides that:

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Freedom of Religion

Originally the First Amendment only applied to the federal government, not the states. For example, the clause prohibiting the establishment of a religion was meant to prevent the federal government from establishing a national religion that superseded the religions already established by the states.

During the colonial period, only Pennsylvania and Rhode Island with their strong Quaker traditions did not establish a tax supported church. It wasn't until the adoption of the 14th Amendment in 1868, after the civil war that the anti-

establishment clause was extended to the states. By then, no state still had a tax supported, or “established” religion.

In 1962, the establishment clause became especially controversial when the U.S. Supreme Court ruled in *Engle v. Vitale* that local school boards could not require prayer at the start of school each morning.

Separation of church and state is far from absolute. For example, there is nothing wrong with inviting a clergy member to say something at the beginning of a Council reorganization meeting. That is not using tax dollars to advocate religion.

In 2014, the U.S. Supreme Court ruled in *Greece v. Galloway*, that local governments may open their meetings with prayers that are explicitly religious so long as the town maintained a policy of including clergy from all denominations in the community. The court also stated that the Constitution does not require searching beyond the town’s borders for non-Christian prayer givers.

Christmas trees, menorahs, and dreidels are considered as secular representations of the Christmas and Hanukkah holidays. However, going beyond these symbols may or may not be constitutional. In one case, a federal court ruled that a crèche located inside a Pennsylvania courthouse, which also featured the words “Glory to God for the birth of Jesus Christ,” had the “unconstitutional effect of conveying a government endorsement of Christianity.”

However, the Court further concluded that not all religious displays run afoul of the Establishment Clause, emphasizing that the display must be evaluated “as a whole.” For instance, the court held in *American Civil Liberties v. Schundler (1999)*, that the addition of Christmas trees and other secular holiday decorations used by Jersey City rendered another crèche display constitutional.

The Supreme Court’s 2022 decision in *Kennedy v. Bremerton*, started a reappraisal of the church/state separation doctrine. In this case, a football coach was disciplined for praying on the field after games. The Supreme Court decided this strictly voluntary act was not a violation of the First Amendment.

In 2022, the Supreme Court also decided in *Shurtleff v. Boston* that municipalities must treat religious groups equally with other charitable nonprofits. The city had a policy of allowing civil groups on their special day to fly their flag in front of city hall but refused the request of a non-profit Christian organization to fly its “Christian Flag.” The Supreme Court ruled that refusing to fly the flag was disparage treatment of the organization just because it was religious.

Freedom of Speech

While the First Amendment says that “Congress shall make no law abridging the freedom of speech, or of the press,” this is not as absolute either. There is a distinction between general speech which is broadly protected, political speech

that is also broadly protected, but with some limitations, and commercial speech that is subject to additional limitations.

The First Amendment's protections do not apply to some speech including defamation, child pornography, fighting words, and deceptive advertising. In *Schenck v. U.S. (1919)*, the U.S. Supreme Court established the Clear and Present Danger test. As Justice Oliver Wendell Holmes wrote, "You cannot yell fire in a crowded auditorium and cause a panic unless there is a fire."

More recently in *Brandenburg v. Ohio (1969)*, A Ku Klux Klan leader advocated at a Klan rally for the use of violence to expel African and Jewish Americans. The U.S. Supreme Court overturned *Brandenburg's* conviction stating that mere advocacy of violence was still protected speech. Speech can be prosecuted only when it poses a danger of "imminent lawless action."

The N.J. Constitution's free speech guaranty is broader. In addition to providing that "No law shall be passed to restrain or abridge the liberty of speech or of the press," it also states that "every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." The U.S. Constitution's First Amendment only protects speech against restriction by the government; while the N.J. Constitution has been held to protect against infringement upon speech even if it is imposed by non-governmental actors.

Political Speech:

There is a general sense that politics have become especially nasty in recent years. Politics have always been rough and tumble. For example, the distance between the front benches in the House of Commons is two sword lengths plus a foot. Early sergeants-at-arms kept order with the mace that was kept in front of the presiding officer for everyone to see.

The Courts have adopted rules for political speech based on the nature of the forum.

- **Traditional Public Forums:** such as street corners or parks where the right to speak, and protest is broadly protected. A century ago, the intersection of 135th Street and Lenox Avenue was a well-known "speakers' corner" in New York City.

Under limited circumstances, municipalities may require parade permits. In the 1989 decision in *Ward v. Rock against Racism*, the U.S. Supreme Court wrote that to survive scrutiny, the regulations must be:

- Content neutral.
- Narrowly tailored to serve a significant government interest.
- Open to ample alternative channels for communicating a speaker's message.

- **Non-Public Forums:** such as military bases where government can exercise broad control over speech.

Limited Public Forums: New Jersey law requires that:

“.....a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern to the residents of the municipality or school district (N.J.S.A. 10:4-12 a).”

Note that this requirement is limited to boards of education and municipal governing bodies. The N.J. Supreme Court declined to extend this provision to the Rutgers Board of Governors.

This does not mean that public meetings are free for all. Maintaining decorum is important because the lack of civility discourages people from becoming involved in government. The lack of decorum also leads to lawsuits and personal liability.

In *Al Falah Center v. Township of Bridgewater (2013)*, discussed in the next chapter, the town was ordered to pay \$2.5 million to purchase another property for the mosque and the township’s insurer paid the mosque’s \$5 million legal bill. An important factor in the Federal Court’s decision was the fact that the public hearing was especially ugly. The court wrote that:

“Bare animus towards a group or fear, unsubstantiated by factors which are properly cognizable in zoning proceedings may constitute sufficient evidence for a zoning ordinance to fail under an equal protection challenge.”

In 1989, the U.S. Court of Appeals in *White v. Norwalk*, California upheld an ordinance that provided that:

“Each person who addresses the Council shall not make personal, impertinent, slanderous, or profane remarks.... Any person who makes such remarks, or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disturbs or otherwise impedes the orderly conduct of any council meeting shall, at the discretion of the presiding officer, or a majority of the Council, be barred from further audience before the Council during that meeting.”

“In dealing with agenda items, the Council does not violate the first amendment when it restricts speakers to the subject at hand.... While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint the speaker is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.”

The key to understanding the White decision is that although local government cannot regulate speech, under some circumstances they can regulate conduct that impedes the process of government.

In 2010, the N.J. Supreme Court applied this principle in *Besler v. BOE of West Windsor-Plainsboro*:

“A public body may control its proceedings in a content-neutral manor by stopping a speaker who is disruptive or who fails to keep to the subject matter on the agenda. The government or a school board, however, has the burden of showing that its restriction of speech in a public forum was done in a constitutionally permissible purpose.”

In this case, a parent complained that a coach used profanity with a girls' basketball team. When the parent did not receive what he considered to be a satisfactory response, he filed a lawsuit. For eight consecutive meetings, he spoke about the case and criticized the coach personally. Finally, the Board President read a statement that speakers should not attack individuals, talk about pending litigation or otherwise repeat themselves. A few minutes later when the parent was recognized, he again returned to the same argument and was cut off by the President. He sued and a jury agreed with the speaker and awarded damages. The Board appealed.

The N.J. Supreme Court ruled that this was a jury question and that the burden of proof was on the Board to show that its actions were reasonable. The Court held that because the Board established its decorum rules just before this speaker was to be recognized, a reasonable juror could conclude that the Board was singling out this speaker. The fact that New Jersey places the burden of proof on local government makes it more difficult to deal with decorum issues, but not impossible.

Maintaining Decorum: The most critical thing a Mayor, School Board President, or other presiding officer must do is to establish the protocols at the reorganization meeting and consistently enforce these rules. Back in the 70s and 80s, it was sufficient to use “Robert’s Rules of Order.” Today, the recommendation is to adopt a resolution or ordinance with basic guidelines on decorum. A model is available on the NJMEL.org website.

- Consistent Enforcement is critical. You cannot call your opponents out of order for things that your supporters are allowed to get away with.
- Establish reasonable time limits for speakers at both hearings and the open portion of the meeting.
- Establish a meeting curfew so that the meeting automatically ends at a certain hour unless the bylaws are suspended by a two-thirds vote. Council Members and the public become more succinct with an automatic end time.

- Avoid debating with the public. If the presiding officer gets into an argument from the dais, the meeting will quickly get out of hand. You are not obligated to answer or respond to any questions. Defer questions that require follow-up to the manager, attorney, or committee chairs. Depending on the circumstances, you can offer to answer questions after the meeting.
- Be careful of your body language. Maintain eye contact with the speaker, avoid comments or expressions that appear to be judgmental, and try to appear as neutral as possible. One expression that will help calm a discussion is: “This is a situation where reasonable people can come to different conclusions with the same facts.” Remind everyone that whatever they say will be permanently on the record and cannot be redacted.
- Do not attempt to shout down a speaker which only escalates the situation. When things are getting out of hand, call for a short recess to try and regain control before taking more formal action. This motion is privileged and proceeds without debate. Always call a recess before asking the police to talk to someone who is violating the rules of decorum. Removal should only be used as a last resort, or if there is a valid public safety concern.
- The presiding officer of a Land Use Board has greater latitude to enforce decorum because a land use hearing is a court proceeding. Failure to maintain decorum can be grounds to overturn the Board’s decision.

Websites: In recent years, Municipalities have made increased use of websites to enlist public views on town matters. Effectively, these websites become an electronic speaker’s corner.

Recently the New Jersey League of Municipalities (NJLM) considered some of the legal issues concerning these blogs. Legal theory supports the idea that a government is free to have its own voice, and as such, does not necessarily need to provide a soapbox for a viewpoint counter to their own.

However, if a municipality creates space on its website for public comment, these platforms become the equivalent to the open public comment section of a Council meeting. The NJLM concluded that it is permissible, and certainly good practice, to establish rules of decorum and a policy that clearly outlines the rules and limitations on allowable comments.

This allows you to define the purpose and scope of your social media usage and could protect your social media sites from becoming a de facto public forum. This provides notice that if comments violate the established rules, then those comments will be deleted.

Freedom of the Press

One of the landmark cases protecting press freedom involved a municipality, Montgomery, Alabama. In *Sullivan v. The New York Times (1964)*, the paper published a full-page advertisement by supporters of Martin Luther King Jr., that criticized the police in Montgomery, Alabama, for their treatment of civil rights movement protesters. The ad had several factual errors regarding the number of times King had been arrested during the protests, what song the protesters had sung, and whether students had been expelled for participating.

Based on the inaccuracies, Montgomery police Commissioner L. B. Sullivan sued the New York Times for defamation. Webster defines defamation as: “The act of communicating false statements about a person that injure the reputation of that person.” In the Alabama court, a jury awarded Sullivan \$500,000. The New York Times appealed.

The Supreme Court ruled that a public official who alleges defamation must also prove actual malice to recover damages. In other words, you must show that the person you are suing knew the statement was false, or was guilty of reckless disregard of the truth. That is a very tough standard. As a result, the court overturned the Alabama decision.

Political figures must be very careful before filing defamation lawsuits. You will probably lose and may be counter sued.

In the *Sullivan* decision, Justice William J. Brennan wrote:

“Our Free Society must give breathing room for an uninhabited and robust discussion of public issues, even when it includes vehement, caustic and sometimes unpleasantly sharp attacks in government and public officials.”

Right to Record and Film:

Under Federal and New Jersey law, private citizens also have some First Amendment rights to record public officials and employees performing their duties. This includes the right to enter public areas buildings or property to record government employees performing their duties. This right is not absolute and is subject to reasonable time, place, and manner restrictions.

The First Amendment right to record images of officials and employees performing their public duties and the right to record or film public facilities includes:

- Recording public officials or employees at traditional public forums, such as parks and public streets, and in limited public forums, such as at public meeting rooms.
- Recording public officials and employees while they are in areas of public buildings and public spaces that are open to the public.

- Recording public officials and public employees while they are in areas not open to public access if the person recording, or the recording equipment itself, does not trespass into closed areas.
- Recording law enforcement activities outside of closed areas, such as officers during an arrest, traffic stop, or truck inspection.
- Recording hazardous or dangerous property conditions.

Limitations

The right to record and film are subject to reasonable time, place, and manner restrictions. The restrictions must be: (i) justified as reasonable time, place, and manner restrictions without reference to the content of the speech; (ii) narrowly tailored to serve a significant government interest; and (iii) must leave open ample alternative channels for communication of the information.

The right to film or record has been found not to exist:

- While filming areas not generally open to the public that pose legitimate safety and security risks such as jails, holding cells, or bathrooms.
- When the recorder interferes with the official's performance of their duties in or interferes with an investigation.
- Recording a police conversation with a confidential informant.
- Violating an ordinance prohibiting or restricting photography of private citizens for commercial resale without a permit.

First Amendment Audits: A social movement has emerged where activists record governmental facilities or employees to test their compliance with First Amendment rights. For example:

- Representatives will show up at a government facility, video the parking lot, check for signs to determine if they can enter protected areas, and enter the public area while recording operations at the facility.
- Representatives will question employees asking for their name and position.
- They may ask about accessing official government records and about the process that must be followed.
- When public employees ask questions, the auditors often refuse to answer. The attitude and demeanor of the auditors can be unnerving, and on occasion, they may use foul and abusive language.
- Many of the videos are posted online. They also may audio dub the recordings with comments that demean or criticize the public employees.

Each local government should adopt a written policy to address the “right to record” at governmental facilities and field activities. A model policy is available on the NJMEL.org website. The MEL also offers an online program to train local government employees on how to handle these situations. Arrange for a periodic site review of each facility to determine security vulnerabilities.

The policy should provide that:

“The (type of local unit) recognizes that citizens have a First Amendment right of access to certain government information. This includes a citizen’s right to enter and access areas of public property that are open to the public for the purpose of recording public officials and employees performing their job functions within these areas open to the public. However, this right is not absolute and unqualified, and may be limited by certain reasonable time, place, and manner restrictions.”

The priority is the protection of employees. Personnel must be instructed to refrain from engaging in any physical contact or verbal confrontation with the First Amendment Auditor. If the “Auditor” engages in physical contact or threats of physical violence, the employee should immediately contact law enforcement. Anyone who engages in threats of physical violence, or a significant pattern of harassment may be removed from government property by police and charged with a “defiant trespass” disorderly persons’ offense (*N.J.S.A. 2C:18-3(b)*).

Work with the Safety Committee to review institutional security, signage, and other safeguards. Where necessary, implement security sign-in, video surveillance, fencing, additional locks, and a system of government identification scan cards.

Door to Door Solicitation Ordinances:

The U. S. Supreme Court’s 2002, decision in *Watchtower Bible v. Stratton*, established high level First Amendment protection for door-to-door canvassers based on the central role of canvassing in spreading protected speech.

New Jersey courts have held that businesses and non-profit groups have the right to conduct door-to-door solicitation until 9:00 p.m. New Jersey courts have questioned and invalidated ordinances that contain lengthy background checks.

In 2018, on the recommendation of the Municipal Excess Liability Joint Insurance Fund (MEL), many municipalities amended various aspects of their door-to-door solicitation ordinances. One municipality that did not change its ordinance paid more than \$50,000 in attorney fees and court costs after a pesticide company filed a lawsuit.

The MEL negotiated with this firm’s legal counsel to develop a reasonable framework to address these issues. The suggested agreement included a change in solicitation hours to stop soliciting at one-half hour after sunset.

The firm also challenged the constitutionality of fingerprinting requirements. In the 2008 case of *New Jersey Environmental Federation v. Monroe*, the court concluded that fingerprinting and/or background check requirements could be considered as a violation of a solicitor's First Amendment right to free speech.

Recommendations:

- Create or bolster an existing “no-knock/no-solicitation” provision, including maintenance of a no-solicitation list that would supersede any business's right to conduct door-to-door solicitation.
- Revise and amend fingerprinting requirements to add a provision allowing an alternative to being fingerprinted by the municipality. For example: a person can submit to the municipality and Chief of Police a certification from the company's general counsel regarding fingerprint and/or criminal background check results from a recognized service. This should also stipulate that the Chief of Police must approve the results received.
- Provide for continued communications between the soliciting vendors and the local police as to the geographical area where the solicitation will be conducted.
- Consider agreements with vendors seeking to solicit in the municipality that all solicitation activities will cease one-half hour after sunset.

Selected Case Law

Kindt v. Santa Monica (1995)

Facts: An apartment owner was ejected on several occasions from the Rent Control Board for trying to speak at various times throughout the meeting. He argued that limiting comments to the end of the meeting meant that he could not share his views when the resolutions were being decided. He was also a true gadfly who often heckled the board and other speakers.

Decision: The court ruled that: “The Board regulations restricting public commentary to three minutes per item at the end of each meeting are the kind of reasonable time, place and manner restrictions that preserve a board's legitimate interest in conducting efficient and orderly meetings.”

Newman v. Delahanty (1996)

Facts: A candidate for Mayor created a newspaper to attack the incumbent Mayor. In this paper, he would take one or two “facts” and contend that these “facts” proved corruption. For example, in one story he wrote falsely that the Mayor was using tax dollars for his home in Florida. The Mayor sued the

would-be newspaper tycoon for defamation. Thinking the case frivolous, the defendant represented himself.

Decision: A jury awarded the now ex-Mayor punitive damages of \$200,000 and the appeals court upheld the award.

Comment: This case was highly unusual because the defendant acted as his own lawyer. The consensus is that the case would probably been thrown out if the defendant had been properly represented.

State v. Charzewski (2002)

Facts: A citizen was told on numerous occasions to stop interjecting into the regular council discussion. The speaker continued and was escorted out of the room without resistance. Later he was charged with being a disorderly person. He sued for malicious prosecution.

Decision: The N.J. Appellate Court ruled that merely being disorderly at a council meeting was not per se a criminal offense. The court wrote that the speaker's "conduct may have been rude and excessive, but it was not criminal."

Donato and Calogero v. Moldow (2005)

Facts: Two members of the governing body sued the operator of an on-line community bulletin board who refused to remove clearly defamatory postings from unidentified writers. There was no question that the postings were defamatory, even under the tough *Sullivan* standard. If the bulletin board was a newspaper, an editor would be liable for printing defamatory letters from unidentified writers.

Under Federal law, operators of web sites are not considered editors and have immunity. In this case, the webmaster also exercised editorial control by deciding which postings to remove from the site. For example, he quickly removed anything critical of himself. The webmaster also admitted in a deposition that he had a personal grudge against one of the Council Members.

Decision: The court ruled that the exemption under the *Federal Communications Act* even applies when the webmaster exercises judgment on what is allowed to remain on the site. However, this exemption does not apply if the webmaster writes the defamatory material.

Olasz v. Welsh (2008)

Facts: After a Council Member was repeatedly ruled out of order, he was arrested and charged with a criminal disorderly person offense. The County Prosecutor threw out the complaint and the Council Member sued the Council President for malicious prosecution. The Council Member admitted to

disrupting the meeting, but contended that his behavior was necessary to make his point.

Decision: The U.S. Court of Appeals ruled that: “The Council President’s actions to constrain the council member’s “badgering, constant interruptions, and disregard for the rules of decorum constitute appropriate time, place and manner regulation.”

State v. Chepilko (2009)

Facts: The defendant was found guilty on two occasions of violating municipal ordinances that prohibit the sale of merchandise on the Atlantic City boardwalk by taking photographs and then attempting to sell them to the subjects. The defendant argued that this business activity is expressive conduct protected by the First Amendment.

Decision: The N.J. Appellate Court ruled that the defendant’s business activity did not predominately serve expressive purposes and was not entitled to First Amendment protection.

Comment: There is a tricky line between purely commercial enterprise and business activities that include protected expression.

Glik v. Cunniffe (2011)

Facts: A bystander was arrested after filming Boston officers making an arrest in a park. The bystander was charged with wiretapping, disturbing the peace, and aiding in the escape of a prisoner.

Decision: A U.S. District Court of Appeals unanimously held that the officers violated the bystander’s constitutional rights. However, the court also ruled that the right to film public officials and employees was subject to reasonable time, place, and manner limitations. Boston paid Glik’s attorneys \$170,000. See *Fields v. Philadelphia (2017)*.

CHAPTER 7



Background

Effective 2005, New Jersey requires all new members of planning and zoning boards to complete a five-hour course offered by the New Jersey Association of Planning Boards & Zoning Boards of Adjustment (NJPO). This chapter focuses on land use liability claims. Affordable housing issues, also known as Mount Laurel lawsuits, are not discussed because these actions are excluded under land use liability policies.

The starting point for land use liability is the fifth amendment of the U.S. Constitution which provides that private property shall not be taken for public use without just compensation. When a governmental entity condemns private property for public use, it must pay the owner.

In 1922, the United States Supreme Court extended this principle to so called “inverse condemnation” (*Pennsylvania Coal Co. v. Mahon, 1922*) where a zoning law or governmental regulation significantly diminishes the value of a private property. While the government does not actually acquire ownership of the property, the laws or regulations adopted by the governmental entity effectively make the property worthless.

Under the law, no person has the right to use property in a fashion that threatens public safety, or is so obnoxious that it materially impairs the rights of adjacent property owners. On the other hand, the government does not have the right to adopt regulations that effectively prohibit any reasonable use of private property. Various Federal and State laws now give civil rights protection to a range of unpopular uses – in other words NIMBY [Not in My Back Yard] — which can include cell towers, group homes, and adult bookstores.

Considering the thousands of land use applications each year, lawsuits against Land Use Boards seeking monetary damages are rare. Appeals of land use decisions are usually to the Superior Court for injunctive relief, not monetary damages. Injunctive relief is a court order that requires government to act or prohibits government from acting. Delays in winning approvals are a normal part of the process and do not usually give rise to liability suits.

Land Use Boards enjoy the broad personnel immunities extended to governmental decision makers. Land use is a judicial function and individual board members have basically the same protection from lawsuits as judges. As the court wrote in *Anastasio v. West Orange (1986)*:

“We think that the public interest requires that persons serving on planning boards act with independence and without fear that developers [will] bring them into court.”

There has been extensive litigation in recent years under the *Religious Land Use and Institutionalized Persons Act*, known as RLUIPA. In one recent New Jersey case a mosque was awarded damages of \$7.5 million. Unanimously adopted by Congress in 2000, this act provides that no government shall impose land use regulation that creates a substantial burden on religious exercise unless, in furtherance of a compelling governmental interest, that is the least restrictive way of accomplishing that objective. These applications can be very controversial.

Therefore, an applicant who has been denied approval normally does not have recourse to sue for monetary damages. The appeal is to the Superior Court for injunctive relief. However, monetary damages can be awarded in cases where the applicant’s Civil Rights have been violated, and these damages include the applicant’s legal fees. That is why these cases almost always involve big numbers.

Risk Control

Land Use Boards should arrange land use liability training for each member. The MEL has a professionally recorded training program available on the NJMEL.org website.

Selected Case Studies

Schad v. Mt. Ephraim (1981)

Facts: The town adopted a zoning ordinance that prohibited adult bookstores and theaters in the commercial zone.

Decision: The U.S. Supreme Court overturned this zoning ordinance because it prohibited adult bookstores and theaters while allowing other bookstores and theaters. The court ruled that this ordinance violated the First Amendment because it singled out a particular type of speech.

Comment: Just a few years later, in *Renton v. Playtime Theaters (1986)*, the same Court upheld a zoning ordinance that prohibited adult theaters within 1,000 feet of a residential zone. In this case, the court ruled that municipalities can take into consideration the higher crime rate around these establishments and use the zoning code to establish a buffer from residential areas, if there are still places within the zone where these establishments could be located. However, be very careful before adopting any zoning or building regulation that could have the effect of singling out any type of speech.

Whispering Woods v. Middletown (1987)

Facts: When the Planning Board rejected a 215-unit application, the developer filed an action in Superior Court for injunctive relief. In closed session, the Board reached a settlement with the developer subject to a subsequent public hearing. Opponents to the application appealed arguing that the board's closed-door agreement violated the *Open Public Meetings Act*.

Decision: The Court ruled that the *Open Public Meetings Act* was not violated if the agreement was conditional upon a public hearing.

Nunziato v. Edgewater (1988)

Facts: While considering a change in the zoning law, the governing body expressed concern about the impact that a development would have on the town. The developer voluntarily offered to contribute \$200,000 to offset some of these costs, although there was no legal requirement for the developer to make this contribution.

Decision: The court ruled that absence a legal requirement, voluntary contributions of this nature are analogous to “pay-to-play” where favorable land use decisions go to the highest bidder.

Comment: As a result of this case, communities are now required to establish specific requirements for offsite improvements.

Smith v. Fair Haven (2000)

Facts: Members of a Land Use Board visited the site of an application and engaged in a discussion with both the applicant and objectors. While most of the discussion was limited to specifics of the application, one of the members went beyond this and engaged in a heated dialogue with one of the parties. This member was recused from further deliberations.

Decision: The Court agreed that the recusal of the one member who engaged in the heated discussion was an adequate cure in this case. The court opinion reiterated that discussion at site meetings must not go beyond the arguments and allegations advanced during the Board's meetings. Further, the court

emphasized that the knowledge gained from the visit should be placed on the record.

Comment: It is good practice to have the Board Attorney at on-site meetings.

Tenaflly Eruv Association v. Tenaflly (2002)

Facts: A group of Orthodox Jewish residents attempted to create an enclosed “Eruv” zone so that they could push or carry objects outside their homes on the Sabbath. Eruvim were originally built with ropes and wooden poles, but today an Eruv can be established by running plastic string between utility poles. Where this has been done, the string is high and out of sight. The utility company agreed, but after bitter controversy, the town decided to stop the plan by enforcing its 1954 ordinance that prohibits placing signs and the like on utility poles, fences, and other public places.

Decision: The court ruled against the town because it constituted selective enforcement. The Court wrote that officials had ignored numerous other violations in the past such as signs for yard sales, lost animals, house numbers, directional signs to churches, and the like.

Comment: While all law enforcement is inherently selective, it is illegal to make that selection based on criteria that amounts to illegal discrimination.

Mansoldo v. State of New Jersey (2006)

Facts: The owner of an otherwise conforming lot in a single-family zone was prevented from starting construction by the DEP because of flood plain regulations. The DEP ruled that the property can only be used for open space, parkland, or a parking lot. The owner sued arguing that this was inverse condemnation.

Decision: The N.J. Supreme Court ruled that in deciding inverse condemnation cases, courts must ask if the regulation effectively eliminates all economically productive use of the land. After answering this question, the courts must go further and determine if the regulation unduly interferes with legitimate investment-backed expectations of the property owner depending on various factors. Based on this analysis, the court found that inverse condemnation occurred in this case and ultimately, the property owner sold the two lots to the town.

Al Falah Center v. Bridgewater (2013)

Facts: A Muslim congregation proposed to build a conforming Mosque and educational center on a site of a former hotel. Within two months, the Council adopted a revised zoning code that required a church to seek a conditional use variance if located in a residential zone. In one of the hearings, no less than

500 citizens attended, and things became quite ugly. The town argued that the area in question had winding roads and there were other properties where the Mosque could locate, although these properties were substantially more expensive. The Mosque argued that its consultant found that traffic would not be a problem, and that the area already had educational and other similar uses.

Decision: The Federal Court was swayed by how quickly the council moved to change the zone. The court was also critical that the town allowed discriminatory statements at the hearing. Under the settlement, the town paid \$2.5 million to purchase another property for the Mosque and the Township's insurer paid the Mosque's legal bills that amounted to \$5 million.

Discussion: As a result of this and similar decisions, the insurance industry no longer offers high policy limits for land use liability.

Muslim Community Association v. Ann Arbor (2013)

Facts: A religious institution applied for variances to build a school in a residential zone. A Board Member lived in a nearby development and coached her neighbors on what questions they should ask at the hearing. She did not recuse from the deliberations.

Decision: The Board Member who helped residents draft their objections was not entitled to personal immunity because she acted in bad faith.

Comment: Other examples where immunity did not apply because of bad faith:

- During a close reelection campaign, the Mayor asked all members of the Planning Board from his party to vote against a controversial application. It is illegal to influence decisions for political or personal gain. Those phone calls cost the taxpayers hundreds of thousands of dollars.
- A developer submitted a conforming application to build a commercial building that included a day care center. The Mayor forced the developer to scale back the application but still voted against it. Subsequently, it came to light that the Mayor had an interest in another day care center nearby.

Hartz v. Spring Lake (2018)

Facts: The Plaintiff in this case complained that a house under renovation next door did not conform to the zoning code. While during the lengthy proceedings the town made several procedural errors, ultimately the town required modifications to the design so that the application complied with the code. The Plaintiff argued that because of the procedural errors, she incurred considerable legal bills, and she sued the town to recover this cost under the *New Jersey Civil Rights Act*.

Decision: The N.J. Supreme Court ruled that while the “Zoning Officer did not adhere to the precise statutory procedures.” ... “In the end, however, the (plaintiff) has not established that the Borough denied her the right to be heard before the Planning Board. She therefore cannot demonstrate that she was deprived of a substantive right protected by the *New Jersey Civil Rights Act*.”

Comment: This was a critical decision because it would be very difficult to operate Planning and Zoning Boards if a municipality is responsible to pay the applicant’s legal bills whenever there is a procedural error.

Conclusion

There are several other precautions to reduce the risk of Land Use Liability.

- Do not meet with applicants or opponents to an application alone.
- Avoid saying anything that can be construed as bias, both at meetings and elsewhere. For example, in one case a board member said at a contentious hearing: “We are not going to do anything that is contrary to the wishes of the public.” Comments like that make it very difficult to defend the board in court.

CHAPTER 8



AMERICANS WITH DISABILITIES ACT AND RELATED LAWS

This chapter was written by Eric Harrison Esq., a senior member of the MEL defense panel.

Background

In 1990, President Bush signed the *Americans with Disabilities Act (ADA)*, often credited as the world's first *Civil Rights Law* for people with disabilities. A bipartisan effort, the Act is intended “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”

President Bush introduced the ADA with soaring rhetoric that matched the Act's lofty ambitions:

“Three weeks ago, we celebrated our nation's Independence Day. Today we're here to rejoice in and celebrate another 'Independence Day,' one that is long overdue. With today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”

The ADA bans disability-based discrimination in employment, public accommodation, public services, transportation, and telecommunications.

- **Title I** addresses employment.
- **Title II** addresses public services, programs, and activities provided by state and local government.
- **Title III** addresses public accommodations, such as restaurants, theaters, offices, and places of business.

Title I

The ADA prohibits employers, employment agencies, and labor unions from discriminating against qualified individuals with disabilities. An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities.
- Has a record of an impairment.
- Is regarded as having such an impairment.

An employer is required to make “a reasonable accommodation” if it would not impose an “undue hardship.” Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee. Not all people with disabilities, or even all people with the same disability, will require the same accommodation.

Reasonable accommodations may include:

- Making existing facilities accessible to people with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position.
- Acquiring or modifying equipment, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.
- Providing a deaf applicant with a sign language interpreter during the job interview.
- Allowing an employee with diabetes regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.
- Changing the schedule of an employee with cancer to accommodate radiation or chemotherapy treatments.

An employer does not have to provide “a reasonable accommodation” if it imposes an “undue hardship.” This is defined as an action requiring significant difficulty or expense when considering factors such as an employer’s size, financial resources, and the nature and structure of its operation. An employer is not required to lower quality or production standards or to provide personal use items such as glasses or hearing aids.

An employer generally does not have to provide “a reasonable accommodation” unless an individual with a disability has asked for one. If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs accommodation. Once “a reasonable accommodation” is requested, the employer and the individual should discuss the individual’s needs and identify the appropriate action. Failure to have an “interactive dialogue” can by itself be grounds for liability. Where more

than one accommodation would work, the employer may choose the one that is less costly or easier to provide.

An employer is not required to create a new position for employees who can no longer continue in their current position. If another position is open, the individual must be able to accomplish the essential functions of that position with reasonable accommodation. In cases of a transfer, the employee is entitled to the rate of pay of the new position, not the employee's previous position.

Other Provisions of *Title I*:

- **Drug and Alcohol Abuse:** Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.
- **Medical Examinations and Inquiries:** Employers may not ask job applicants about the nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned upon a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations must be job related and consistent with employer/business needs.
- **Confidentiality:** The basic rule is that with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course, and even if it is not generated by a health care professional. For example, an employee's request for reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

HIPAA

The *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* also protects employee health information. Under this federal law, the Department of Health and Human Services established national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge.

Privacy Rule: The HIPAA Privacy Rule covers the use and disclosure of individuals' health information, known as protected health information (PHI), by entities subject to the Privacy Rule.

- **Healthcare Providers** - Every healthcare provider, regardless of size of practice, who electronically transmits health information in connection

with claims, benefit eligibility, referral requests, and other similar transactions.

- **Health Plans** - Entities that pay the cost of medical care including: insurers; health maintenance organizations (HMOs); Medicare, Medicaid, Medicare Choice, and Medicare supplement insurers; and long-term care insurers (excluding nursing home fixed-indemnity policies). Health plans also include employer-sponsored health plans, government and church-sponsored health plans, and multi-employer health plans. The regulations include an exception for group health plans with fewer than 50 participants that are administered solely by the employer that established and maintains the plan.
- **Business Associates** - A person or organization (other than a member of a covered entity's workforce) using or disclosing individually identifiable health information to perform functions such as claims processing, data analysis, utilization review, and billing.

Permitted Uses and Disclosures: A covered entity is permitted to use or disclose protected health information, without an individual's authorization, as follows:

- Disclosure to the individual. If the information is required for access or accounting of disclosures, the entity **MUST** disclose to the individual.
- Treatment, payment, and healthcare operations.
- Opportunity to agree or object to the disclosure of PHI. Informal permission may be obtained by asking the individual outright, or by circumstances that clearly give the individual the opportunity to agree, acquiesce, or object.
- Limited dataset for research, public health, or healthcare operations.

Public Interest and Benefit Activities: The Privacy Rule also permits use and disclosure of protected health information, without an individual's authorization, for 12 national priority purposes:

1. When required by law.
2. Public health activities.
3. Victims of abuse or neglect or domestic violence.
4. Health oversight activities.
5. Judicial and administrative proceedings.
6. Law enforcement.
7. Functions (such as identification) concerning deceased people.
8. Cadaveric organ, eye, or tissue donation.
9. Research, under certain conditions.
10. To prevent or lessen a serious threat to health or safety.
11. Essential government functions.
12. Workers' compensation.

HIPAA Security Rule: While the HIPAA Privacy Rule safeguards protected health information (PHI), the Security Rule protects all individually identifiable health information a covered entity creates, receives, maintains, or transmits in electronic form. This information is called “electronic protected health information” (e-PHI). The Security Rule does not apply to PHI transmitted orally or in writing.

To comply with the HIPAA Security Rule, all covered entities must:

- Ensure the confidentiality, integrity, and availability of all electronic protected health information.
- Detect and safeguard against anticipated threats to the security of the information.
- Protect against anticipated impermissible uses or disclosures.
- Certify compliance by their workforce.

Covered entities should rely on professional ethics and best judgment when considering requests for these permissive uses and disclosures. The Health and Human Services Office for Civil Rights enforces HIPAA rules, and all complaints should be reported to that office. HIPAA violations may result in civil monetary or criminal penalties.

Title II

The ADA requires public entities to provide reasonable accommodations to the extent necessary to ensure equal access to the public of all governmental programs and services. Most *Title II* litigation arises out of disputes over what accommodations are reasonable, and what process should be employed to arrive at the determination. Failure to provide “a reasonable accommodation” is equivalent to an act of discrimination, whether or not the public entity or public official has discriminatory animus towards the disabled. Good faith is no defense to a claim that local government, or its employee, failed to provide “a reasonable accommodation.”

In New Jersey, the *Law Against Discrimination (LAD)* also protects individuals with disabilities. New Jersey courts generally follow federal ADA principles when construing LAD.

Federal Regulations

Existing public facilities built or last altered before January 26, 1992, are treated differently from public facilities built or altered after that date. “Grandfathered” facilities are subject to the following regulations:

Existing Facilities (28 CFR § 35.150)

“(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(b) Methods

(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.”

As the U.S. Supreme Court noted in *Tennessee v. Lane* (2004):

“Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes.”
New construction and alterations (28 CFR § 35.151).

Under ADA regulations, facilities that are constructed or altered after January 26, 1992, and new facilities and alterations generally must comply with the *ADA Standards for Accessible Design* and the *ADA Architectural Guidelines (ADAAG)*:

“(a) Design and construction.

(1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) Exception for structural impracticability.

(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(b) Alterations.

(1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities.

(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

(3) (i) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c).

(ii) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(4) Path of travel. An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

Disproportionality

(A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order -

- (1) An accessible entrance.
- (2) An accessible route to the altered area.
- (3) At least one accessible restroom for each sex or a single unisex restroom.
- (4) Accessible telephones.
- (5) Accessible drinking fountains; and
- (6) When possible, additional accessible elements such as parking, storage, and alarms.”

ADA Standards for Accessible Design

In 2010 the Department of Justice issued revised *ADA Standards for Accessible Design*, which incorporate the 2004 *ADA Architectural Guidelines (ADAAG)* and articulate enforceable scoping and technical standards for new construction. The standards and guidance for navigating the standards may be found on the ADA.gov website:

ADA Standards:

<https://archive.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.pdf>

ADA Guidance:

<https://www.ada.gov/law-and-regs/design-standards/standards-guidance/>

Disputes

Experience with local government construction teaches that disputes and litigation most frequently arise not because of misapplication of ADA regulations, but because of disregard of the regulations. This can be due to ignorance of their existence or a mistaken belief that they are preempted by other code.

Most code officials, engineers, architects, and builders in New Jersey are familiar with the *American National Standards Institute (ANSI)* guidelines, the *Council of American Building Officials (CABO)* building code, the *New Jersey Barrier Free Subcode (N.J.A.C. 5:23-7)*, and a host of other standards applicable to new construction. However, even the most competent professionals have only a passing familiarity with the ADA Standards or the ADAAG. Compounding the problem is the absence of any express legal requirement that construction officials deny a permit or a Certificate of Occupancy (CO) to a builder or local government whose plans run afoul of ADA regulations.

In many instances, strict compliance with all applicable ADA Standards and the ADAAG is all but impossible. This is why 28 *CFR* § 35.151(a)(2) sets forth a detailed “exception for structural incompatibility.” It is much easier to defend a design or building decision based on application of a regulatory exception when that exception has been considered before the project’s completion. Invoking the exception for the first time after a member of the public complains or sues will carry considerably less credibility with a judge – even if the exception appears valid.

Access to Public Programs and Services

The ADA and LAD also apply to programs and services offered to the public. New Jersey regulations (*N.J.A.C. 13:13-4.4*) enforcing LAD, provide that places of public accommodations are, “to the extent reasonable,” required to accommodate “a person with a disability in the most integrated setting appropriate to the needs of that person.” The law generally recognizes two broad categories of access claims against public entities: particularized claims of a failure to reasonably accommodate and generalized claims of an overall lack of access (*Lasky v. Borough of Hightstown, 2012*).

A claim that a building has been constructed incorrectly so that all individuals’ dependent on wheelchairs can’t move within it would qualify as a program inaccessibility claim. A claim by a disabled individual who requires a specific accommodation within the building – such as assistance reaching books within a library or using a public computer – would qualify as a “particularized” claim of a failure to reasonably accommodate. Particularized reasonable accommodation claims require that the individual requiring assistance asks for it and engages in an interactive process with the municipality before suing. Program inaccessibility claims do not require this type of advanced notice. Admittedly, the line between the two can be blurry.

“Tester” Lawsuits

Like most civil rights legislation, the *Americans with Disabilities Act* and the *Law Against Discrimination* permit an award of attorney fees to successful plaintiffs. While so-called “fee-shifting” legislation supports the laudable goal of increasing representation of traditionally marginalized members of society, it also encourages fraud masquerading as advocacy.

Since the passage of the ADA in 1990, attorneys across the nation have joined with serial litigants to sue multiple local governments and businesses for alleged ADA violations. The plaintiffs characterize themselves as “testers” – “private attorneys general” – enforcing the ADA on behalf of all similarly situated disabled individuals who may not have the resources to assert their rights.

A typical suit will take the defendant by surprise; no complaint or request for accommodation will have preceded it. Then, demand a few modest architectural modifications and demand payment of fees to the plaintiff’s attorney. As the cost to defend such litigation is likely to far exceed the demand, defendants frequently have no prudent choice other than acquiescence in the demand. Some commentators have decried this practice as a “shakedown.” Others have applauded the work of “testers” for filling the vacuum created by the Department of Justice’s “under-enforcement” of the ADA.

Risk Control

If a public entity has fifty or more employees, it is required to designate at least one responsible employee to coordinate ADA compliance (28 C.F.R. pt. 35, § 35.107(a)). Public entities should designate an ADA Coordinator regardless of the number of employees.

The ADA Coordinator is responsible for coordinating the efforts of the government entity to comply with *Title II* and investigating any complaints of inaccessibility. The name, office address, and telephone number of the ADA Coordinator must be provided to interested people.

The ADA Coordinator is often the main contact when someone wishes to request an auxiliary aid, or service for effective communication, such as a sign language interpreter or documents in Braille. A knowledgeable ADA Coordinator is charged with assisting people with disabilities. The coordinator is also responsible for investigating complaints of inaccessibility.

Designating an ADA Coordinator benefits local government by demonstrating a commitment to ADA compliance and ensuring consistent messaging, both within the organization and to members of the public. The ADA Coordinator can answer questions from staff and the public in a consistent manner with the help of resources such as the Department of Justice’s “ADA Best Practices Toolkit,” supplemental training where warranted, and advice from your local government attorney. The coordinator also can take the lead in auditing the programs, policies, activities, services, and facilities for ADA compliance.

The ADA requires every public entity to provide public notice of ADA rights (28 C.F.R. § 35.106). Federal regulations define the target audience as applicants, beneficiaries, and other people interested in the state or local government’s programs, activities, or services. An effective notice states the basics of what the ADA requires of the state or local government without being too lengthy, legalistic, or complicated. It should include the name and contact information of the ADA Coordinator. A template may be found on the ADA Toolkit website: <https://archive.ada.gov/pcatoolkit/chap2toolkit.pdf>.

Similarly, local governments with 50 or more employees are required to adopt and publish procedures for resolving grievances arising under *Title II* of the ADA (28 C.F.R. § 35.107(b)). Grievance procedures articulate a system for resolving complaints in a prompt and fair manner.

Neither *Title II* nor its implementing regulations describe what ADA grievance procedures must include. However, the Department of Justice has developed a model grievance procedure that is included within the ADA Toolkit on its website.

The grievance procedure should include:

- A description of how and where a complaint under *Title II* may be filed with the government entity.
- If a written complaint is required, a statement notifying potential complainants that alternative means of filing will be available to people with disabilities who require such an alternative.
- A description of the time frames and processes to be followed by the complainant and the government entity.
- Information on how to appeal an adverse decision; and
- A statement of how long to retain complaint files.

Once a state or local government establishes an ADA grievance procedure, it should be distributed to all agency heads. Post copies in public spaces of public buildings and on the government's website. Keep the procedures and the contact information updated. The procedure must be available in alternative formats so that it is accessible to all people with disabilities.

Selected Case Law

Castro v. Borough of Ridgefield (2007)

Facts: Manuel Castro, a quadriplegic homeowner, applied for a zoning variance to add a handicap ramp to his front yard. The Board of Adjustment held the hearing on the third floor of Borough Hall, which was built long before 1992. The building did not have an elevator. The Board did not propose an alternate location for the hearing and offered no assistance to Mr. Castro reach the third floor. His wife dragged him up the stairs. Once they reached the third floor, Mr. Castro was unable to use the bathroom because it was not handicap-accessible. The Borough claimed that it had no notice of Mr. Castro's needs because he did not request assistance, even though it knew that his disability was the basis of his application.

Decision: A federal jury found the Borough liable for failing to provide reasonable accommodations to attend the meeting, notwithstanding the age of the building and the absence of a formal request for assistance.

Comment: A public entity's responsibility to provide reasonable accommodations to access its programs and services extends to buildings and facilities that predate the enactment of the ADA. An ADA Coordinator should ensure proper training of all municipal officials and employees so they are sensitive to the needs of the disabled, even when not expressly the subject of a request for assistance.

Heusser v. N.J. Highway Authority (2008)

Facts: A building maintenance worker for the N.J. Parkway, who had a Commercial Driver's License, was promoted to a position in the road department. Most of the functions were similar in the two positions including truck operations, lawn care and the like. However, this employee had Cerebral Palsy and stumbled several times during the first two weeks of a six-month probationary period. As result, he was demoted back to his original position when his supervisors determined that there was a potential safety issue.

The plaintiff challenged the action in court under the *Americans with Disabilities Act* contending that the Highway Authority failed to even discuss possible accommodations. He also provided an expert witness who testified that the employee could perform most, but not all, functions in the road department.

Decision: The N.J. Supreme Court ruled that the Highway Authority was liable because it failed to enter an interactive dialogue to determine if reasonable accommodations were available in this case. The court awarded the employee compensatory damages of \$15,000 and awarded his attorney \$456,000. This case is especially important because the N.J. Supreme Court discussed how "fee shifting" should be calculated.

Comment: The ADA does not require unreasonable accommodations, or that an employer ignore safety concerns. However, The ADA does require that management have an interactive dialogue with the employee. Further, in this case the court was impressed by the fact that in his earlier position the employee already performed most of the functions of the road department. These discussions are complicated and should be left to professionals.

Stoney v. Maple Shade (2012)

Facts: A disabled person filed suit against the Township alleging that she was not afforded proper access to the Municipal Building, downtown sidewalks, and curb cuts, or the park. Following a trial, a jury rejected all claims but those involving her inability to access the park and a bathroom in the Municipal Building. The jury declined to award damages, and the court denied her request for an order compelling the Township to make improvements to the park. The disabled person appealed.

Decision: The Appellate Division held that the trial court erred in refusing to grant injunctive relief without considering all relevant factors. While the plaintiff in this case was arguably a "tester" in that she resided in another state, she still had standing because she claimed to visit Maple Shade, where her attorney resided, several times a year. Her failure to communicate her accessibility concerns to the Township's ADA Coordinator was fatal to all of her claims except those involving the park, where recent repaving of a path failed to conform to the ADA Guidelines.

Comment: Her attorney was awarded substantial legal fees.

Lasky v. Moorestown (2012)

Facts: A paraplegic filed a lawsuit against the Township, alleging that it discriminated against him by not providing access to a park. A jury ruled in favor of the Township and plaintiff appealed.

Decision: The Appellate Division ruled that the jury had ample basis to dismiss plaintiff's claim, based on evidence that had the plaintiff requested assistance, the Township would have responded enabling him ready access to the park.

Comment: At trial, the plaintiff was confronted with the numerous lawsuits he had filed, through the same attorney, against other local governments and businesses in New Jersey and elsewhere. His failure to demonstrate a legitimate desire to use the park beyond testing it for ADA compliance, combined with the ADA Coordinator's testimony regarding the Grievance Procedure which plaintiff did not use, buttressed the Township's defense.

Robles v. Domino's Pizza (2019)

Facts: Guillermo Robles, a blind person, sued Domino's Pizza because he was not able to order food through their website. Domino's Pizza extensively advertises its website, but its program was not compatible with common screen reading software. Domino's Pizza argued that the ADA applies to physical locations and that the Federal Government has not promulgated standards for website accessibility.

Decision: The Appeals Court ruled that the ADA also applies to services and products, and that the lack of Federal standards is not a defense for failure to provide reasonable accommodations.

Comment: Considering the growing number of website-accessibility lawsuits, local governments should be aware that their websites, just like their buildings, are subject to ADA requirements. We strongly recommend that local governments speak with their attorneys and IT professionals about bringing their websites into compliance. It would also be prudent to post a prominent notice on the web site to assist the public with accessibility issues. Specifically:

"If you have any trouble with accessing information contained within this website, please contact [insert name of website administrator with telephone number and email address]."

Richter v. Oakland BOE (2021)

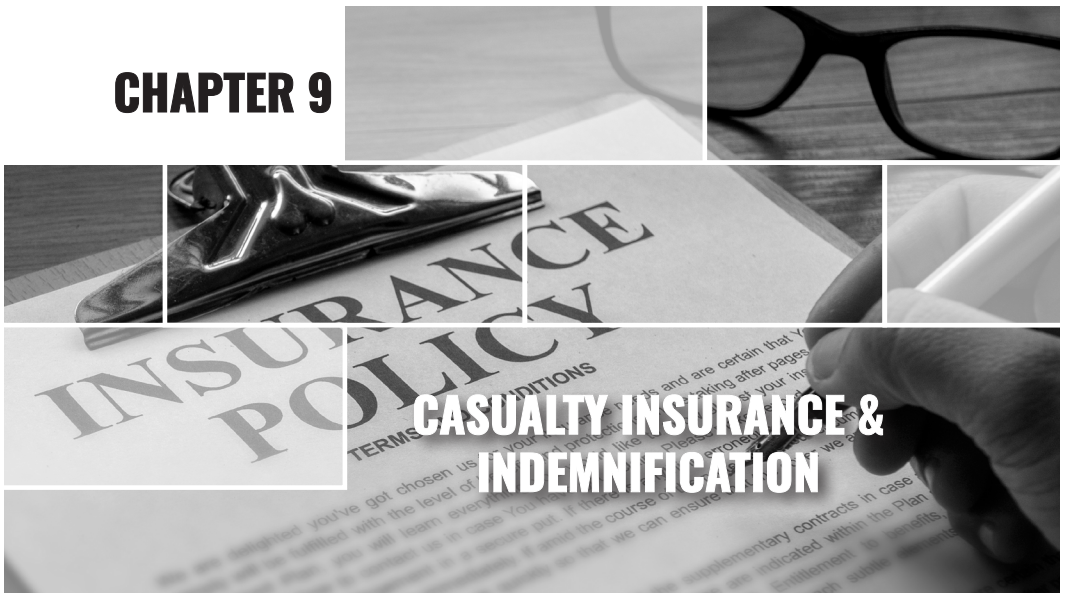
Facts: A science teacher with a condition that impacted her blood sugar level requested that her lunchroom assignment be changed so that she could eat earlier. The principal said he would investigate it, but did not make the change. One day, the teacher suffered a hypoglycemic event in front of her students, lost consciousness, and struck her head on a lab table. She was transported to a hospital for treatment. Prior to that, she had never passed out at work. The teacher collected workers' compensation and sued the BOE under New Jersey's *Law against Discrimination (LAD)* for failure to accommodate her diabetic condition.

Decision: The N.J. Supreme Court ruled that the teacher did not need to show an adverse employment action such as demotion, termination, or the like to proceed in a failure to accommodate action under LAD. The court also ruled that the workers' compensation sole recourse provision does not bar a LAD claim, although the employer could reduce the LAD claim by the amount of the workers' compensation.

Conclusion

Independent of the risk of lawsuits, New Jersey local governments have a duty to be proactive in making facilities and programs available to people with disabilities. All local governments should appoint an ADA coordinator and conduct an audit to determine where changes in facilities and programs should be implemented. They should also post a code-compliant ADA Notice and establish a code-compliant ADA Grievance Procedure. In the event of a lawsuit, they should work closely with defense counsel.

CHAPTER 9



The discussion in this chapter is general in nature and is not a binding insurance policy.

Background

Local governments, along with their officials and employees, enjoy broad immunities to protect them from liabilities. In this chapter, we will discuss the role of insurance and other forms of indemnification when the immunities do not apply.

Insurance coverage issues can be complex and very fact sensitive. It is important that local governments retain a knowledgeable risk manager for advice. Holes in coverage can also occur if the terms and conditions of individual policies are not coordinated. For this reason, JIFs generally require members to join for all lines of insurance to minimize these gaps.

Local elected officials enjoy all immunities and protections afforded to governmental employees. Officials are considered employees even if they are not paid. The only practical difference between an elected official and any other employee is that officials first elected after July 1, 2007, are no longer eligible to join the regular pension plan, but may join the defined contribution plan.

Some volunteers are also covered by the property and casualty insurance policies. Specifically included are volunteer firefighters, first aid workers, and reserve or auxiliary police officers (*N.J.S.A. 34:15-43*).

Non-emergency volunteers may also be covered for most of the local government's insurance except workers' compensation depending on the circumstances. Check with your risk manager to determine the coverage for volunteers.

- **Governmental Volunteers:** The policies usually cover volunteers for any organization that is “controlled” by the local government and subject to both the *Fiscal Affairs Law* and the *Public Contracts Law*. Independent utility, housing, and other “authorities” that adopt their own budgets usually have their own policies.
- **Non-Profit Volunteers:** Some local governments also include in their insurance programs non-profit organizations that perform functions that are commonly administered by local governments. The most common of these non-profits are “recreation associations.” Coverage is not automatic and is subject to special application and reporting procedures. Your Risk Manager may also offer outside insurance coverage that will work together with JIF coverages to provide the broadest protection. See the applicable coverage bulletin on the NJMEL.org website.

When is an official, employee, or volunteer “on duty”?

As a general principle, a local government’s insurance policies and indemnification procedures only apply if the official, employee, or covered volunteer is “on duty,” meaning that all of the following are met (*Golaine v. Cardinale, 1976*):

- The individual was acting in a matter in which the local government has an interest, and
- The individual was acting in the discharge of a duty imposed or authorized by law, and
- The individual was acting in good faith.

Career and volunteer first responders are “on duty” when they respond to an emergency that happens in their jurisdiction outside of normal duty hours, even if not specifically called out. They are also considered to be “on duty” if they come upon an emergency outside their regular jurisdiction.

Electioneering is not covered because it is not in the discharge of duty. It is illegal for an employee to campaign while on duty. For the same reason, election opponents who sue each other for defamation will not be protected by their local government because they are not “on duty” while campaigning.

Workers’ Compensation Insurance

Workers’ Compensation represents half of the cost of property-casualty insurance for the typical local government. The law mandates coverage for all employees and certain volunteers for on-the-job injuries and occupational illness on a “no-fault basis” (Chapter 1).

The *Workers’ Compensation Act* also requires all employers to demonstrate their ability to provide for their financial responsibilities to injured employees by either purchasing an insurance policy from an approved insurance company or qualifying with the N.J. Department of Insurance as a self-insurer. Governmental entities in

New Jersey are not required to seek approval to self-insure and have the additional option of joining a joint insurance fund. This option results in considerable cost savings.

Almost all workers' compensation policies have "statutory" limits which means that they cover the employer's obligations under the Act subject to the limits provided by New Jersey law. The purpose of the policy is to protect the employee, even if the employer becomes insolvent or is no longer able to meet its "statutory" obligations. A governmental entity is still responsible to pay all claims due under the Act, even if it decides not to purchase coverage.

Liability Insurance

Liability claims represent 30% of the cost of property-casualty insurance for local government. This coverage typically consists of seven primary insurance policies, many provided by the same insurer that also covers workers' compensation. Note that the insurers at the excess level are usually different.

Liability Coverage	Insurer
General Liability	Primary Casualty Insurer
Automobile Liability	Primary Casualty Insurer
Police Professional Liability	Usually the Primary Casualty Insurer
Public Officials, Land Use, and Employment Practices	Specialty Insurer
Environmental Liability	Specialty Insurer (Chapter 12)
Cyber Liability	Specialty Insurer (Chapter 13)
Aircraft Liability	Specialty Insurer

- All these policies have an "other insurance" exclusion to avoid duplication. Under this clause, an insurer will not cover what is normally insured under another coverage, even if the local government decided not to purchase the other policy.
- These policies do not cover liabilities assumed under contracts unless there is a special provision to include these specific liabilities. It's good practice to ask your risk manager to review all significant contracts.
- The policies usually do not cover suits for injunctive relief, in other words a suit that demands that the governmental entity does something or stops doing something. Generally, insurance policies only cover claims for monetary damages and are not meant to be a substitute for the general legal budget.
- While General Liability policies cover defamation under limited circumstances, they exclude lawsuits between officials, employees, and volunteers. For example, if two elected Council Members get into a

shouting match at a meeting and sue each other for defamation, they can't look to the policies for defense and indemnification.

- The insured has a duty to cooperate in defending the claim. Deliberate failure can nullify coverage.
- Liability policies do not cover punitive and similar damages because these are not insurable under New Jersey law.

Duty to Defend

In addition to paying judgments and settlements, liability insurance policies also pay the cost of the defense. Usually, the insurer has the right to select the attorney who will provide this defense.

In the case of Joint Insurance Funds (JIFs), defense attorneys are selected by a process that begins with a periodic request for competitive proposals released by each Fund Attorney. After reviewing the responses, the Fund Attorney recommends a panel that is appointed annually by resolution of the Commissioners at the January re-organization meeting. After the panel is selected, individual cases are assigned to defense attorneys by the Fund Attorney, or by the insurer in the case of specialty insurance coverages.

- The duty to defend applies to only those causes of action that would be covered if the claim is valid (*Burd v. Sussex Mutual, 1970*).
- When multiple causes of action are stated, the duty to defend continues until every covered claim is eliminated (*Mt. Hope Inn v. Travelers Indemnity, 1978*).
- Where an insurer exercises full control of the claims settlement process, the insurer has a duty to exercise good faith in settling claims (*Rova Farms Resort v. Investors Insurance, 1974*).
- An insurer has no duty to reimburse an insured for defense costs incurred before the insured reports the claim (*SL Industries v. American Motorists, 1992*).
- Policies do not cover defense costs for criminal matters, even if you are acquitted.

Special Liability Reporting and Coverage Requirements

JIFs and Insurers commonly require precautions before insuring dangerous activities. Seek the advice of your Risk Management Consultant. Guidelines, requirements, forms, coverage bulletins, and other resources related to risk management and issues below are available on the NJMEL.org website.

- **Special Events:** Local governments either host or become involved in a wide range of special events including parades, community picnics and fairs, marathons, craft festivals, concerts, etc. These events require careful planning to minimize legal exposures.
- **Fireworks Displays and Amusement Rides:** The contract with the display or ride provider must be approved by the JIF or insurer prior to the event. The provider must execute a “hold harmless agreement” and attach certificates of insurance for Workers’ Compensation, General Liability, Umbrella/Excess Liability, and Auto Liability. The MEL has established minimum policy limits and a standard reporting form.
- **Skateboard Facilities:** To include a skateboard facility in your insurance program, it must be designed by a qualified architect or engineer, and the plans must be approved by the governing body before construction can begin to qualify for design immunity.
- **Employed Attorney Professional Liability:** Most attorneys that represent local government are in private practice and are required to obtain their own Professional Liability insurance. Local governments may secure an attorney’s professional coverage as a part of the organization’s insurance only if the attorney is a full-time employee of the governmental entity as opposed to a law firm. The application for coverage must be approved by the JIF before coverage is granted.

Automobile Insurance

Local government is subject to the same auto liability laws as other vehicle owners, except police and firefighters who have special immunities while responding in good faith. Just as in the case of workers’ compensation, New Jersey law requires all vehicle owners to demonstrate their ability to provide for their financial responsibilities by purchasing insurance or by qualifying with the Department of Banking and Insurance as a self-insurer. Governmental entities are not required to seek approval to self-insure and have the additional option of joining a Joint Insurance Fund (JIF).

Auto policies for local governments usually include all vehicles that are owned, leased, or borrowed including vehicles not specifically listed in the policy. The policy covers all permitted drivers, even if the driver is not named in the policy. The policy also provides excess limits for all vehicles owned by others while being used on governmental business. For example, if the Building Inspector has an accident while driving a private car on official business, the Inspector’s policy covers the accident until the limits are exhausted. At that point, the local government’s policy is triggered thereby protecting the governmental entity.

There is often confusion when employees are injured in car accidents. As indicated in Chapter 1, the courts have ruled that an employee is only covered by

workers' compensation while on the employer's business. There is no coverage under workers' compensation if the employee is on personal business when an auto accident occurs, even if the employee is driving an employer owned vehicle (*Chisholm v. Ocean County, 1989*). However, in this situation the employee and any passengers are eligible for PIP (personal injury protection) by both the employer's and the employee's Auto Insurance policies. Further, an employee is also covered by workers' compensation while operating a privately owned vehicle on the employer's business. The coverage trigger for workers' compensation is being on the employer's business.

Indemnification Ordinances

An important tool to further protect officials, employees and volunteers is to adopt an indemnification ordinance. Specifically, *Title 59:10-4* provides:

“Local public entities are hereby “empowered” to indemnify local public employees consistent with the provisions of this act. A local public entity may indemnify an employee of the local public entity for exemplary or punitive damages resulting from the employee’s civil violation of State or federal law if, in the opinion of the governing body of the local public entity, the acts committed by the employee upon which the damages are based did not constitute actual fraud, actual malice, willful misconduct or an intentional wrong.”

Note that “local public entities” are “empowered” to indemnify while the equivalent provisions for state and school employees “require” indemnification. There have been cases where a Municipal or County official was denied indemnification because the opposite party had control of the Council. Like all actions of a local public entity, the governing body's decision is subject to being overturned if shown to be arbitrary and capricious. In other words, you cannot indemnify one official and not another under similar circumstances.

There are special statutes that pertain to indemnification of Police Officers and Municipal Clerks. The subject of indemnification was discussed in *Zirkle v. Fairfield (2015)*.

The NJMEL.org website includes a model indemnification ordinance with several optional provisions. One optional clause allows indemnification for punitive damages at the governing body's prerogative. The second model clause prohibits indemnification for punitive damages. Considering the long statute of limitations for some personal liability exposures, consider adopting a broader version of the indemnification.

Homeowner's Policies

Standard Homeowners Insurance or Personal Umbrella Insurance policies often exclude coverage for officials while performing their official duties. Talk to your

personal insurance agent about special policies that are specifically designed for public officials. The best practice is to immediately report any potential claim.

Risk Management Consultant

One of the responsibilities of the Risk Management Consultant is to review contracts for issues with the indemnification and insurance provisions. Vendors and service providers frequently insert language that puts local government at risk in the event of vendor non-performance or claims caused by vendor negligence. Check with your Risk Manager and JIF Fund Office for model insurance and indemnification guidelines.

Selected Case Law

Rova Farms Resort v. Investors Insurance (1974)

Facts: A guest at a resort was severely injured when he jumped off a diving board into murky water. Attorneys for the resort urged the insurance company to settle the case, but the insurer decided to take the matter to the jury hoping that the award would be less than the policy limits. The jury awarded the injured guest more than expected and the resort had to pay the difference. The resort sued the insurer alleging bad faith.

Decision: The N.J. Supreme Court ruled that where an insurer reserves full control of the claims settlement process, the insurer has the duty to exercise good faith. By ignoring the insured's attorneys, the insurer became responsible for the amount the jury award exceeded the policy limits.

Werner Industries v. First State (1988)

Facts: Werner Industries purchased a primary liability policy with a \$500,000 limit from one insurer and an excess policy from a second insurer. The first insurer became insolvent, and the Guarantee Fund only provided \$300,000 in coverage. Werner contended that even though the language in the second policy was clear that coverage only stated when the claim exceeded \$500,000, the excess policy should start coverage at \$300,000 in this case because Werner had a reasonable expectation that there would be no gap between the primary and excess policies.

Decision: The N.J. Supreme Court ruled against Werner Industries. If an insured's reasonable expectations contravene the plain meaning of a policy, the plain meaning can only be overcome if the policy is inconsistent with public expectations and commercially accepted standards.

Comment: This is a major decision that reaffirmed that the courts are not inclined to re-interpret clear policy language for the benefit of either the insured or the insurer.

Loigmann v. Monmouth County (2000)

Facts: A Prosecutor was held liable in a defamation action filed by an Assistant Prosecutor who was awarded punitive damages. The governing body paid the Prosecutor's defense costs and the award. A citizen sued contending that the governing body's actions were not authorized under *Title 59*.

Decision: The Appeals Court ruled that the Freeholders are within their rights to defend and indemnify the prosecutor. *Title 59* permits broad discretion in deciding whom to indemnify and under what circumstances so long as the decision is not arbitrary and capricious.

Comment: As indicated before, governing bodies should seriously consider adopting an ordinance that establishes indemnification and defense policies.

McCurrie v. Kearney (2002)

Facts: There was a change in party control and the Clerk (who was closely associated with the outgoing administration) negotiated a severance package with the incoming governing body. A citizen sued to block the agreement, and the Clerk hired an attorney to defend the Clerk's interest in the suit. The Town agreed to pay the clerk's legal bills. The citizen then argued that it was improper for the Council to cover the Clerk's legal costs. The Appellate Court agreed with the citizen on the grounds that Clerks have a special indemnification statute that is not broad enough to cover the Clerk's legal costs in this case. The matter then went to the N.J. Supreme Court.

Decision: The N.J. Supreme Court overturned the Appellate Court and ordered the payment of the Clerk's legal bills. The Court agreed with the Appellate Court that the special statute concerning Clerks did not cover the legal costs in this case, but the Supreme Court then ruled that the governing body could still pay the bills under the broader indemnification language in *Title 59*.

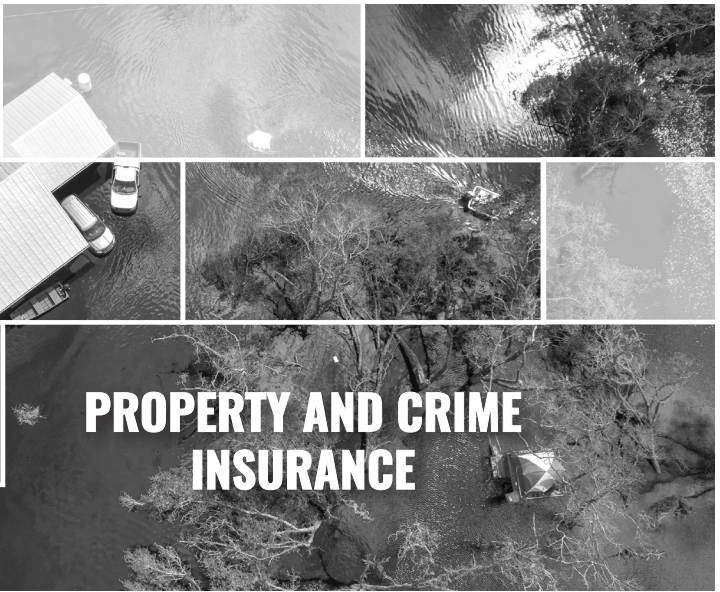
Comment: This decision is an excellent discussion of the interrelationship between the various laws on indemnification.

Ferentz v. Frederick (2019)

Facts: A Police Officer sued for damages after she was fired for cause. When her boyfriend was elected Mayor, the council reinstated and promoted her to Chief. Over the warning of the insurer, the Council adopted a resolution exonerating the now Chief, making it all but impossible to defend the previous Mayor. The insurer then denied coverage to the Town but continued to defend the former Mayor. A jury awarded the Chief a seven-figure sum and the Town sued the insurer to pay the award.

Decision: The Appeals Court ruled that the actions of the new Mayor and Council violated their duty to assist in the defense and therefore nullified coverage. While the governing body was within its right to reinstate the Police Officer, the resolution went too far.

CHAPTER 10



PROPERTY AND CRIME INSURANCE

The discussion in this chapter is general in nature and is not a binding insurance policy.

Background

Property losses represent approximately 24% of the cost of property-casualty insurance for local government and increased 107% in the five years since 2020. Property insurance costs are increasing at this dramatic rate because weather patterns are changing. The number of major weather-related natural catastrophes worldwide has almost tripled since 2000. While these figures are largely comprised of flood and wind events, other major risks are becoming a significant portion of the loss, such as wildfires, landslides, and freezes. Property insurance premiums are also indexed to replacement values that have increased because of supply chain issues and the shortage of labor.

Nowhere is the rising number of natural catastrophes more evident than North America, where these events have seen a fourfold increase over the past three decades. The increase is entirely weather related. Here in New Jersey, we were hit with Hurricane Irene in 2011, Superstorm Sandy in 2012, and Hurricane Ida in 2021.

Since 1900, sea levels have increased an average of 8 inches and temperatures have increased an average of 1 degree Celsius (1.8 degrees Fahrenheit). This change is expected to accelerate over the remainder of this century and sea levels could rise by as much as another 3 feet by 2100. Over the last 30 years, precipitation has also increased 30% in the Northeast. Of special concern is the fact that precipitation has been coming in heavier downpours.

Property insurance covers government assets and vehicles for a wide range of perils including fire, flood, earthquake, etc. The policy also covers collision damage to

motor vehicles. Each year, values must be updated to make sure property coverage is adequate. Your Risk Manager is responsible for this process.

The Safety Committee should arrange for a semi-annual inspection of all facilities to identify and correct fire and other property hazards. JIFs provide this service. Much of this is basic housekeeping. However, the inspection must also include the fire suppression systems (sprinklers, etc.), emergency exit lighting, generators, and other critical equipment.

Local government has special vulnerabilities that must be addressed. For example, garbage trucks should not be stored inside garages while full. The capital plan should include funds to update electrical wiring, heating, plumbing, and roofs at least every 20 to 25 years.

What makes local government different is that it must remain operational during emergencies. As part of its evaluation of local vulnerabilities, the Local Emergency Planning Committee (LEMC) needs to evaluate the exposures, both man-made and natural, for each facility.

Coverage:

While each property insurance policy has different terms, generally the policy is only triggered when there is a physical loss to property caused by a covered peril. Coverage issues are technical, and local governments should seek the advice of a qualified Risk Manager. Coverage usually includes:

Most Common Perils

- Fire including arson.
- Flood, windstorm, lightning, and other weather-related events.
- Motor vehicle collisions and other damage.
- Failure of mechanical and electrical equipment.

Perils Not Covered

- Flood within the flood hazard zone.
- Wear and tear along with faulty construction.
- Pollution, disease, and pathogens.
- Theft by officials, employees, or volunteers.

Types of Property Covered

- Buildings and contents.
- Mechanical and electrical equipment.
- Motor vehicles, including emergency vehicles and attached emergency equipment.
- New construction and buildings under renovation.
- Outdoor property (light poles, signs, benches, etc.).
- Synthetic turf fields.
- Computer equipment.
- Waterborne features (boardwalks, piers, docks, etc.).
- Valuable papers and records.

Types of Property Not Covered

- Land, beaches, and related improvements (sidewalks, roadways, greenery, etc.).
- Sanitary and storm sewers.
- Watercraft and aircraft.
- Personal property and personal vehicles owned by others including employees.
- Electronic data, programs, and software.
- Money and securities.

Coverage Considerations

- **Natural Catastrophes:** The largest losses under the property policy are natural catastrophes including flood, storm surge, wind, hail, lightning, and earthquake. While policies usually have significant coverage sub limits for these exposures, amounts not covered by insurance are often reimbursed by *Federal Emergency Management Agency (FEMA)*. Flood coverage in high hazard zones (Zones A, E, etc.) has a much higher deductible that corresponds to the limits available from the *National Flood Insurance Program (NFIP)*. If a local government fails to purchase available NFIP Coverage, it may find itself responsible for a considerable portion of the loss.
- **Vehicles:** The property policy also covers damage to vehicles owned or leased by the insured local government. The policy does not cover damage to vehicles owned by employees or volunteers even if they are being used on official business at the time of the accident.
- **Boiler and Machinery:** This specialized insurance is now rolled into the property policy to avoid coverage gaps. Boiler and machinery insurance also covers “objects” such as heating and air conditioning units, generators, electrical equipment, and large motors. A significant aspect of this coverage is that it includes the safety inspections required by state law.
- **Newly acquired property:** While most newly acquired property is automatically covered by the policy, there are exceptions such as vacant buildings. Because each insurer has different requirements, it is good practice to report all acquisitions and disposals to the Risk Manager.
- **Valuations:** Insureds are required to update their property listings and valuations annually. Property is usually valued at “replacement cost,” which means the insurer will pay to repair or replace the damaged property with “like kind and quality.” Property valued at “replacement cost” will only receive this higher settlement if it is repaired or replaced. Otherwise, the insured will receive “actual cash value” which means “replacement cost minus actual depreciation.” Some property such as non-emergency vehicles and vacant buildings are usually insured for “actual cash value.”

Many vacant buildings are only insured for debris removal when the insured intends to demolish the structure to make way for open space or a new building.

- **Historic Buildings:** Structures on federal or state historic registries may be insured for special replacement cost that contemplates the materials and special contractors to repair or replace these buildings. To be eligible for this coverage, the higher valuation must be reported. Otherwise, the insurer is only responsible to repair or rebuild with modern materials. For example, if a historic town hall is destroyed, the insurer will replace it with a modern building unless it has been valued as a historic structure.
- **Errors in Valuations:** Inadvertent failure to list a property or mistakes in valuations will not impact claim settlements unless the error was intentional. However, failure to report and value certain special risks will nullify this “errors and omissions” clause in the case of special properties such as dams, bridges, and vacant buildings.
- **Pollution:** Damage caused by pollution is not covered by the property policy, but may be covered by the local government’s pollution insurance (Chapter 12).
- **Contamination:** Most damage caused by contamination is not covered including mold, mildew, fungus, bacteria, virus, pathogens, and other pollutants. However, there may be coverage if the contamination was caused by a “preceding covered loss.” For example, mold in the attic is not covered unless caused by a roof leak that was the result of an otherwise covered windstorm or lightning strike.
- **Faulty Work:** Damage caused by faulty work is not covered. However, the policy may cover “ensuing loss.” For example, the policy will not pay to repair a support beam that was cut to the wrong size, but may pay to repair other damage caused when the faulty beam failed.
- **Corrosion, Wear and Tear:** While “depletions” over time are not covered, the “ensuing loss” coverage may apply depending on the facts. For example, if an old pipe bursts, the insurance will pay for the subsequent water damage, but not the replacement of the pipe itself.
- **Builder’s Risk:** The policy covers buildings while under construction. Depending upon the circumstances, coverage for builder’s risk may require prior approval. Check with your Risk Manager for the reporting requirements.
- **Business Interruption and Extra Expense:** If property is unusable because of a covered loss, the policy will also pay the extra expenses

incurred to maintain operations during a reasonable restoration period. The policy will also reimburse any lost profits if the damaged property was income producing, such as an apartment building owned by a housing authority. However, business interruption and extra expense only applies to losses to covered property. This coverage will not reimburse a municipality for lost tax revenue caused by the destruction of buildings not otherwise covered by the policy. Nor will the policy pay for lost beach revenue because sand is not covered property. While these losses are not covered by insurance, they are often reimbursable by FEMA.

- **Underground Piping:** Sanitary and combined sanitary/storm sewers are not covered. Other types of underground piping, including storm sewers, may be insured within a 1,000-foot radius of covered buildings or structures. However, the policy does not pay for the excavation costs to identify the cause of the damage unless such investigation determines the cause of damage to be covered in the policy.
- **Fine arts:** Individual JIFs have special policies concerning the reporting and coverage of fine arts.

Crime Policies

Property policies exclude coverage for monies and securities as well as theft by officials, employees, and volunteers. While the crime policy covers these exclusions, the limits are considerably lower than other policies. Check with your Risk Manager to determine if additional limits are necessary to provide adequate protection.

Statutory Bonds: The crime policy provides the faithful performance bond required by the Municipal Treasurer (or Chief Financial Officer performing duties of the Treasurer), Library Treasurer, Utility Collector, and Tax Collector. These bonds protect the local government if the official steals or misappropriates public funds. *NJAC 5:30-8* provides tables of bonding levels based upon the entity's revenue. The auditor will advise of the levels required for the various positions. The Risk Manager must be kept informed to make sure the limits are adequate.

The MEL requires the following information every three years to underwrite this position:

- Completed Statutory Bond application.
- Credit score of 600 or above.
- No pending bankruptcies, insolvencies, or similar financial conditions, including in any organization where the applicant has at least 10% ownership.
- Completed FCRA Consumer Disclosure and Authorization form.

Appeals: Should the individual not be automatically approved, there is an appeal process to a panel comprised of the three senior-most MEL Commissioners. The appeal must include the individual's explanation of the situation along with a letter of recommendation from the member employing the individual.

Social Engineering: Cyber criminals have become quite adept at duping local governments into voluntarily releasing assets. The most common tool is a fake e-mail that looks to be from a legitimate source. Chapter 13 has more detailed information on this topic and a list of best practices the MEL requires to prevent these losses, and additional materials can be found at NJMEL.org and CyberJIF.org. Failure to adhere to these practices may lead to an increase in deductible, claim denial or coverage termination.

Selected Case Studies:

Superstorm Sandy (2012)

Facts: 125 MEL member towns suffered flood damage during a storm that was officially just below a hurricane when it came on shore. In other states, claims of this magnitude often take a decade to resolve and usually involve considerable litigation.

Decision: The MEL established a special claims committee and appointed a retired judge as the arbitrator. The excess insurer agreed to this process. The excess insurer also agreed to pay for a claim documentation system that member municipalities could use to present their claims to FEMA. Every claim was resolved without litigation.

CHAPTER 11



MANAGING A JOINT INSURANCE FUND

Background

Since the mid-1980s, the risk management revolution for governmental entities in New Jersey was led by the 19 JIFs that created the Municipal Excess Liability Joint Insurance Fund (MEL). From its inception, the MEL organization has reduced property/casualty costs for its members by at least half. Much of this reduction comes from the fact that member employee accident rates have been reduced by over 65%. At the same time, non-claim costs have been cut to the lowest in the country. The average non-claim cost for MEL members is under 20% compared to 31% for commercial property casualty companies.

Joint Insurance Funds (JIFs) are governmental entities that are governed by member appointed commissioners who make all decisions. As a result, the commissioners go considerably beyond commercial insurers to provide service to the members. For example, when the MEL was first established, a major reinsurer offered a lower property insurance rate if the program did not include the shore communities. The MEL's first Chairperson Joseph Giorgio, who also served as the Manager of Hanover Township (Morris County), flatly rejected the idea stating that all JIF members must look out for each other.

Most towns also prefer to join local JIFs that insure their neighbors. This gives local officials greater control over their JIFs and substantially improves safety and claims control. Because JIFs are local governments, their members may simply renew every three years without seeking quotations from multiple insurance providers. Under the public contracts law (*N.J.S.A 40A:11-5 (6)*), a governmental entity does not need to seek competitive quotations before entering a contract with another governmental entity such as a JIF.

Under state law, JIF Commissioners must be either local elected officials or employees of member local units. At the reorganization meeting each January, the Commissioners elect officers and an Executive Committee that meets monthly to decide the Fund's business. These meetings are subject to all laws impacting local governments. Over 250 local officials participate each month in the governance of their local JIFs. As a result, they are continually exposed to the importance of safety and claims control.

Solvency

Another advantage of being a governmental entity, joint insurance funds are not required to contribute capital and surplus up front, making it much easier and less expensive to establish the organization. If the ultimate claims cost results in a profit, the surplus goes back to the membership.

One of the issues when JIFs were first formed was the insolvency of commercial insurance companies. To ensure that JIFs remain solvent if claims exceed estimates, members can be assessed based on their share of the original budget. Fortunately, this has proven to be rare.

Since claims can reopen years or even decades after an occurrence, there is no time limit on supplemental assessments. When enacted they are usually payable over many years so that the impact on local government budgets is minimal. Therefore, each member's final cost is no less or more than its pro rata shares of the JIF's final cost based on each member's original contribution for the accident year in question. This responsibility is shared jointly and severally so that employees and other injured parties have assurances that claims will be paid.

Regulation

While JIFs are not insurance companies, they are closely regulated by the state.

- **Department of Banking and Insurance (DOBI):** DOBI is responsible for technical insurance related regulation. DOBI requires extensive annual filings including budgets, audit statements, contracts as well as insurance and excess policies. Every five years, DOBI assigns a team of examiners to the JIF office for four or five months to review the financial records, meeting minutes, contracts, excess and reinsurance agreements, and other critical documents. DOBI also audits a sample of claims and engages their actuary to render an independent opinion on the JIF reserves.
- **Department of Community Affairs (DCA):** DCA focuses on JIF compliance with laws and regulations concerning governmental operations such as the *Fiscal Affairs Act*, *Public Contracts Law*, *Local Government Officials Ethics Act*, *Open Public Meetings Act*, and the *Open Public Records Act*. DCA also receives copies of all filings made to DOBI and has joint authority concerning the approval of JIF By-Laws and Plans of Risk Management.

- **New Jersey State Controller:** JIFs are required to file any contract with the Controller that exceeds \$2 million and must seek prior approval for any contract that exceeds \$10 million. JIFs are also required to file all financial audit reports with the Controller’s office.
- **New Jersey Department of Labor and Work Force Development and the New Jersey Department of Health:** The JIF works closely with the members to assist their compliance with the regulations promulgated by DOL and DOH concerning employee safety. The JIFs also assist members to comply with various laws concerning employment practices. As indicated before, the MEL developed and updates a comprehensive Employment Practices Risk Control Program that has been adopted by over half of the state’s local units.
- **New Jersey Department of Environmental Protection:** The E-JIF provides the technical engineering assistance and training to assist members comply with DEP regulations.

JIF Commissioners should be familiar with four documents:

1. **Title 40A:10-36** is the enabling statute. Note that Title 40A is the municipal code, not the insurance code. Legally, JIFs are not considered as insurance companies. Instead, a JIF is an inter-local governmental entity that is responsible for the insurance program of its members. The enabling statute even exempts JIFs from the insurance code (*Shapiro v. Middlesex JIF, 1996*). A copy of the enabling statute can be found on the NJMEL.org website.
2. **NJAC II: 15 – 2** is the regulation adopted jointly by the Department of Community Affairs and the Department of Banking and Insurance. While there are JIFs in almost every state, New Jersey has the most comprehensive regulations.
3. **The JIF Bylaws** establish the basic structure of a JIF. The bylaws must be ratified by the governing bodies of the member local units.
4. **The Plan of Risk Management** fleshes out the details. This plan is adopted each year by the JIF governing body.

Bylaws

This document includes all important provisions in the statute and regulations. Most JIFs in New Jersey have adopted the model bylaws developed in the late 1990s.

Article 1: Definitions

This section is mostly boilerplate that mirrors the state regulations. Several definitions are especially important.

“Administrator” and **“Servicing Organization”** - Under the regulations, there are three ways to administer a JIF:

1. Hire employees to operate the Fund.
2. Allow one member to provide the administration as “Lead Agency.”
3. Retain an outside administrative firm to act as Executive Director and hire other “Servicing Organizations” to perform those functions that are not assigned to the Executive Director.

Almost all municipal JIFs retain an outside administrative firm so that they do not need to deal with the personnel issues required when hiring employees.

“Indemnity and Trust Agreement” - Under the law each member must agree to be jointly and severally liable for JIF’s obligations. As a result, JIFs are backed by the full faith and credit of all its members. This definition also limits the term of membership to a maximum of three years. Each JIF can establish its own minimum period of membership up to this maximum. Many JIFs have opted for three years to provide for stability in membership from year to year. A model agreement approved by DOBI is available at NJMEL.org.

Article 2: Membership

To apply for membership, a local unit must adopt a resolution that accepts the JIF bylaws and authorizes the execution of the indemnification and trust agreement discussed above. The application must be approved by a majority vote of the Fund Commissioners, or a two-thirds vote of the full authorized membership of the Executive Committee.

The prospective member must also meet any territorial or similar limitations established in the bylaws. Many JIFs limit their membership to a specific territory such as a county. Other JIFs limit their membership to certain types of local units, for example housing authorities or utilities.

This section also discusses membership renewals. A member wishing to withdraw must give notice at least 90 days in advance of the end of the membership period. This corresponds to the beginning of the Fund’s budget process. In most JIFs, if a member fails to provide timely notice, its membership is automatically extended for a year. If the member wants to withdraw at the end of the extended period, notice must still be given 90 days in advance, or its membership is automatically extended again. In a few JIFs, the member must reapply for membership if they fail to renew before the 90-day deadline.

A renewal application is deemed approved unless rejected for cause by the Fund Commissioners 45 days prior to the end of the membership period. Cause is defined as failure to meet the Fund’s risk management or underwriting standards, or other reasons approved by the Commissioner of Banking and Insurance.

Article 3: Organization

Commissioners: One Commissioner is appointed by each member’s governing body and must be either an elected official or an employee. Elected officials are appointed for two-year terms while employees must be reappointed each year. Members can also appoint an alternate.

Special Commissioner: A Special Commissioner is appointed as the tie breaker whenever the number of members is even. The power to appoint the Special Commissioner is determined alphabetically, and while the Special Commissioner must be an elected official or employee of a member, the Special Commissioner does not have to be from the member having the power to make the appointment for that year.

Responsibilities: Commissioners have the following powers:

- Operate the Fund “in the interests of the total membership.” In other words, a commissioner must consider all members, not just the member entity the Commissioner represents.
- Establish the budget and coverage limits, purchase reinsurance, and determine all other financial and operating policies of the Fund.
- Invest funds in accordance with the rules for the investment of public monies.
- Enter contracts in accordance with the public contracts law.
- Adopt the risk management plan.
- Join a Joint Insurance Fund: This provision permits the local JIFs to join the MEL, the Environmental JIF, and the Cyber JIF.

Voting: Each Commissioner has one vote. As a general principle, inter-local agencies in New Jersey, including JIFs, operate on the principle that each member has one vote even though the members entities are of different size. One of the few exceptions is the Environmental JIF (E-JIF), where the statute specifically allows proportional voting. However, this provision only pertains to Environmental JIFs.

Annual Reorganization Meeting: At the beginning of each year, the Commissioners have a reorganization meeting where they elect a Chairperson and a Secretary, who is really the Vice Chairperson. A few JIFs have three officers: Chairperson, Vice Chairperson, and Secretary.

If the membership exceeds seven, the Commissioners must also elect an Executive Committee of seven members, including the officers, along with a maximum of seven alternates. Some JIFs with more than seven members continue to meet

monthly as a full Board of Fund Commissioners so that every member has a vote. However, they are still required to elect an Executive Committee so that the JIF can conduct its regular business even if the full Board of Commissioners lacks a quorum.

Appointments: A JIF can delegate all professional functions except the independent auditor to a single outside firm, or to several firms. The structure for the JIF is defined in the bylaws. Specifically:

- **Executive Director:** Responsible for the overall operation of the Fund.
- **Fund Attorney:** Advises the Commissioners on legal matters and oversees the attorneys assigned to defend claims. Most JIFs also permit the Fund Attorney to defend some claims as well.
- **Actuary:** Certifies the budget and financial reports for soundness.
- **Treasurer:** Custodian of the Fund's assets. Note that while the Treasurer is responsible for the bank accounts, in many JIFs the Treasurer does not maintain the general ledger. This is a basic check and balance. The Treasurers of the various JIFs in the MEL also serve on the Investment Committee that releases a joint RFQ for banking and investment services.
- **Auditor:** Has the same function for the JIF as with any other local governmental entity. The annual audit report must be accepted by the Commissioners, who must also certify that they have read the comments section at the end of the report.

The major service contracts include:

- **Claims Administrator:** Adjusts the claims for the JIF.
- **Managed Care Organization:** Contracts with doctors and medical facilities to treat employee injuries,
- **Safety Service:** Provides risk control services for JIF members,
- **Underwriting Manager:** Places the JIF's excess insurance and answers coverage questions.

Selection of Service Providers and Other Professionals: The JIF Commissioners follow both the procedures established by *Public Contracts Law* and the best practices recommended by the New Jersey Comptroller. The MEL also retains a Qualified Purchasing Agent (QPA) who oversees the process. At the intervals established by law, the JIFs advertise RFQs (Request for Qualifications) for all functions using a format adapted from the standard RFP used by the N.J. Department of Purchasing.

The responses are initially reviewed by the standing committee responsible for that function. Depending on the circumstances, the Commissioners may retain an independent consultant to help evaluate the responses. At the end of the process, the Commissioners rate each proposal using an evaluation form adopted before the responses are received. The recommendation then goes to the full Board of Commissioners for final ratification. All contracts including the position of Executive Director and Fund Attorney are subject to the RFQ process.

Selection of Defense Attorneys: Defense attorneys are selected by a process that begins with a periodic RFQ released by each Fund Attorney to give potential candidates an opportunity to make an application to participate on the Fund's legal panel. After reviewing the applications, the Fund Attorney recommends a panel that is appointed each year by resolution of the Commissioners at their January re-organization meeting. For Public Officials and Employment Practices, the panel is created by the insurer after receiving advice from the local JIF Fund Attorneys. After the panel is selected, individual cases are assigned to defense attorneys by the Fund Attorney, or by the insurer in the case of public officials and employment practices liability.

JIF defense panels include almost all firms in the state that have successful defense experience in areas of the law pertaining to *Title 40 (municipal code)*, *Title 59 (Tort Claims Act)*, *Workers' Compensation Law*, *The Law Against Discrimination (LAD)* and the *Conscientious Employee Protection Act (CEPA)*. Most of the firms that are not on the panel regularly represent plaintiffs in suits against member local governments and therefore are conflicted from serving on the defense panels.

Under New Jersey law, local units are permitted to adopt an indemnification ordinance to protect officials and employees under most circumstances. Because a Joint Insurance Fund is a local unit, it also enacts an indemnification in the bylaws.

Committees: The bylaws also give the Chairperson the power to establish and appoint advisory committees. By regulation, all JIFs must have a Safety Committee. The number of other committees depends on a JIF's size. Committees usually meet in advance of the main monthly meeting to explore issues so that they are ready for consideration by the full board. While the committee structure varies, generally JIFs include:

- **Safety Committee (Required):** Responsible for the risk control program.
- **Management Committee:** Responsible for long range planning, budgets, requests for proposals, contracts, finances, and regulatory compliance.
- **Coverage Committee:** Responsible for insurance related issues, coverage determinations, and membership applications.
- **Claims Committee:** Responsible for approval of claims presented by the claims adjusters for settlement.

Risk Managers: With rare exceptions, towns in New Jersey do not have in-house risk management expertise and need professional assistance for this function. Most JIFs require their members retain a licensed insurance advisor to act as Risk Manager. This insurance advisor must be appointed pursuant to the Public Contracts Law and is subject to the same “pay-to-play” regulations applicable to the local unit’s other professional appointees. There is a considerable difference between the various JIFs as to how risk managers are compensated. Refer to your JIFs bylaws on this issue.

Article 4: Operation of the Fund

This article begins with a series of strong provisions that clearly establish that a JIF must be operated to the standards of a New Jersey public entity including the *Local Fiscal Affairs Law*, *Local Public Contracts Law*, and the various statutes authorizing the investment of public funds. New Jersey has a reputation for implementing the most robust system of regulation of JIFs in the country.

Plan of Risk Management: The Commissioners are required to adopt a Risk Management Plan and file it with the state for approval. The plan is prepared by the JIF’s Underwriting Manager and is then adopted at the reorganization meeting in January. This plan must detail:

- Lines of coverage, limits, and amount of risk retained by the JIF.
- Reinsurance and excess insurance.
- Methods to calculate member assessments.
- Loss adjustment procedures, and
- Actuarial methodology.

The regulations also require JIFs to file financial reports with the State of New Jersey. The year-end report is supplemented with the Auditor’s report and a statement from the Actuary. The regulations also require reports to the membership at least quarterly. Most Funds accomplish this with a series of reports known as “Fast Tracks” that monitor the Fund’s performance.

The last section of Article 4 expands the Fund’s authority beyond merely providing insurance. Specifically, the regulations permit JIFs to provide safety and loss control services, training, equipment, and apparatus.

Article 5: Rules of Order

Meetings: The quorum for a Fund Commissioner’s meeting is a majority unless the number of members exceeds 25, in which case the quorum is 13, plus 20% of the number of members more than 25. The reason for this is that larger Funds sometimes experience problems getting enough members to attend the reorganization meeting in January. There is also a provision that permits a paper ballot if a quorum is not reached.

All meetings of the Fund are subject to the *Open Public Meetings Act*. Unless otherwise provided, “Robert’s Rules of Order” governs the conduct of all meetings.

Transparency: The MEL and the JIFs substantially exceed the requirements for transparency.

- **Public Meeting Notices:** JIF public meeting notices are posted on the bulletin boards of all member municipalities and authorities.
- **Newspapers:** All MEL public meeting notices, requests for complete proposals, contract awards, and budgets are published in papers located throughout the state.
- **OPRA Requests:** The MEL and the JIFs respond to an average of 85 OPRA requests each year.
- **Annual Report:** Each year, the MEL distributes 5000 copies of its annual report.
- **Web Site:** All notices are also posted on the MEL’s website, NJMEL.org. The website serves as a comprehensive resource that averages over 2,000 users and some 8,000 pageviews per month from people inside and outside of New Jersey.

Bylaw amendments: When an amendment is proposed, the Fund must hold a hearing within 45 days. Then the amendment must be approved by at least 75% of the members within 6 months of the hearing. If the amendment passes that requirement, it must also be approved by the State.

Article 6: Budgets

The budget is usually introduced in October and adopted in November after a public hearing. A few JIFs introduce and adopt their budgets one month later. The budget is then filed with DOBI and DCA. This timing allows members to know their insurance assessments in time for their temporary budgets adopted in January.

The budget consists of three major appropriations:

- **Claims** (computed by the Actuary).
- **Excess Insurance and Reinsurance** (computed by the Underwriting Manager).
- **Expenses** (almost entirely professional services).

Article 7: Assessments

- **Manual Premium:** The first step is to compute each member's manual premium. There are manual rates for each line of coverage. The manual premium is computed by multiplying each member's exposure data, such as payroll, the number of employees, vehicle count, values, etc., times the manual rate. The exposure data is updated each year.
- **Experience Modification Factor:** Next, the JIF computes an experience modification factor for Workers' Compensation, Auto Liability, and General Liability based on each member's claims experience. A factor of 1.0 means the member's experience is average. A factor of more than 1.0 means the member has higher than normal experience. A factor of less than 1.0 means the member has better than expected experience.
- **Member Assessment:** Each member's assessment is computed by multiplying its manual premium times their experience modification factor.
- **Capping:** Most JIFs also have a provision that caps the maximum amount a member's assessment can change in any given year. Talk with your JIF's Executive Director about the formula used by your JIF.

Supplemental Assessments

If a Fund year is in an overall negative position, the JIF usually nets the loss against surplus from other Fund years. The JIF can also adopt a supplemental assessment to cover the deficit. Supplemental assessments are chargeable to all members who participated in the JIF during the deficit year. To minimize the impact on member budgets, supplemental assessments are spread over a period of years starting in a subsequent year.

Article 8: Return of Surplus

Before a dividend can be paid, the JIF must file an application for DOBI's approval. The State has adopted a dividend formula that caps dividends based on the value of unpaid claims. Dividends are payable to all members who participated in the JIF during the year that generated the surplus. In most JIFs, members who leave the Fund do not receive dividends until the statute of limitation has run on all exposures during the period of membership.

Article 9: Excess and Reinsurance

All JIFs are required to secure excess or reinsurance to cap claim liabilities. The majority of JIFs providing insurance to municipalities and authorities in New Jersey meet these requirements by joining the Municipal Excess Liability Joint Insurance Fund (MEL). The advantage of this approach is that the MEL is large enough to

self-insure some of this risk and can purchase excess and reinsurance at a lower rate because of its size.

Article 10: Trust Fund Accounts, Investment and Disbursements

Under this section, a JIF must follow the financial rules applicable to local units of government. For example, the Treasurer presents a bills list for adoption during the JIF's meetings.

Article 11: Conflicts of Interest

One of the reasons JIFs are distinctly different from insurance companies is that everyone connected to a JIFs is subject to the *Local Official's Ethics Act*. For example, all officers of the Fund's Administrator and many other fund professionals complete the annual filings required by any other local official.

Article 12: Voluntary Dissolution of the Fund

Arrangements must be made to pay all open claims before a JIF can be dissolved. In some cases, claims remain open for decades. Under the regulations, a dissolution plan must be voted by the membership after a hearing. Then the application must be filed for approval by DOBI.

Article 13 Claims Handling Procedure

This Article provides that the Commissioners must approve any claims settlements that exceed the authority they grant to the claim adjusters in the risk management plan. In some JIFs, all Commissioners review the claims at the monthly meetings. Other JIFs establish a claims sub-committee to approve the Payment Authority Requests (PARS).

The MEL has established a multi-tiered approach to claims administration:

- Each local JIF contracts with a claims service provider to administer claims within its retention.
- The MEL contracts with a separate claims adjuster to administer claims that potentially exceed the local JIF's retention.
- The Executive Director employs a claims examiner to oversee the local JIF and MEL adjusters.
- The Excess and Reinsurers employ senior adjusters that monitor claims that potentially exceed the MEL's retention.

- The MEL Auditor reviews claims as a part of its annual report and the MEL Audit Committee periodically retains a consultant to also review the adjusters and examiners.
- The Department of Banking and Insurance (DOBI) audits the claims adjusters as a part of the State's periodic examination of the JIFs and the MEL.

Article 14: Complain Handling Procedure

Whenever a complaint is received in writing, the Executive Director must send a copy to the Commissioners and place it on the agenda for the next meeting. The Commissioners are then required to consider the complaint and render a decision. The findings must be communicated in writing to the complaining party, as well as the Commissioner from the member affected by the complaint. The written notice may include an opportunity for a hearing before the Commissioners.

Parties that are dissatisfied with the decision may appeal to the independent appeal organization or arbitrator designated by the Fund annually. Any party that is still dissatisfied may exercise any other remedies provided by law.

Article 15: Other Conditions

- The Fund has the right to inspect each member's facilities and records.
- Members are also required to report any injury or other claim to the JIF as soon as practical. Failure to comply with this provision could nullify coverage under some circumstances.
- Each member must fully cooperate with the JIF in adjusting and defending claims.
- A member may not sue the Fund until complying with all provisions of the bylaws.
- If the JIF makes a claim payment, it is subrogated to all the member's rights of recovery from other sources.

Selected Case Law

State v. Brett Gookins (1994)

Facts: In 1989 and 1990, an Officer made eighty-four drunk-driving arrests after falsifying breathalyzer tests. The Officer was caught in a sting operation and the N.J. Supreme Court overturned their convictions. When the motorists also sued for damages, the question arose whether this was a single occurrence or multiple occurrences. At that time, the local JIF retained the first \$100,000

of the risk; the MEL retained \$900,000 excess of the JIF's \$100,000, and American Re (now Munich Re America) reinsured the risk excess of the MEL's \$900,000. If this was one occurrence, the JIF's exposure was limited to \$100,000 in total, but if this was multiple occurrences, the JIF's potential exposure was \$8.4 million (84 cases times \$100,000 per case).

Decision: American Re agreed that since the MEL took the position that this was all one occurrence, American Re would accept the MEL's position as well. From the beginning, the reinsurer stood behind the JIF and the MEL.

Comment: It is important to investigate the reputation of a reinsurer. Some excess insurers and reinsurers shave prices, but are quick to go into court to contest coverage. In a traditional reinsurance relationship, the reinsurer will "follow-the-fortunes" of the reinsured. A good reinsurer backs up its long-term clients.

Shapiro v. Middlesex JIF (1998)

Facts: A Chiropractic group sued a JIF contending that it failed to refer cases to the group. The group contended that this constituted tortious interference with business relations and was a violation of the *New Jersey Anti-Trust Act*.

Decision: The Court ruled that a JIF was a local governmental entity and was not subject to anti-trust laws. Further, a JIF is entitled to all immunities and protections in *Title 59* (Chapter 3).

The court wrote:

"By reason of the role that JIF plays on behalf of its constituent municipalities, and the fact it must conform to the rules and regulations applicable to other local units, we deem JIF to be a "special function governmental unit" for purposes of immunity."

Comment: This case affirms that a joint insurance fund is a governmental entity. *N.J.S.A 40A:10-48* specifically provides:

"A joint insurance fund established pursuant to the provisions of this act is not an insurance company or an insurer under the laws of this State, and the authorized activities of the fund do not constitute the transaction of insurance nor doing an insurance business. A fund established pursuant to this act shall not be subject to the provisions of Subtitle 3 of Title 17 of the Revised Statutes." (The laws that regulate insurance companies).

Statewide Insurance Fund v. Star Insurance (2023)

Facts: This insurance coverage dispute between a joint insurance fund and Star Insurance Company concerned whether the JIF provided "insurance" to

its members or, instead, the JIF members protect against liability through “self-insurance.” That distinction was pertinent because Star’s excess insurance policy included a clause that provided that its coverage obligations began only after coverage available through “other insurance” was exhausted. The clause did not mention “self-insurance.” Star argued the JIF provided insurance and therefore Star’s coverage was excess to the JIF. The JIF disagreed and contending that because its members were “self-insured,” Star’s coverage was primary.

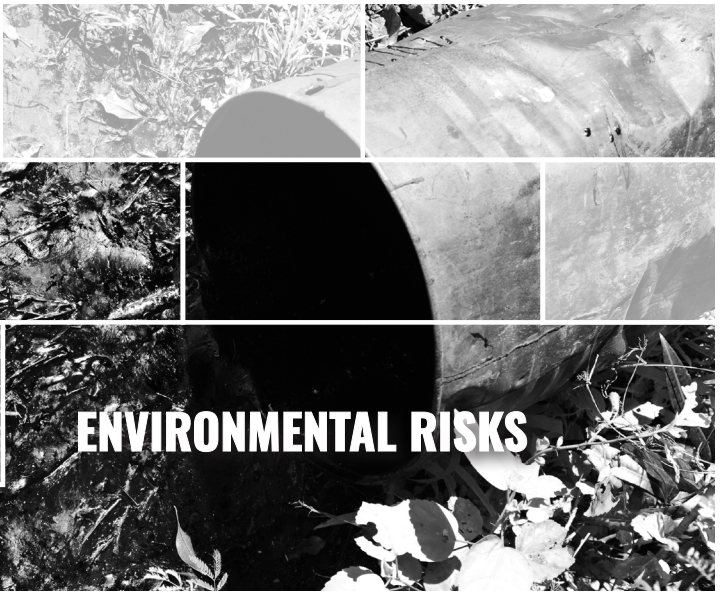
Decision: The N.J. Supreme Court found that under the plain language of *N.J.S.A. 40A:10-48*, a JIF “was not an insurance company or an insurer under New Jersey law, and its “authorized activities . . . do not constitute the transaction of insurance nor doing an insurance business.” By the statute’s plain terms, JIFs cannot provide insurance in exchange for premiums, as insurance companies typically do; instead, JIF members reduce insurance costs by pooling financial resources, distributing and retaining risk, and paying claims through member assessments. Therefore, JIFs protect members against liability through “self-insurance.” “Self-insurance” is not insurance.

Comment: In this decision, the N.J. Supreme Court reaffirmed the decision in *Shapiro v. Middlesex* that JIFs are not insurance companies. As a result, JIFs are exempt from the taxes, fees and assessments otherwise charged to insurance companies. Also, as a unit of government, JIFs are exempt from anti-trust laws. This status results in substantial tax-payer savings.

Conclusion

This is not as complicated as it appears. The responsibilities of a commissioner are like the responsibilities as an elected official or local governmental employee. It involves sound governmental process. Even the technical insurance aspects are not difficult with a little experience.

CHAPTER 12



ENVIRONMENTAL RISKS

Much of the material for this chapter was provided by Peter King Esq, a member of the E-JIF legal panel, Steve Sacco, the E-JIF Executive Director, and Richard Erickson, the E-JIF Engineering Director.

Background

Environmental liability was not a significant concern until 1983, when a New Jersey court awarded almost \$16 million damages in *Ayers v. Jackson Township*. While the N.J. Supreme Court did not affirm this decision for another four years, the impact to the insurance market was immediate. This case was a significant factor in the widespread cancellation of insurance policies for public entities in 1985 leading to the development of JIFs to fill the void.

The *Ayers* case involved claims from residents contending that their well water was contaminated by toxic pollutants leaching into the Cohansey Aquifer from the Township’s landfill. After an extensive trial, the jury found that the Township had created a “nuisance” and a “dangerous condition” by virtue of its operation of the landfill. The jury also determined the Township’s conduct was “palpably unreasonable” and was the proximate cause of the contamination of plaintiffs’ water supply.

The jury awarded \$2 million to residents for emotional distress, \$5.4 million for deterioration of their quality of life during the 20 months when they were deprived of running water, and \$8.2 million that was placed in a fund to cover the future cost of annual medical monitoring. This case also established the principle that the cost of pollution claims must be shared by all general liability insurers that covered Jackson Township during the many years that toxic waste was placed in the landfill. Insurers then rushed to exclude pollution claims in all policies going forward. Public entities were now on their own for any new pollution.

In 1987, the State responded to this crisis by establishing the N.J. Spill Compensation Claims Program (Spill Fund) that pays claims primarily related to potable water contamination. This program is funded by a tax on the petroleum and chemical industries. Before the Spill Fund pays a claim, it requires claimants to sue the responsible parties that caused the pollution. Therefore, the Spill Fund is a two-edged sword for local government. While under some circumstances local government can apply to the Spill Fund to cover remediation costs, in most circumstances local government is named in suits by other parties making a claim to the Spill Fund.

By 1993, the MEL had grown to over 200 members and the Commissioners decided to create a specialized pool to provide environmental coverage. The New Jersey Municipal Environmental Risk Management Fund (E-JIF) was finally established after the enabling law was signed into law.

E-JIF Structure

The E-JIF has a different structure than other JIFs. Under the enabling statute, the E-JIF is authorized to bond especially large claims. No other JIF is legally permitted to bond. Fortunately, bonds have not been necessary, and the E-JIF has built a large surplus over the years.

Currently, the E-JIF membership is 14 JIFs with collective membership of 357 municipalities, 74 authorities, and 7 other entities. Membership is limited to JIFs as opposed to individual governmental units. This prevents adverse selection where the only municipalities and authorities that apply for membership are those that already know they have a problem. The E-JIF is one of the few inter-local entities that is permitted to adopt proportional representation. In most other inter-local entities including JIFs, each member receives an equal vote.

Coverage

No other state has been able to match the success of New Jersey's E-JIF. The program provides the most extensive coverage available to local government anywhere in the country.

The policy includes five coverage parts:

- I. Third-Party Liability
- II. On-Site Clean-up Costs
- III. Public Officials Pollution Liability
- IV. De Minimus Abandoned Waste Sites
- V. Storage Tank Systems

Part I: Third-Party Liability

This part of the policy covers the activities of public entities that may result in an actual or alleged “pollution conditions” that cause bodily injury or damage to property of others.

- Pollution conditions mean the discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, materials, or waste materials, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater. Waste materials include materials to be recycled, reconditioned, or reclaimed.

The E-JIF pays on behalf of the member local government’s losses due to liability for bodily injury and/or property damage caused by pollution conditions emanating from a covered location or arising from covered operations. This coverage is subject to exclusions. Legal defense is included subject to the aggregate defense costs limit.

Third-Party Liability Limits

- \$1,000,000 per claim
- \$1,000,000 annual aggregate
- \$250,000 sub-limit Transportation coverage
- \$250,000 sub-limit Cyber coverage

Exclusions

The E-JIF will not pay or defend under the third-party liability coverage part:

- a) Pollution conditions that existed prior to the inception date of the policy.
- b) Injunctive or non-monetary relief.
- c) Lead.
- d) Asbestos.
- e) Workers’ compensation, unemployment compensation, or disability benefits.
- f) Employment Practices Liability.
- g) Mold or fungi.
- h) Contractual Liability, except where coverage would apply in absence of contract.
- i) Acid rain.
- j) Automobiles (except transit sublimit), aircraft, watercraft.
- k) Pollution conditions after location has been sold, leased, or abandoned.
- l) Chlorine based products.
- m) Airports (unless endorsed).
- n) Willful, deliberate non-compliance with regulation, statute, or other law.

Part II: Onsight Cleanup Costs

Third Parties often pollute public property, for example dumping a toxic material in a public park late at night. This coverage section pays remediation costs triggered by pollution conditions caused by an unrelated third party on public lands.

Onsite Cleanup Limits:

- \$ 50,000 per claim
- \$ 100,000 annual aggregate

Note: The member is required to make application to the N.J. Spill Fund or other available funding sources for reimbursement. The E-JIF coverage is net of this reimbursement.

Part III: Public Officials Pollution Liability

All Public Officials' Liability (POL) policies have an absolute pollution exclusion. The purpose of this coverage section is to cover claims that would otherwise be covered by POL policies had they not included the pollution exclusion. Legal defense costs are included, subject to aggregate defense costs limits.

Public Officials Pollution Liability Limits:

- \$1,000,000 per claim
- \$1,000,000 annual aggregate

Part IV: De Minimus Abandoned Waste Sites

Local governments, through various departments and refuse collection, have contributed substantial amounts of waste to hazardous waste landfills. Municipalities that hired an independent waste hauler are still responsible for this waste. Under the concept of strict liability for pollution, a municipality can be held liable for its waste even if it had no knowledge of where it was being taken.

When the Federal EPA or New Jersey DEP remediates a waste site, it assigns the costs to all Potentially Responsible Parties (PRPs). This is complicated by the fact that it is often unclear who was truly responsible for the hazardous waste.

Because the E-JIF often insures many local governments in the region served by a land fill, it can negotiate a reasonable settlement on behalf of a large block of PRPs. The E-JIF has also saved millions in defense costs by assigning a single attorney to defend all its members who are parties to the action. Most of the costs are then charged back to the insurers that covered the members before the E-JIF was created. The E-JIF has established a comprehensive database of these prior insurers.

De Minimus Abandoned Waste Sites limits:

- \$50,000 per local government

De Minimus abandoned waste site coverage is subject to exclusions and conditions including but not limited to:

- Legal services will be provided solely by the approved E-JIF attorney.
- The covered local government must agree to participate in any group settlement proceedings deemed appropriate by the E-JIF attorney.
- The E-JIF must agree to the negotiated settlement.
- The member local government and the E-JIF must be indemnified from further liability from this site as a result of the payment.

Part V: Storage Tank Systems Coverage

Both the Federal Environmental Protection Agency (EPA) and the New Jersey Department of Environmental Protection (NJDEP) require tank owners to insure underground storage tanks to prove that the costs will be paid in the event of a leak. E-JIF's storage tank systems coverage meets these requirements. The policy covers bodily injury or property damage liabilities in addition to the cleanup caused by a release from a storage tank at any scheduled site.

The claim must be first made against the member local government during the policy period and reported to the E-JIF during the policy period. There is no coverage for underground storage tanks that have been rejected or are unknown and/or unscheduled. Unregulated underground storage tanks may also be covered subject to E-JIF underwriting rules. Above ground storage tanks must comply with all underwriting requirements established by the E-JIF, including compliance testing.

Storage Tank Systems coverage limits:

- \$ 1,000,000 each incident – Third party
- \$ 1,000,000 each corrective action – Onsite cleanup cost
- \$ 1,000,000 Aggregate Limit
- \$ 100,000 Aggregate Defense Limit

Storage tank coverage exclusions: (Partial list - refer to policy for all exclusions)

The E-JIF only covers those events emanating from any sudden, or non-sudden, release of petroleum arising from the operation of a storage tank at any scheduled site that results in a need for clean-up and/or compensation for bodily injury or property damage neither expected nor intended by the insured. The coverage does not apply to:

- a) Any claim arising from any knowingly unlawful, dishonest, fraudulent, criminal, malicious or wrongful act or omission committed by or at the direction of any supervisor, department head, elected or appointed official of the local unit.

- b) Any claim with respect to which the local unit was aware of non-compliance with any applicable statute, regulation, instruction or court order relating to the petroleum tanks.
- c) Any claim arising from any accidental release at any place other than scheduled sites.
- d) The cost of installation, replacement or repair of any storage tank or any other receptacle including the cost of excavation or backfilling, piping and valves, all leak detection systems and all containment systems and all monitoring systems.
- e) Any routine maintenance, measurement or testing expense which is not caused by a pollution event.
- f) Any fines, exemplary or punitive damages, statutory or other penalties, trebled or other multiple damages.
- g) Any unregulated tanks that exceed the 20-year age limit as of January 1, 2014.

Underground Storage Tank Remediation Grant Program

The E-JIF may make grant up to a maximum of \$10,000 per impaired location for unknown/undisclosed underground storage tanks to reimburse members for remediation costs. To be eligible, the member must not have had any prior knowledge of the tank. The grant request must also demonstrate proper due diligence if the tank was found on a newly acquired property. Each member entity is subject to a lifetime maximum of three grant applications.

Risk Control

One of the E-JIF's primary objectives is to contain costs through sound environmental controls. The E-JIF has engaged environmental engineering companies to work closely with member public entities. It has also arranged for an experienced claims-servicing company and a panel of environmental defense attorneys to provide adjustment services. Members are provided with continuing education, environmental alerts, a website containing additional resources, and access to a professional environmental engineering consultant available to answer questions at no cost.

Environmental Audit Services

A periodic audit at each facility is conducted by an E-JIF environmental professional. Unlike the NJDEP, the E-JIF does not issue violations or penalties and helps members resolve issues before a regulator conducts a compliance inspection. The audit involves a review of written programs and record keeping. The environmental professional also inspects facilities and grades the operation on a scale of 1 to 100 based upon the risks and severity of the deficiencies found.

Petroleum Storage Tanks

It is common for local governments to have large fuel tanks for fleet operations (DPWs and Utilities) along with smaller tanks for emergency generators and heating fuel. Leaky tanks can result in expensive remediation.

- **Underground Storage Tanks:** Over time, there is a high risk that steel USTs will rust and develop leaks. Being underground, these conditions may go unnoticed for years. To reduce the risk, the EPA and NJDEP mandate double-walled tanks, equipment to detect leaks, regular inspections, and, most recently, a license requirement for the individual responsible for managing the tanks. The E-JIF provides annual inspections for USTs. Unlike the EPA and NJDEP, the E-JIF also monitors unregulated USTs (less than 2,000 gallons) used for heating oil. The E-JIF established a policy to limit the useful life expectancy of a regulated UST to 20 years. It is far less expensive to replace a tank before it leaks. The E-JIF keeps a full database of all regulated and unregulated USTs for its members.
- **Above Ground Storage Tanks:** ASTs have the advantage that any leaks are more easily seen. Unfortunately, they are also vulnerable to the occasional vehicle accident. The E-JIF requires AST owners to physically protect ASTs from vehicle collisions and other possible accidents. The E-JIF assists members comply with the EPA's Spill Prevention, Control and Countermeasure (SPCC) requirements by providing sample SPCC plan templates and free training. Another E-JIF program monitors underground piping associated with ASTs. Members are encouraged to reengineer the piping system to an aboveground location, add a leak monitoring system on the piping, or conduct biennial tightness testing. The E-JIF also keeps a full database of all ASTs, including details about tank construction.

Continuing Education

- Each year, the E-JIF offers a series of training classes around the state such as Spill Prevention Control and Countermeasures (SPCC), storm water management, air permitting, pollution prevention planning, resiliency, and many others. The E-JIF has copies of these training presentations at nejif.org.
- One of the most popular presentations concerns the municipal storm water regulations published by NJDEP in 2004. Because the NJDEP lacked funds to develop this training, the E-JIF stepped in and fulfilled the requirement with a series of on-line videos. The NJDEP website links to the E-JIF website.
- The E-JIF publishes technical bulletins that are also available on the website to keep members up to date.

Foreclosed Properties

The E-JIF offers a free environmental screening service before a member acquires a property. An environmental professional will conduct a walkthrough of the property and search various databases for outstanding environmental problems. Although it is not intended as a substitute for more extensive due diligence, such as a Phase 1 or NJDEP Environmental Site Assessment, it can give a member a quick heads-up regarding environmental problems with the site. When concerns are uncovered, the member will often choose not to acquire the property or use the information in negotiating the sales price. In more extreme cases, members have allowed the site to be taken over by the EPA or NJDEP, sparing local taxpayers the burden of remediation.



Environmental Emergency Information

STEP ONE

LOCAL HAZMAT RESPONDERS

Telephone: _____

Contact: _____

Address: _____

STEP TWO

EJIF ENVIRONMENTAL HOTLINE

1-800-289-6681

NOTE: 24 hours/7day per week, leave message and call will be returned shortly.
NJDEP 24 HOUR TOLL - FREE HOTLINE FOR ENVIRONMENTAL INCIDENTS

1-877-WARNDEP

(1-877-927-6337)

24-Hour Emergency Response Consulting

The E-JIF provides members with a free hotline available 24-hours a day, 7-days a week, to call during emergencies. In the event of a spill or other environmental incident, the E-JIF will immediately dispatch an environmental professional to assist the local incident commander. For larger incidents, the E-JIF has an on-call emergency response crew. The E-JIF distributes emergency response posters (see previous page) with phone numbers that should be posted in DPW, utility, fire departments, and other appropriate locations.

Emerging Issues

The E-JIF is also looking ahead at challenges that are just now becoming apparent.

- **Green Infrastructure:** New Jersey is planning stronger environmental design and construction standards, including green infrastructure. The concept is to design “green” spaces such as pervious pavement, rain gardens, vegetative swales, cisterns, and green roofs into commercial areas while reducing the use of impervious surfaces such as concrete and asphalt. This increases the infiltration of water into the soil, improving water quality as water recharges the local aquifer. It also reduces the risk of flooding in nearby low-lying areas. As a side benefit, adding green infrastructure can also provide a reduction in what is known as the “heat island” effect. As green plants and other open spaces replace areas of black surfaces, less sunlight is converted to heat.
- **Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS):** This is a large group of chemicals that were produced to create new substances such as non-stick cooking surfaces (Teflon), more stain resistant carpets/furniture, and more effective firefighting/fire suppression foams. PFAS are referred to as “forever chemicals” because they persist in the environment for a long time and show up in water supply systems. The NJDEP is implementing new standards for how much of these chemicals are allowed in drinking water. The numbers used are very low, in the parts per trillion (PPT) range, and water supply systems often need expensive new water treatment equipment.
- **Resiliency:** Perhaps no emerging environmental concern has more potential impact than building resiliency into our communities during a period of climate change. Rising sea levels impact coastal communities and severe storms impact the infrastructure all over the state. Climate change also impacts the energy grid. The E-JIF collaborates with members to meet the regulatory concerns promulgated by federal and state agencies to address these issues.

Selected Case Law

Re: Combe Landfill South (1998)

Facts: The Combe Landfill South Landfill located on a 115-acre parcel was in operation from the 1940s until it was ordered closed by the EPA in 1981. In addition to municipal garbage, the facility was licensed to accept non-hazardous industrial wastes, sewage sludge, septic tank waste, chemicals, and waste oils. In 1998, the EPA sued approximately 250 parties to recover cleanup costs estimated to be over \$150 million. Among the defendants were 21 towns insured by the E-JIF.

Decision: The E-JIF settled the suit against its 21 members for \$3.8 million. To save costs, the E-JIF hired one law firm to defend all members and was able to fund the entire settlement without any contribution from the towns. Much of the money came from prior insurers.

Comment: The E-JIF used a process known as “archiving” to document the insurers that previously insured its members. In cases such as the Combe Land Fill lawsuit, all contamination occurred before the towns became members of the E-JIF. By coordinating the claims against these prior insurers, the E-JIF was able to resolve this very complex litigation on behalf of all 21 members. This strategy has been successfully utilized in similar cases.

Re: Toms River Lagoon Drive (2003)

Facts: While installing a storm water pipe in an easement between two homes, a DPW crew ruptured a heating oil line, extensively contaminating one of the houses. The clean-up was complicated by the fact that the property backed up to a waterway and the line ran under the slab foundation of the house.

Decision: The E-JIF decided that the best way to resolve the case was to purchase the property from the elderly homeowner and demolish the structure. After the clean-up, the E-JIF was then able to recover over \$300K of the 800K cost by selling the property.

Comment: This case demonstrates how the E-JIF creatively resolves otherwise politically sensitive issues.

NJDEP v. Occidental Chemical et al. (2005)

Facts: Over the years, chemical plants along the Passaic River discharged toxic materials that poisoned the six-mile stretch, in Newark, Harrison, East Newark, and Kearny. Of special concern was dioxin that was used to manufacture Agent Orange used extensively during the Vietnam war. Because of tidal movement, the high concentrations of dioxin also contaminated other

areas of the river and the NJ/NY harbor. The direct defendants counter sued numerous municipalities alleging that municipal storm water and discharge from sanitary processing plants contributed to the contamination. 32 of these municipalities are members of the E-JIF.

Decision: The E-JIF settled the case on behalf of its 32 members for just over \$2 million. Under the settlement, the E-JIF paid the \$50,000 policy limit for each of the members along with the defense costs. Each town was responsible for the remaining \$45K. In some cases, the individual JIFs picked up that expense so that there was no net cost to their members.

Comment: To save legal costs, the E-JIF retained only three attorneys who each represented ten or eleven towns. This strategy saved at least \$5 million in legal bills.

Mignano v. Sullivan (2006)

Facts: A light industrial building was used to manufacture mercury thermometers until the company ceased operations and filed for bankruptcy in 1994. The DEP issued a spill compensation and control directive requiring the cleanup of the site, but neither the company's former owner nor the DEP ever followed up on the agreement. In 2001, a new owner acquired the property in a tax sale/foreclosure procedure and then flipped the property to another owner. This new owner then leased the property to a day care center known as Kiddie Kollege. In 2006 the DEP determined the site had been converted to the new use without having been remediated. Test results in 2006 revealed the presence of mercury vapors in the building. Testing also revealed that some children had elevated mercury levels. The parents sued the current and prior owners along with the Town.

Decision: In a decision that was subsequently overturned on appeal, the Trial Judge ruled that the Town had a duty to confirm that the remediation was complete before issuing building permits. The judge ordered the town to pay for medical monitoring and awarded several million dollars in legal fees to the plaintiff's attorneys. The Appellate Court overturned this verdict and ruled that under the *Tort Claims Act* (Chapter 3), the town cannot be held liable for negligence in issuing a permit. The plaintiffs then appealed to the N.J. Supreme Court who refused to hear the case.

Comment: The E-JIF fought this expensive legal battle to protect both the individual Town and all communities from what could have been a very bad precedent.

Re: Haddonfield (2010)

Facts: The Haddonfield DPW Superintendent called the E-JIF's environmental engineers concerning a suspected leak in the underground pipe from their

aboveground tank. The E-JIF's engineer determined that the lines did not hold pressure and that petroleum odors were detected downstream. The town then contacted Hazmat and the NJDEP.

Decision: The E-JIF paid \$600,000 to remediate the spill.

Comment: The E-JIF also contracted with its environmental engineering vendor to test the integrity of all similar systems owned by members throughout the state. This is another example of the E-JIF going considerably beyond any insurance company to prevent losses and protect the environment.

Morristown Associates v. Grant Oil (2015)

Facts: A dry cleaners and numerous other parties were sued by a strip store owner after an old leak was discovered from an underground fuel tank. The dry cleaners had changed hands on several occasions since the leak. The current owners of the dry cleaners contended they were protected by the 6-year statute of limitations in commercial litigation.

Decision: The N.J. Supreme Court ruled that the statute of limitations did not apply to lawsuits under New Jersey's Spill Fund. The court held that the Spill Fund was remedial legislation, and the statute of limitations was contrary to the legislative intent.

Comment: Under New Jersey's doctrine of "the polluter pays" anyone who had anything to do with a polluted property is potentially liable. This is why a municipality needs to be very careful about foreclosing or acquiring land that may have contamination.

Hamilton v. Consolidated Rail and Paulsboro (2016)

Facts: A Fire Department responded to a freight car derailment that released 20,000 gallons of vinyl chloride. As the day progressed, other entities also provided emergency response. In their suit by the residents against the railroad, the residents also named the Fire Department alleging that their response was inadequate.

Decision: Two years later, the court dismissed the case because of *Title 59*, Fire Department immunity, and the failure of the residents to file a tort claim notice before the statutory deadline (Chapter 3).

Hoffman v. Gloucester (2024)

Facts: A resident sued his community for selling water contaminated with Perfluoroalkyl (PFAS) contending that this was a breach of contract.

Decision: The court ruled that the town was not liable because *Title 59* provides immunity for products liability. The court also ruled that the municipality was providing a service, not selling a product.

Discussion: Without this *Title 59* immunity, Municipalities and Water Utilities would be sued every time there was a problem with the water supply.

CHAPTER 13



Much of the material for this chapter was provided by Ed Cooney, the Cyber JIFs Underwriter, and Marc Pfeiffer, a retired Director of the N.J. Department of Local Government Services.

Background

Imagine you are a local government official walking into your town hall office in a community of 10,000. You start your computer and see a skull and bones graphic with a warning that your computer files have been encrypted. The screen also tells you that to restore your computer, you need to pay a ransom of several hundred thousand dollars in Bitcoin. Then you find out that the virus has infected every computer in the municipal network.

You immediately reach out to the person who manages the network. Unfortunately, the Network Manager discovers the backups are also encrypted, since they were on the same network. You just learned the hard way that backups must be independent of the network. You call law enforcement who tells you they cannot do anything because there is no way to tell who attacked you and where they came from.

Then you remember you have Cyber Insurance. You call your Risk Manager who should be an important part of your Cyber Risk Management Program. The Risk Manager called the insurer and now you finally get some action. The insurer quickly arranged for you to work with a breach coach who talks to your Network Manager. That starts a chain of events that results in a national cybersecurity firm working with you to solve the problem and bring you back to normalcy.

Unfortunately, because the backups were compromised, you will have to pay the ransom to recover your data. You may also learn that despite paying the ransom, the criminals left other forms of malware on your system so that they can come

back later. After several days of downtime because of a couple of frustrating false starts, your network is finally cleaned of infection, data restored, and you only lost several days of productivity and several nights of sleep.

This story has become all too common because criminals have found that attacking local government computer systems is a lucrative and low risk activity. As a result, cyber-attacks on local government have increased exponentially. These vulnerabilities continue to increase as local governments create “smart cities” that deploy internet-connected devices in public transit, solid waste collection, traffic lights, water meter reading, and security cameras.

Municipalities have become the target of choice because they:

- Store large amounts of sensitive information, including Personally Identifiable Information (PII).
- Have become highly dependent on their systems to deliver emergency and other services.
- Utilize several generations of computers, different software versions, and lack proper backup.
- Operate under financial restraints that limit their investments in cyber security.
- Are at a disadvantage in competing for IT staff.

In any year, 7-10% of local governments will experience a cyber event, and Administration and Law Enforcement are usually the primary targets. A recent Verizon DBIR report, which has a view of about 90% of world internet traffic, found that human error accounted for 51% of all breaches and the top three reasons breaches occur are:

- Credentials (weak/stolen passwords)
- Phishing (fake e-mails containing malware/ransomware/social engineering)
- Exploited vulnerabilities (missing software updates/patches)

In addition to these attacks, the newest threats, according to the 2025 CrowdStrike Global Threat Report, include: Voice Phishing (vishing), which increased by 442%; and Help Desk social engineering which is on the rise due to Generative AI and Deep Fakes.

The costs of cyber-attacks are also on the rise. A recent IBM study revealed the average cost of a data breach to be \$9.36 million, and noted that it takes 292 days on average to identify and contain a breach.

In New Jersey, there have been increases in cyber-attacks on local government. Most are phishing attacks where the system is breached when an employee or volunteer opens an infected e-mail attachment. The second most common attack involves inserting ransomware that encrypts individual computers and networks

that require submitting a payment to the attacker to get the decryption key. Another attack that often goes undetected involves infecting systems to find personally identifiable data to sell on the dark web. A third scam involves sending very convincing looking – but fraudulent – emails to compromise financial controls or steal user and banking credentials. This was discussed under the crime policy in Chapter 10.

Technology risks go far beyond financial loss. These attacks often disrupt the ability of local government to provide essential services. Any delay in dispatching emergency services can have a devastating impact on citizens who need assistance in life threatening situations. Often after a cyber-breach, the public questions the effectiveness of local officials and reputations can be permanently damaged.

Technology has become so embedded in local governments that it is no longer possible to operate without strong controls and a well-trained staff. At the same time, technology is evolving so quickly that it is hard for local officials to successfully manage their risks before a problem develops.

Unfortunately, the typical local government has several generations of computers, different versions of software, limited network support, and a poor backup system. It's time to rethink technology investments, how to manage the system, and how to protect your municipality or public entity from criminal intruders.

Cyber JIF

To control this exposure, 19 Joint Insurance Funds (JIFs) came together at the beginning of 2023 to establish a new “special purpose” JIF known as the New Jersey Cyber Risk Management Fund (CYBER JIF), based on the successful model of the Environmental JIF (Chapter 12).

To avoid adverse selection, the CYBER JIF only provides coverage to MEL Property/Casualty JIFs. Each individual local government receives basic cyber insurance coverage and deductibles are based on the controls the local government has in place at the time of the loss.

All members have access to the claim services that are necessary to quickly restore a hacked system. The CYBER JIF also purchases excess insurance and basic cyber risk control services that should be a part of any local government's controls. This substantially reduces the costs as compared to the price if each local government separately purchased these services.

Basic Cyber Security

There are two things you absolutely must have in place:

1. A trusted employee or consultant to advise on technology management.
2. Tested back-up procedures to restore operating systems and data in the event your technology is compromised (e.g. ransomware).

Technology Management

Larger entities typically employ a full-time IT Director. The other option is Senior Manager who depends on an independent consultant. Whoever has the primary responsibility must:

- Prepare an annual technology plan that includes a cyber risk assessment for the governing body before they establish budget priorities.
- Establish a cybersecurity incident response plan that must be tested periodically.

Consider retaining a cyber-auditor to put an independent set of eyes on your systems. If you have your own staff, or contractors, consider joining GMIS, the association of local government technology managers and its New Jersey Chapter. The membership fee is among the lowest of any professional association. For more information about GMIS visit their website (gmis.org/page/newjersey).

Also consider joining two services that are free to state and local governments:

- The N.J. Cyber Communications and Information Cell (NJCCIC) the State's information security resource (cyber.nj.gov).
- MS-ISAC, a US Homeland Security funded national cybersecurity support group for governments (cisecurity.org/ms-isac).

Cyber Hygiene

The dictionary defines hygiene as “conditions or practices conducive to maintaining health and preventing disease, especially through cleanliness.” In this context, health and disease refers to your technology and cleanliness means prevention. Information about the items listed below can be found on the CYBER JIF website, and items marked with * indicate the CYBER JIF retains a vendor to provide these services to all members at no additional cost.

***Training:** Because your staff is a critical line of defense, computer users must understand that they will see attacks, and they need to know how to recognize and deal with them.

***Testing:** You should periodically test by sending e-mails with suspicious attachments to all computer users to see who falls into the trap.

***Vulnerability Testing:** Systems should be tested monthly from the outside to identify vulnerabilities that can be used by hackers.

Password Policy: You need a password policy that requires strong, unique passwords, or even better, pass phrases, that are changed at least annually. Training material explains how this can be accomplished.

Two Factor Authentication (2FA): This is an access management system that requires a user to supplement the user's password by providing a second form of identification such as answering a text to the user's phone.

Internet and email use policies: You must adopt sound internet and e-mail use policies. The Cyber JIF has a model communications media policy on the website, and it is included in the MEL's Model Personnel Policies and Procedures Manual (Chapter 4).

Personal Information Security: Since criminals are after personal information, files with Personally Identifiable Information (PII) or Personal Health Information (PHI) need very strong controls including unique password protection. Better yet – encrypt them.

Technical Competency

Backup plan: The plan needs to be designed so that you can reasonably recover from mechanical failure, loss of your facilities through fire, flood, or other calamity, as well as ransomware or any other form of malware. The best hardware, software, and facilities are only as effective as the people available to support your technology and respond to incidents. Your backup plan should detail the staff, or contractors, that are ready to respond when needed.

Security: Servers need to be protected from unauthorized access to secure them from tampering. Servers should not just sit on a table or be housed in an unlocked basement or closet. Access to applications should be limited to those who need it. Always remove access when a person leaves your organization or if their responsibilities change.

Software: All computers and networks need to have actively maintained defensive software, such as anti-malware, anti-virus, anti-spam, and firewalls. Software needs to be patched with manufacturer updates as soon as possible after they are released.

Financial Controls

Another type of cyber hygiene involves instituting internal financial controls to protect against fraudulent transactions, a.k.a. Business E-mail Compromise. Cyber criminals now try to use e-mail, phones, and websites to convince employees to execute financial transactions that involve wire transfers to their direct deposit accounts (Chapter 10).

Deductible Tiers:

The Cyber JIF bases deductibles on the controls members have in place at the time of the breach. Contact your Risk Manager or go to the Cyber JIF website for the current Risk Control standards.

Cyber Security Back to Basics: 7 CORE CONTROLS



Data Management & Recovery:

Frequent backups, off-network.



Account Management & Access: Strong password policy; Virtual Private Network (VPN) AND Multi-Factor Authentication (MFA) for access.



Vulnerability Management: Security updates applied within 30 days from notification; Scan technology ecosystem monthly.



Cyber Hygiene & Awareness Training: Continually train and test on recognizing current cyber security threats; Annual leadership briefing on security; Join a recognized cyber organization (MS-ISAC, CIS, NJCCIC).



Policies, Procedures & Incident Response: Implement a cyber security incident response plan; Establish banking controls for wire/ACH payments.



Asset Management: Inventory technology ecosystem including all hardware and software.



Data Management & Protection: Define data sensitivity, owner, retention and disposal; Follow applicable laws/regulations (ie: HIPPA, NJ Reporting); Password protect/encrypt confidential data.

Case Studies

Case Study #1: Shared Drives

Facts: A local government used a common network, where documents were shared and saved in a central server. The attacker employed a typical phishing e-mail that included a fake link that deployed malware. An employee was duped and clicked on this fake link, downloading two strains of malware. One of the malware strains was designed to find shared drives and spread across the network. This shared drive was open to all employees with no segregation, no encryption, or password protection. As a result, the Department of Public Works could access financial records, Law Enforcement could access Human Resource records, and so on. The malware was able to access all these confidential and sensitive records.

Result: The event cost over \$100,000 in legal and forensics costs. Breach response was engaged to help triage the incident and cyber counsel was retained to handle the legal response. A forensic firm was also engaged to review the files and identify the individuals that needed to be notified. These notifications were sent by legal counsel. All costs, subject to the deductible, were included in the insurance coverage.

Comment: While having a shared drive is not an issue itself, the lack of segregation, password protection, and user privileges was a serious weakness. The local government should also have deployed document protection for the sensitive documents, such as (complex) password protection or encryption.

Case Study #2: Personally Identifiable Information

Facts: A payroll manager was performing the annual task of sending employee W-2 Wage and Tax Statements to senior managers. Unfortunately, the local government lacked a policy for employee departures, and these sensitive documents with Personally Identifiable Information were sent to former employees.

Result: New Jersey data breach laws require special notifications to the affected individuals. The breach coach and cyber council also recommended credit monitoring for all affected individuals. The costs, subject to the deductible, were covered by the insurance.

Comment: Policies should detail procedures for employee departures so that all departments update their records. Employees must be trained, and the policies should be periodically reviewed.

Case Study #3: Contractor Breach

Facts: A local government contracted with outside technology and security professionals. The IT Contractor was breached probably using a compromised password. Once in the Contractor's network, the attacker was able to breach their clients' networks via the remote desktop connections established by the IT Contractor.

Result: The attacker then released ransomware into the networks and demanded between \$200,000 and \$300,000 in Bitcoin from each of the Contractor's 20 clients. Unfortunately, the contractor failed to ensure proper backups. The MEL's insurer engaged cyber counsel and forensics for MEL members.

Comment: Properly vet IT Contractors by requiring credentials and experience. Look into the Contractor's own security practices, such as complex and unique passwords, use of Virtual Private Networks (VPNs) and encryption, and unique passwords when remoting into clients' systems. Also require the Contractor to maintain proper insurance.

Case Study #4: E-Mail Malware

Facts: An employee received an e-mail from a popular delivery company during the December holiday season and clicked on the link to check the package delivery. The link downloaded malware to the network that encrypted the police system. The attacker demanded a substantial ransom while rummaging through the police network.

Result: Cyber counsel and forensics were engaged to remediate the breach, and computer equipment was replaced. All costs, subject to the deductible, were covered by the insurance.

CHAPTER 14



LOCAL OFFICIALS ETHICS ACT

Much of the material in this chapter is from William Kearns, former Mayor of Willingboro, and long-time Fund Attorney for the PMM and BURLCO JIFs. The author would also like to thank the Acting Dept of Community Affairs Commissioner Jacquelyn Suarez and the staff of the Local Finance Board for their assistance in researching case studies.

Background

Webster's defines ethics as: "The discipline dealing with what is good and bad and with moral duty and obligation." In government there is the smell or gut test. If you think something may be a conflict and do not have time to secure a legal opinion, it is best to recuse yourself.

Federal and state governments have enacted criminal laws covering bribery and official misconduct. New Jersey has also enacted the *Local Government Ethics Act* that goes beyond the criminal statutes by covering conflicts of interest. The Legislature declared that:

"Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties."

While rare, officials have been sent to jail for ethical lapses. For example:

- While running for re-election, a Mayor offered his opponent a governmental job if he would drop out. The Mayor was sentenced to 5 years.

- Another Mayor who was also a powerful State Senator used his official position to push the DEP to grant an approval for a law client. He was sentenced to 3 years.
- A Mayor who was also a foreman of a utility authority assigned authority employees to work at his Supervisor’s house. The Mayor was sentenced to 3 years and the supervisor was sentenced to 5 years.

Even if not prosecuted, ethical lapses can end a public official’s career. In one case, a Mayor who was in the business of selling uniforms, stated on numerous occasions that he was the Police Department’s best friend and “had their backs.” Despite this obvious bias, he did not recuse himself from union negotiations. The retired Superior Court Judge who the town retained to investigate this matter ruled that the relationship was too cozy, and the Mayor did not have sufficient objectivity because of this outside business. As a result, the Mayor resigned.

Provisions of the Act

Applicability

The Act covers anyone who is elected, employed, or appointed. Specifically, the Act pertains to, “Local government officers or employees, under the jurisdiction of the Local Finance Board.... (N.J.S.A. 40A:9-22.5).”

Prohibitions

The Act provides that:

“No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest (N.J.S.A. 40A:9-22.5a).”

Note that this basic prohibition pertains to both the public official as well as the official’s immediate family which is defined as:

“The spouse or dependent child of a local government officer or employee residing in the same household (N.J.S.A. 40A:9-22.3i).”

However, you are not off the hook for matters involving family members just because they no longer live with you. In *Re: Engelbert (1997)*, the court ruled that a council member improperly voted on a matter involving his son who was a police officer even though the son lived independently from his father.

Courts have defined the four types of prohibitive involvement:

1. “Direct pecuniary” involvements arise when an official votes on a matter benefitting the official’s own property or affording a direct financial gain.
2. “Indirect pecuniary” involvements arise when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member.
3. “Direct personal” involvements arise when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance.
4. “Indirect personal” involvements arise when an official votes on a matter which an individual’s judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

Other Employment

Governmental officers and employees are prohibited from other employment that conflicts with official positions. For example, an elected official cannot also be an employee of the town.

Specifically:

“No local government officer or employee shall undertake any or service whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties; (N.J.S.A. 40A:9-22.5e).”

Exceptions:

- This provision does not bar nepotism.
- The law allows volunteer fire fighters to serve as local elected officials even though they are technically employees. This exception is limited to volunteers.
- Board of Education employees are also permitted to serve on municipal councils (*Allen v. Toms River Regional BOE*).

Gifts, Meals, and Other Entertainment

Public officials and employees may not accept gifts, meals, or other entertainment if there is any inference that someone is attempting to influence their decisions. For example, let’s say you are meeting with a potential contractor or developer who offers to take everyone out to lunch after the meeting. Situations such as this should be avoided. If you find yourself at a bar or restaurant, pay your portion of the tab and get a receipt.

The restriction against accepting things of value does not apply to political contributions, “if the local governmental officer has no knowledge or reason to believe that the contribution, if accepted, was given with the intent to influence the local government officer in the discharge of his official duties (N.J.S.A. 40A:9-22.5f).”

Using Information Learned During Official Duties.

Under the Act, it is only legal for public officials to use information or governmental services that are generally available to members of the public. In other words, if you learn something in executive session or in caucus, you cannot use that information in your private affairs.

Representing Parties Before Boards and Agencies

The Act prohibits officials and employees from representing other parties before any of the local unit’s boards or agencies. This prohibition also applies to engineers, architects, auditors, planners, or anyone else. However, the law specifically permits employees to represent other employees involved in union activities (N.J.S.A. 40A:9-22.5g).

Other Exceptions to the Act

“No local government officer shall be deemed in conflict with these provisions if no gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group (N.J.S.A. 40A:9-22.5i).”

This provision recognizes that there is a potential conflict in every action and if taken to an extreme, this Act would make it impossible to conduct business. For example, every Council Member pays local taxes, either directly or indirectly. Therefore, one could argue that every Council Member has a personal interest when adopting the budget.

The legislature also recognized that the Act could be interpreted to prohibit public officials from taking up a cause for specific constituents. Therefore, they added the following exception:

“No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefore (N.J.S.A. 40A:9-22.5j).”

The word “if” is important. As discussed earlier, a very powerful elected official went to jail for ignoring that word.

Cure for a Conflict of Interest

Normally the cure is to disclose and not take part in the decision. After recusal, officials and employees can represent themselves or their family in matters before your public entity. For example, in one case a Zoning Board Member who recused himself because he lived within 200 feet of the subject property was permitted to appear before the Zoning Board from the audience to object to the variance. However, be very careful and talk to the attorney in your local government with the authority to review ethical issues. See *Murtagh v. Park Ridge (2006)*.

Hobbs Act Extortion

This 1946 federal Act is the statute of choice for prosecutors investigating governmental corruption. Initially, the *Hobbs Act* was meant to prohibit certain strong arm labor activities, and it was not until the 1970s that it was regularly used against corrupt state and local officials.

Under the Act, “extortion” means “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under the color of official right.” In other words, “bribery” which is a federal crime under the *Hobbs Act* because it is extortion.

- The offense of extortion “under the color of official right” does not have to involve force or threat on the part of the public official. The coercive element is provided by the existence of the public office itself.
- The law also prohibits indirect payments or other tangle benefits to family, friends or campaigns.
- It is not necessary for the government to prove that the public official or employee misused or even attempted to misuse the office. Although the other party may not have received anything more than their due, the official’s acceptance of money or a benefit in return for the use or attempted use of official power is enough to establish criminal extortion.

Other Cautions

- Don’t use governmental equipment or vehicles for personal business, including volunteer activities or political campaigns.
- Don’t request governmental employees to work on your property, personal business, or campaigns.
- Don’t use governmental information not commonly known for personal gain. A good test is to avoid using any information that is not available through OPRA.

- Don't meet alone with developers or others seeking advantages from you. It is best to meet in the local government's office or the office of the government's attorney – not in restaurants or your personal business office. Record the meeting and immediately break off the discussion if anything improper is suggested. Avoid the temptation to be polite and assume that whatever you say may be read to a jury.

Selected Case Law

Hollander v. Watson (1979)

Facts: A Freeholder was appointed by the Board of Freeholders to the unpaid board of the County College.

Decision: The court ruled that the Freeholder could not serve on the college board under the doctrine of incompatibility. You cannot serve in a dual capacity where you must supervise yourself by serving on the board of a subordinate agency. Michael Pane, a noted expert on conflicts of interest, wrote:

“Offices are incompatible when there is a conflict or inconsistency in their functions. Therefore, offices are not compatible when one is subordinate to or subject to supervision or control of the other or the duties of the offices clash requiring the officer to prefer one obligation over the other.”

Comment: In some cases, a statute provides an exception. For example, there is no problem with you representing your agency on the board of a Joint Insurance Fund because that is permitted by the statute that creates JIFs. For the same reason, there is no problem with the volunteer Chief of a Fire Company serving on the Municipal Council because that is also permitted by statute. Just be very careful to recuse yourself whenever a matter impacts both entities. On the other hand, the statute does not permit a volunteer Chief in an Independent Fire District to serve as a member of the governing body of that Fire District. These calls are very technical, and you need the guidance of an attorney before proceeding.

Evans v. United States (1992)

Facts: An FBI agent, posing as a real estate developer, called an elected County Commissioner and offered a campaign contribution in return for assistance to rezone a 25-acre tract for high density residential use. The Commissioner accepted a cash contribution of \$7,000 and a check to the campaign of \$1,000.

Decision: The U.S. Supreme Court ruled that, “If a public official demands or accepts money in exchange for specific exercise of his or her official power, such a demand or acceptance does constitute a violation of the *Hobbs Act* regardless of whether the payment is made in the form of a campaign contribution.”

Comment: Under the *Hobbs Act*, the official does not need to instigate the transaction and payments to other parties or campaign contributions still constitute a felony.

Local Finance Board Opinion 92-015 (1992)

Facts: A Council Member worked for an auto supply company that had a contract through the state cooperative purchasing system. The member inquired if it was permissible for his municipality to purchase auto parts from his firm.

Decision: The Board ruled that this would violate the *Ethics Act*. The state cooperative purchasing system often includes multiple vendors for a given item. Therefore, the town is still showing favoritism by selecting one firm over another, or by deciding to use the cooperative purchasing system as opposed to issuing a separate bid.

Wyzykowski v. Rizas (1993)

Facts: The Mayor applied to the Planning Board to develop his own property and recused himself from the deliberations. The application was controversial, and opponents argued that the Planning Board favored the Mayor because he appointed them.

Decision: The N.J. Supreme Court decided in a split decision that the Mayor may apply, but the court cautioned that the Mayor must be very careful not to exert any influence on case. The court also wrote that, “Whether the Legislature should have proscribed all such activity is a close policy question. It appears not to have done so.”

United States v. Bradley (1999)

Facts: The Mayor’s Chief of Staff, who was also a member of the N.J. State Assembly, assisted an independent insurance “Consultant” obtain insurance contracts for a large national broker. The Consultant was paid part of the commissions by the national broker, but did little real work. The Consultant then shared the fee with the Assembly Member.

Decision: The Federal Appeals Court upheld the jury verdict and jail sentences against both the Assembly Member and the “Consultant.”

Comment: At one time, undisclosed commission sharing arrangements in insurance contracts were common and have resulted in criminal convictions.

Shapiro v. Mertz (2004)

Facts: A Zoning Board Member with many years of experience was confirmed for reappointment by one vote. The tie breaker was his recently elected wife

who argued that her vote was not a conflict because the law did not bar nepotism.

Decision: The court ruled that the spouse's vote was clearly a violation of the *Local Official's Ethics Act*. The court noted that the *Ethics Act* broadened the definition of "conflict." Before the Act, common law used the words "any personal of financial interest." However, in the *Ethics Act* the legislature used the words "financial or personal involvement." The court wrote that, "The specific interests of the parties must be evaluated before a conflict is declared." In this case, the "interest" was substantial even though the position was unpaid.

Comment: These cases are fact sensitive. In another case, the court ruled that a Planning Board Member did not have a conflict when he voted to approve a parking garage at a hospital where his wife occasionally worked.

Beacon Hill Farm v. Marlboro (2006)

Facts: While considering a zoning code amendment, the Council President recused himself, but continued to sit at the dais and perform his functions, including directing debate, controlling the meeting, and calling on interested parties.

Decision: The Council President's actions were deemed unethical. If you recuse yourself, you must leave the table, and if the matter is being discussed in closed session, you must leave the room. Under some circumstances, you must also leave the room even if the Board is in public session because your presence may influence the other Board Members. Further, once you recuse yourself, you must have nothing to do with any aspect of the matter during its entire life cycle.

Hughes v. Monmouth University (2007)

Facts: Several Zoning Board Members voted to approve a controversial expansion of a college library even though they were alumni.

Decision: The court ruled that there was not enough of a connection to create a conflict.

Comment: Contrast this decision with another case where the court determined that members of the Planning Board could not sit in on an application from a marina because they belonged to a neighboring boat club that opposed the marina. Ethics matters are very fact sensitive.

Re: Zisa (2008)

Facts: A town purchased land for a parking lot. The Mayor then entered into an agreement to lease some of the spaces for his business. Subsequently, the town

advertised bids to pave the parking lot and awarded the bid. Before voting on the contract award, the Mayor was advised by the Municipal Attorney that his vote on the award was not a conflict of interest even though his business would be using many of the spaces. A complaint was made to the Local Finance Board, which fined the Mayor \$200 after deciding that the Mayor's actions were clearly over the line. The Mayor then appealed.

Decision: The Appellate Court ruled that absent any indication of collusion, the fact that the Mayor requested and received the advice of the Municipal Attorney qualified the Mayor for the safe harbor defense. However, this defense is limited to the fine and does not legitimize the action. See *Kennedy v. Local Finance Board (2018)*.

United States v. Donna (2010)

Facts: The Mayor and his wife, who also served on the Planning Board, became close to two sisters who owned several bars in town. After the sisters experienced difficulties with one of their liquor licenses, they intentionally befriended the Mayor's wife. Over the next few years gifts were exchanged, including some from the sisters to the Mayor's wife that were quite expensive. When the sisters filed an application to the Planning Board, the Mayor interceded with the building inspector and other officials. Neither the Mayor nor his wife recused themselves when the application was heard by the Planning Board.

Decision: The Mayor and his wife were convicted of extortion and the Mayor served 4 years in Federal prison. The court ruled that the government did not have to prove a direct connection between the "gifts" and the official acts. The mere fact that there had been a "stream of benefits" over time is sufficient to establish a criminal violation of the *Hobbs Act*.

Comment: The fact that someone is a "friend" does necessarily create a problem. However, if the relationship involves extensive gift giving or other favors, it is best to recuse yourself from any matter involving the friend.

Local Finance Board Opinion 10-013 (2010)

Facts: A new Freeholder owned a business that removed deer carcasses from county roadways. He requested the Local Finance Board for an advisory opinion on whether he could submit a bid to the county so long as he recused himself from establishing the specifications or considering the award.

Decision: The Local Finance Board decided that even though the service is being awarded by bid, and the member recused from anything concerning the award, the other members of the governing body may still be influenced to give their colleague special consideration.

Comment: These situations are very fact sensitive. Let's say you work for an auto company. It would not be a problem for the local dealer to submit a bid for police cars so long as you recuse yourself. However, it would be a conflict if you worked for that dealer. Again, this demonstrates the importance of talking with your public entity's attorney before deciding whether to participate in a matter.

Local Finance Board Opinion 11-073 (2011)

Facts: A member of the Municipal Council was also employed as the Town's Planning Board Secretary.

Decision: The Board ruled that an elected official may not be an employee of the municipality, or an authority controlled by that municipality. The only exception is a Volunteer First Responder who is technically considered as an employee.

Comment: This prohibition does not extend to family members. However, you must be very careful about voting or participating in anything that impacts your family member. This is another example of where you should talk to the attorney in your organization with the responsibility for ethical matters.

Local Finance Board Opinion 11-146 (2011)

Facts: the town was having a referendum on combining the Planning and Zoning Boards. The Mayor urged residents to vote for the measure in the town paid newsletter.

Decision: The Board ruled that there is nothing per se wrong with the Mayor using the town newsletter to explain the referendum. However, once the Mayor uses statements such as "I urge you to support this proposal" or "vote yes in the referendum," then the Mayor has crossed the line into campaigning. It is illegal to use public resources in campaigns.

Local Finance Board Opinion 12-037 (2012)

Facts: The Mayor used the title "Mayor" in solicitations for a charity and sent letters at his expense requesting contributions to individuals and firms that did work for the town. He did not use official stationery.

Decision: The Board ruled that it is legal use your title and you can solicit donations from individuals and firms that do work for the town so long as there is no implication of a "quid pro quo."

Comment: You can also use your title when soliciting campaign contributions. However, you cannot use official letterhead or public resources when soliciting contributions for either charities or campaigns.

Local Finance Board Opinion 12-093 (2012)

Facts: The Mayor’s agency provided insurance to a lawn service that worked for the town for many years. The service only started purchasing insurance from the Mayor after the Mayor was elected.

Decision: The Board ruled in favor of the Mayor. The fact that the contractor did work for the town before the Mayor was elected suggests that there was no favoritism in the award. The Board’s decision was also influenced by the fact that the contractor’s policies represented only a small portion of the Mayor’s commissions.

Local Finance Board Opinion 12-013 (2012)

Facts: The Council President used one sheet of official town stationery to endorse a candidate for Congress. The letter was reproduced at the expense of the campaign and had the proper “paid for” statement at the bottom.

Decision: The Board ruled that you may not use even the image of official stationery for anything other than official governmental business.

Comment: One sheet or a ream of paper doesn’t matter. You cannot use anything funded by the taxpayers in your campaigns. While one sheet of paper seems like a small matter, your opponents will have a field day in the press at your expense, and you are exposing yourself to a fine if anyone complains to the Local Finance Board. What constitutes illegal use of public resources is very broadly interpreted.

Local Finance Board Opinion 14-008 (2014)

Facts: A Council Member voted to appoint his campaign manager to a vacant position on the town’s Utility Board.

Decision: The Board ruled that simply because someone was involved in your campaign does not bar you from appointing or confirming them in any paid or unpaid municipal position.

Comment: In another case, a Mayor and Municipal Attorney were significant owners of a bank that conducted business with a firm that had a controversial application before the Planning Board. Neither the Municipal Attorney nor Mayor recused themselves and a neighbor sued. Both the Mayor and the Municipal Attorney had to make substantial contributions to the settlement.

Local Finance Board Opinion 13-014 (2014)

Facts: A Council Member voted on a matter involving the non-profit Police Athletic League that oversees some of the athletic events in the town. While the Council Member was also President of the League, there was no hint of personal gain, and the athletic teams were open to all members of the public.

Decision: The Local Finance Board ruled that this violated the Act. The Board wrote that this would be legal if the Council Member was not an officer of the non-profit.

Comment: This is another example why you should seek the advice of your local government's attorney before participating in discussions concerning any organization you are involved with.

Grabowsky v. Montclair (2015)

Facts: During the hearing for an application to build a senior citizen home the Mayor created a storm when he said that this might be a good place for his mother to live.

Decision: The N.J. Supreme Court ruled that the Mayor did not have a conflict merely because his mother might move into the proposed senior center. However, the Mayor was also a Board Member of a church adjacent to the proposed senior center and therefore the Mayor's vote was a conflict because of his relationship with the church.

Kennedy v. Local Finance Board (2018)

Facts: The unpaid Mayor of a small Town performed many duties that would normally be assigned to a Municipal Administrator and Personnel Director. He proposed to the Council that he be appointed to those positions and be paid salary while he also continued as Mayor. The municipal attorney advised that this was legal. The Local Finance Board found that this was a violation of the *Local Government Ethics Law* that prohibits local elected officials from also being an employee of the governmental unit they serve and fined him \$500. The Mayor appealed on the grounds that he sought the advice of the Municipal Attorney in advance and was entitled to a safe harbor defense.

Decision: The court agreed with the Local Finance Board that the Mayor's employment was illegal and that he could not be both an employee and an elected official at the same time. However, the court also held that he could not be fined because he had received the opinion of the Municipal Attorney in advance.

Comment: Even if you receive the advice of the Municipal Attorney, a violation of the *Local Government Ethics Law* will still result in the action being overturned. However, acting under the advice of the Municipal Attorney may prevent the official from being fined.

CHAPTER 15



Much of the material in this chapter was provided by Chuck Cuccia, a long-time Municipal Manager and MEL Commissioner.

Background

The current emergency management framework evolved from Cold War era “civil defense” requirements. With the end of the Cold War, emphasis shifted towards disaster relief, recovery, mitigation, terrorism, cyber threats, and global pandemic events. In 1979, disaster-related responsibilities were consolidated into the newly created Federal Emergency Management Agency (FEMA). After 9-11, the goals of emergency preparedness were revised to three basic points:

1. Reduce loss of life and property.
2. Minimize suffering and disruption caused by national disasters.
3. Prepare the nation to address the consequences of terrorism.

State and local governments mirrored the changes at the federal level by adopting an “all hazards” approach to emergency management. The federal structure continued to adapt to terrorist threats, global pandemics, and climate change.

In New Jersey, the most important organization for local officials is the Office of Emergency Management (OEM) of the State Police. Responsibilities of the State OEM include emergency planning, first responder training, organizing large-scale exercises, and responding to major incidents. The focus is on four areas:

1. Severe weather.
2. Hazardous materials training and response.
3. Radiological preparedness.
4. The process of developing local emergency operation plans.

In the event of a major emergency, the State OEM serves as the principal advisor to the governor. If a presidential declaration is issued and local governments become eligible for reimbursement of public costs, the State OEM plays a lead role in collecting information on damage, providing technical assistance to applicants, reviewing claims applications, disbursing grants, and monitoring expenditures.

The State delegates many emergency management functions to the County and Municipal levels. Each County in New Jersey has an Office of Emergency Management to coordinate activities and provide technical support to Municipalities and to review emergency operation plans.

Mandates and Best Practices

Leadership: State law requires every municipality to appoint a resident as Emergency Manager for a term of 3 years. Some communities assign the task to a municipal official with full-time duties, while others have assigned citizen volunteers or part-time employees. The candidate must be able to provide an adequate focus on the responsibilities of the position. In addition, he or she must be able to obtain the respect of other community leaders, particularly those in the public safety professions.

Ideally, the individual should:

- Be experienced in the planning, development, and administration of both municipal and emergency response activities, although many of these skills can be acquired through proper training.
- Not have conflicting responsibilities to fulfil during the emergency, such as being an Incident Commander or head of a principal public safety service.
- Not be subordinate to other public safety professionals in other aspects of their employment with the local unit.

The Emergency Management Coordinator (EMC) must be recognized as having the authority to declare a “state of local disaster emergency” whenever a disaster has occurred or is imminent. This authority is provided by the *New Jersey Emergency Management Act* and specified in State Office of Emergency Management directives. This authority should be codified locally in the municipal emergency operating plan.

In any major emergency, the EMC should be the person coordinating municipal resources. However, the EMC should not be the Incident Commander. This role can be performed by the Police Chief, Fire Chief, or other official as specified in the municipal plan. If the right person is filling the EMC position and has been adequately trained, the governing body and Chief Executive Officer should be comfortable with the statutory delegation of such authority. In practice, the EMC

will issue the declaration only after consulting with the Mayor or Municipal Manager. The significant leadership role of the EMC during a disaster does not diminish the roles of the other community leaders.

Every EMC must complete a home study course and attend a workshop as a condition of appointment. State Police guidelines go further by requiring every EMC to complete 24 hours of training annually. Municipalities need to provide adequate administrative and financial support to facilitate this level of training.

EMCs should be encouraged to participate in professional emergency management organizations, especially those that permit networking with Emergency Managers from elsewhere in the nation. EMCs should also be encouraged to obtain professional certifications, such as Certified Emergency Manager and Certified Flood Plain Manager.

Emergency Planning Committee (LEPC): State and federal law require every municipality to have a functioning LEPC that must meet at least once per year to review the Municipal Emergency Plan. The LEPC should meet at least quarterly and ideally, it will meet monthly. Elected officials that are not on the LEPC should attend at least one meeting per year to obtain first-hand exposure to emergency management challenges and resources.

The LEPC should include representatives of all agencies involved in emergency response and recovery, as well as managers from any high risk or large industries in the community.

By statute, the group is chaired by the EMC. Other members should include:

- Mayor and/or Municipal Manager
- Other Elected Officials
- Police Chief
- Fire Chief
- Health Officer
- IT Professional
- DPW Superintendent
- Municipal Engineer
- School Representative
- Public Relations Officer (Optional)
- Construction Official
- Finance Officer
- Media Representative
- Risk Manager (optional)
- Business Liaison
- Service Organization Liaison
- Utility Liaison
- Social Services Liaison
- Government Continuation Liaison
- Operators of facilities subject to SARA *Title III*

In addition to reviewing the municipal Emergency Operations Plan, the LEPC should conduct regular evaluations of community vulnerabilities and review emergency plans of any high-risk facilities, including schools and healthcare institutions.

Assuring the active participation of School representatives is particularly important. School officials are outside of the normal organizational structure of the municipality and are at risk of being isolated from the other functions of local government. Schools are custodians of a critical population (children) and resources (school facilities that are commonly designated as shelters) and must be intimately involved in the emergency planning process.

Similar efforts should be made to closely involve representatives from Utilities, Authorities, and other organizations that are not a formal part of the normal municipal government structure.

Evaluation of Local Vulnerabilities: Disasters are generally categorized as either “natural,” i.e. caused by a force of nature, or “technological.” The latter, also called “man-made” disasters, are caused by the failure of a system or piece of equipment, an accident, or an intentional act of man.

Disasters can also be classified as either predictable or non-predictable events. A hurricane, for example, is now relatively predictable because it can be tracked long before it reaches land. However, fires, transportation accidents, chemical releases, terrorism, global pandemics, major incidents of school violence and cyber-crimes usually occur without warning. In these cases, community officials must rely on established emergency plans that, ideally, will have anticipated the course of events. These plans should be incident specific since a procedure that will work on one type of event may not work for another.

The local emergency planning process begins with a comprehensive analysis of community hazards and vulnerabilities, i.e. the likely impacts of those hazards.

RISK
Terrorism

ISSUES

What community resources or infrastructure could be the focus of terrorist attention?

Have plans been made for continuity of government operations?

What steps have been made to assure citizen and family preparedness?

Flooding

What areas are likely to flood during periods of severe weather or when drainage systems of dams fail (including those in neighboring communities)?

Flooding	<p>What community assets are in floodplains?</p> <p>How vulnerable are municipal records, communications, utilities, and other basic infrastructure?</p>
Other	<p>What is the likely impact of a severe hurricane or winter storm?</p>
Transportation	<p>What are the risks posed by major transportation corridors in the community and in nearby towns?</p> <p>What is the likelihood of an air crash?</p> <p>Do pipelines create special risks?</p>
Technological	<p>What facilities in, and near, the community use or store hazardous materials are what are the risks?</p> <p>If a chemical release occurred, what areas would be affected?</p>
Public Facilities and	<p>What are the vulnerabilities of schools, healthcare facilities, high-rise apartments, transportation centers, other sites with large concentrations of people?</p>
Large Fires	<p>What sites (both structures and underdeveloped properties) are particularly vulnerable?</p>
Infrastructure	<p>What is the risk and likely impact of disruptions to power supply, water, sewer, and other key systems?</p>
Pandemic	<p>What are the specific equipment needs to ensure the safety of first responders and other municipal employees?</p> <p>Develop plans to split or modify work schedules to limit employee and volunteer exposure.</p> <p>What sites are potentially high risk for pandemic spread?</p> <p>Identify issues associated with response capabilities and resource availability of community emergency management agencies to support healthcare agencies and systems in their response to a pandemic.</p>
Cyber Crime	<p>What governmental systems would be affected and how would you address the issue of government continuity.</p>

The staff of the local Office of Emergency Management, local emergency, and support services, and LEPC must work together to identify the hazards, assess the risks, and analyze the implications for the community. This evaluation will provide the foundation for the Emergency Operations Plan (EOP), which will describe how the community is to prepare for, respond to, and recover from, these major vulnerabilities.

Annual Update of the Emergency Operations Plan: The format and organization for municipal EOPs in New Jersey have been standardized by the State Office of Emergency Management. The EOP must, by law, be updated every two years, but an annual review and update is recommended. EOPs are certified by the State Police every 4 years.

The EOP of each municipality consists of multiple chapters or “annexes.” Each annex focuses on a key component of the emergency management plan. The contents will reflect the unique characteristics and hazards of the community, every municipal EOP will have the following annexes:

Basic Plan (Executive Summary)	Hazardous Materials
Alert, Warning, and Communications	Public Health
Damage Assessment	Public Works
Emergency Medical Services	Radiological Protection
Emergency Operations Center	Resource Management
Emergency Public Information	Shelter, Reception, and Care
Evacuation Plans	Social Services
Fire Services	Terrorism

Each community should also consider developing a separate annex with specific plans for any high-risk facilities, such as schools, healthcare facilities, shopping malls, office complexes, or high-rise buildings. In today’s environment, it is especially important to address cyber-crime and global pandemics. While these plans are not required by the State, they will greatly enhance public safety and emergency services preparedness.

The plan should be reviewed for functionality after every emergency event or exercise. If responders were forced to depart from the plan, or some assumption proved unrealistic, the problem should be discussed at an LEPC meeting, and the plan should be modified. The municipal EOP should never be viewed as complete. It should be continually revised to reflect changes in the community and recommended improvements.

The EOP should include plans for assuring the safety of families of emergency responders. Public safety leaders, staff, and emergency responders can focus on their duties during an emergency only when their personal responsibilities for the safety of their own families is assured.

The Continuity of Government is especially critical in all emergency events. There is a particular need to identify the line of succession to the office of Mayor/Chief Executive Officer to ensure continuous leadership. The plans need to establish both who will lead, and how the government will operate under emergent conditions.

Incident Command System (ICS): No matter how much time, money and effort are invested mitigating risks, developing emergency plans, and training responders, the risk of a sudden emergency cannot be eliminated. When the unthinkable happens, local leaders will face a barrage of questions. Who is in charge? How do we respond to calls for assistance? How do we tell the public and news media? What are the priorities?

If the community has an effective emergency plan, most of the answers should be found there. How well those plans are put into action will depend on the ability of the response team to manage and control the event. The basic approach to incident management that has been adopted by New Jersey and other states is a tool called the Incident Command System (ICS). The State Police has mandated that ICS be the standard command and control system during emergencies, including fires. Federal law requires the use of ICS for hazardous materials incidents. In addition, the ICS approach must be incorporated into emergency operation plans. Consequently, any local official who may become involved in the response to an emergency, including off-site support personnel, needs to understand the concept.

The utilization of a Unified Command structure is a team effort, which allows agencies and departments with functional responsibilities for an incident to assign an Incident Commander to the Unified Command. The Unified Command then establishes a common set of incident objectives and strategies. This structure includes Command, Logistics, Operations, Finance, Planning, and Administration.

The approach provides a means to coordinate the efforts of separate agencies as they work toward stabilizing an incident. Coordination is key because most incidents will require multiple agencies on one jurisdiction or involve multiple jurisdictions. Regardless of the size of an emergency, or the number of organizations involved, there must be some coordination mechanism to ensure that resources are used effectively, efficiently, and safely.

The plan should not assign tasks such as hazardous material incident command to individuals unless they have earned the required certifications. Documentation of these certifications should be readily available.

Emergency Operations Center (EOC): In a large-scale disaster, numerous incidents are likely to be reported. An organizational mechanism is required to establish priorities among the incidents and to coordinate the response across the entire community. That function is performed by the Emergency Operations Center (EOC).

An EOC is where the EMC, department heads, elected officials, and volunteer agencies gather to coordinate the response. It is normally activated only for large, area-wide events, such as those caused by severe weather and major technological incidents. The space is designed to provide the logistical tools and supplies to properly manage the disaster. Every department that plays a role in managing the event should have a representative in the EOC with the authority to make decisions for the individual agency. All personnel to the EOC should be trained in its operation, and ideally, will have participated in exercises in which the EOC has been activated.

Drills and Exercises: State regulations require each municipality to conduct one drill or exercise per year. The drill should be designed with goals in mind or should test specific chapters of the Municipal Emergency Plan and should involve both volunteer and career responders. Any weakness revealed by the drill should result in plan changes.

The State OEM recommends testing seven annexes per year. These exercises can vary in complexity.

- **Drill** is the first and simplest exercise. An individual organization, such as the Fire Department or Rescue Squad, practices its function. In most communities, the emergency services conduct drills throughout the year.
- **Tabletop Exercise** is the next step. The agency representatives, assembled in a command center, are asked to respond to various scenarios in a simulated emergency.
- **Functional Exercise** is the third type and is conducted in the field. Here, various organizations practice performing one or more coordinated activities such as a large-scale evacuation.
- **Full-Scale Exercise** is the most extensive test and draws on all or most annexes and organizations. This can be expensive and requires planning, but is the most effective test short of a real emergency.

Town-Wide Alert System: The response capabilities of every community must include an effective method of conveying meaningful information to the public. In the event of severe weather or major technological incident whole neighborhoods, or an entire community, may need to be evacuated on very short notice. The people at greatest risk must be contacted and told what to do and where to go sometimes in a matter of minutes. In other less threatening situations, Emergency Managers may be required to convey important public safety information to residents so they can take preventive measures. New technologies such as Reverse 911 or an e-mail blast offer a range of options that should be evaluated.

Financial Planning: Whether approached incrementally or more systematically, the municipal budget reflects a community's values and priorities. If emergency planning is to be seriously considered, it will have an impact upon the local budget.

The local operating budget should reflect compensation for the EMC, provide for training, reflect funding needed to upgrade equipment and systems, and provide for the mitigation of threats. Fortunately, intergovernmental aid is available to help reduce the impact on local tax rates.

Local purchasing ordinances and procedures should anticipate the need for emergency requisitions of supplies and services. New Jersey law permits local emergency purchases without formal bidding. The EMC should be familiar with these procedures and have written guidelines and access to the municipality's contracting officer.

Coordinating planning with neighboring communities may also help reduce opportunities for sharing resources.

CHAPTER 16



CRISIS MANAGEMENT

This Chapter was written by Norris Clark of Princeton Strategic Communications.

Background

In the last chapter, we discussed that the Emergency Manager must be able to coordinate all aspects of local government’s response, including communications. The Crisis Communications Plan must clearly designate the spokesperson and who is responsible for preparing the content. Every official must become fully versed in this plan after being elected.

Developing a Crisis Communications Plan: Most Local governments need two related plans – one for issues that fall under the scope of the Emergency Manager and a second to respond to other issues. The individual responsible for communications will probably be the same, but this individual may report to different officials depending on the type of crisis. Where the Emergency Manager is involved, the Communications Director should be a part of the Local Emergency Management Planning Committee (LEMC). Otherwise, the Communications Director will report to either the local government’s top elected official, administrator, or Incident Commander as outlined by the Municipal Emergency Management Plan. Advanced planning is essential because the Communication Director must be able to act immediately. These plans must consider the wide range of possible crisis events.

Communications Planning: In developing the Communications Plan, determine who will be in overall command for each scenario and who will be the Incident Commander. Then identify who on the staff needs to be involved. The plan should also determine the immediate communications needs including:

- What is the potential public impact or interest?
- Who will be affected and how, and what emotions need to be considered?
- What will the public be asked to do (evacuate, shelter-in-place, avoid a location)?
- What information is needed, who beyond the staff need to get it, and when will it be available?
- What CAN and CAN'T be said?
- Is legal counsel needed?
- Who will communicate the response as the spokesperson?
- Who should be contacted and in what order of priority (media, legislators, stakeholders, others)?
- Does the issue have traction (will it be more than a blip on the news)?

The Communications Director must develop factual, responsive messages to be used by the organization and its representatives. All media and public inquiries should be referred to the authorized spokesperson for comment. All other staff should be professional and helpful to the media by connecting them with the spokespeople, however, staff should not speak directly to the media or provide any information.

Do not release information until the person who manages the crisis team reviews the situation and authorizes the strategy. Quickly craft “holding statement(s)” to deliver interim responses to the media. This demonstrates that local government is taking ownership and not “stonewalling” or being uncooperative.

1. “No comment” is never an acceptable response. If an answer is unknown or can't be immediately answered, make a note of the question and tell the inquirer you will get back to them – then do so. Let the inquirer know if the question can't be answered due to a policy (such as sharing personnel information, HIPAA, etc.).
2. Personnel matters are to remain confidential except as required by the *Open Public Meetings Act* and the *Open Public Records Act (OPRA)*.
3. Communicate the scope and significance of the problems before promoting the solution. Once the solution is being implemented, communicate what's being done to resolve the crisis. Avoid speculation or blaming anyone or anything when little is known about the origins of the crisis. Instead, focusing first on mitigating the crisis and protecting public health and safety.
4. Keep in constant contact with key stakeholders, especially with schools, utilities, hospitals, and neighboring communities if they could be affected.
5. Without guessing or speculating, create realistic and honest expectations of the actual risk, what the public can expect, and whether protective actions are required. Do not communicate unverified numbers such as people injured, timelines, cost projections. Quickly correct or clarify inaccurate and misleading statements.
6. Tap independent third parties, when possible, where their expertise is unique or pertinent to the crisis or response.

7. Ensure the response effort is visible throughout the crisis. Anticipate the needs of journalists/media and their deadlines.
8. Designate a liaison to stay in touch with victim's families. Show empathy for people, and place their concerns above costs or inconveniences.
9. Ensure the quality of the communication itself does not become an issue. Stay on message. Never make accidental news.
10. At the end of the crisis, conduct a post-mortem evaluation: What worked well and what didn't? Were there any points of confusion?

Staff Notification: Many employees have frequent contact with residents because of their job duties. As soon as practical, the Communications Director will communicate information regarding the situation to the employees who are not directly involved with responding to the emergency. If the crisis occurs at a time when staff are not in the office and disseminating the information is either critically time-sensitive or regards the safety of the office building, a phone or text message tree should be used to communicate the information to staff. The needs of affected staff and their input on the situation should be taken into consideration. Also, remind staff that they are not authorized to comment and should refer all inquiries (media, neighbors, etc.) to the designated spokesperson.

Record Keeping: Document all critical conversations, decisions, details, and media questions regarding the situation. This will help to effectively evaluate crisis communications management and to preserve a record in case of litigation.

Conclusion:

The right message, from the right person, at the right time can save lives. The Centers for Disease Control and Prevention (CDC) emphasizes six vital communications principles for crisis and emergency planning:

1. **Be First:** Crises are time sensitive. Communicating information quickly is crucial. For the public, the first source of information often becomes the preferred source.
2. **Be Right:** Accuracy establishes credibility. Information can include what is known, what is not known, and what is being done to fill in the gaps.
3. **Be Credible:** Honesty and truthfulness should not be compromised during crises.
4. **Express Empathy:** Crisis can create harm and the suffering should be acknowledged in words. Addressing what people are feeling, and the challenges they face, builds trust and rapport.
5. **Promote Action:** Giving people meaningful things to do calms anxiety, helps restore order, and promotes a sense of control.
6. **Show Respect:** Respectful communication is particularly important when people feel vulnerable. Respectful communication promotes cooperation.

Case Study:

Hurricane Katrina: On August 29, 2005, Hurricane Katrina began a chain of events that would devastate and flood the city, breach protective levees, and claim 1,392 lives across the Gulf Coast. A study of the disaster by Terry W. Cole and Kellie Fellows found that a fundamental failure in risk communications contributed to the storm's consequences.

- Residents became apathetic about the risks associated with a major hurricane. The government's unfulfilled promises and lack of attention to the risks damaged its credibility.
- The messages and messengers compounded the problems by delivering conflicting and confusing messages about the impact the storm would have on the city's levee system.
- While 90% of those with the resources and means evacuated the region, approximately 70,000 could not or could not evacuate. Those who heard evacuation orders may have presumed it was not all that mandatory because of perceived negative consequences, unclear messages from officials, or lack of knowing how to evacuate.
- The evacuation language at pre-Katrina levels and hours before landfall was vague and uncertain. Evacuation levels varied from parish to parish and avoided the term "mandatory".
- The spokespersons lacked credibility with the African American population, particularly because of the government failed to assist with an evacuation during Hurricane Ivan in 2004. With Katrina, "Previous communication had warned of levee failure and massive flooding, yet the evacuation plan did not take residents out of the city, but to a facility that was already becoming surrounded with floodwaters."
- Despite warnings and expressions of danger, neither the city nor the state implemented pre-planned evacuation plans for all New Orleans citizens. No information was disseminated specifying how individual citizens or Parish officials should execute the evacuation.

CHAPTER 17



Background

While Risk Management initially focused on issues that impact the insurance budget, it quickly expanded into other exposures that affect the organization. Local government is on the front line for many serious safety issues impacting the public. The country has made tremendous strides reducing some types of accidents.

Unfortunately, recent years have seen large increases in pedestrian accidents, accidents involving seniors, and bicycle accidents involving adults. These accidents are now increasing because of distracted driving, including the use of cell phones and text messaging. Safety and health issues of an aging population have also put a tremendous burden on emergency responders at a time when budgets are tight.

The solution to these issues must include officials at all levels. Priorities are determined by what leaders are interested in. For a safety program to be successful, it must be given consistent attention. The safety program's status should be a recurring item on the governing body's regular workshop agenda.

Sports

Each year more than 1 million Americans are injured during recreational sports. Brain injuries cause more deaths than any other sports injury. Too often, concussions are untreated because few symptoms are visible to the casual observer. In addition, an athlete may experience considerable pressure from spectators, teammates, and coaches to resume playing. Multiple concussions over time may result in cumulative damage, while repeated concussions over a short period may lead to Second Impact Syndrome.

Signs of Brain Injury: Whenever an individual loses consciousness, the brain has suffered an injury. However, most brain injuries do not involve loss of

consciousness. It is essential for a coach to keep a player out of a game when there are any signs or symptoms of a concussion.

The term “concussion” is often used in the medical literature as a synonym for a mild traumatic brain injury. If a concussion is managed appropriately, the prognosis for complete recovery is good. The hallmarks of concussion are confusion and amnesia, often without preceding loss of consciousness. Amnesia generally involves loss of memory for the traumatic event, but frequently includes loss of recall for events immediately before or after the head trauma. An athlete with amnesia may be unable to recall details about recent plays in the game or details of well-known current events in the news. Amnesia also may be evidenced by an athlete repeatedly asking a question that has already been answered.

Training: The Rutgers SAFETY Clinic course includes training on sports concussions. The Center for Disease Control (CDC) has a free online training program that produces a certificate upon successful completion of the course. All coaches, referees, and other officials involved in sports activities should be required to complete at least one of these, or a similar course, and submit the documentation for the town’s records. Parents should also be encouraged to take a course.

Leading Causes of Sports Accidents

1. Basketball	260,000	6. Skiing	57,000
2. Football	222,000	7. Lacrosse	55,000
3. Swimming	156,000	8. Volleyball	39,000
4. Soccer	145,000	9. Hockey	33,000
5. Baseball	116,000	10. Track	15,000

Baseball: The head is involved in more baseball injuries than any other body part. Almost half of the injuries involve a the head, face, mouth, or eyes. The leading cause of injury and death is being hit by the ball; second leading cause is collision.

Football: In any given season 10% of all college players and 20% of high school players sustain brain injuries. Football players with brain injuries are six times as likely to sustain new injuries. Ways to reduce injuries include:

- Match players (size, weight, and training) in contact drills.
- Limit tackling and blocking routines during practice.
- Emphasize “keeping the head out of football.” No butt-blocking using your head.
- Teach proper techniques and rules for safety: Never face/head tackle!
- Train consistently and properly. This includes doing exercise recommended for strengthening the neck and shoulder muscles.

Soccer: About 5% of soccer players sustain brain injuries. This may occur from head-to-head contact, falls, or being struck by the ball on the head. What you need to know:

- Heading, or hitting the ball with the head, is the riskiest activity when done repeatedly. The risk is greater if a small child uses ball that is too large. Heading the ball, especially by younger players, should be discouraged.
- Girls are injured playing soccer more often than boys.
- Collision with other players should be discouraged and avoided.
- Younger teams should use the appropriate size and weight ball during practice and play.
- Goal posts should be padded and properly anchored to the ground.

Cardiac Arrest: Sudden cardiac arrest events are another health issue that can occur during sports activities.

Janet's Law (N.J.S.A. 18A:40-41a through 41c) requires public and non-public schools to have an Automated External Defibrillator (AED) for youth athletic events.

- The AED shall be located within reasonable proximity of the gym or athletic field.
- The AED must be available in an unlocked location with an identifying sign.
- The AED must be accessible during the school day and any other time a school sponsored athletic event or practice is taking place.
- A coach, trainer, staff member, EMT or first responder trained in CPR/AED must be present during the event or practice.
- Schools must develop an Emergency Action Plan for responding to sudden cardiac arrest events. This plan must include who gets the AED, who calls 9-1-1, who starts CPR and uses the AED, and who assists rescuers getting to the victim.

Playground Safety

Over 180,000 injuries are reported each year on playgrounds in the United States. The Consumer Product Safety Commission (CPSC) developed the playground safety standards (Publication 325) which have been adopted by New Jersey. A copy of this publication can be found on the CPSC's website (cpsc.gov). Many of the MEL's safety professionals are also certified Playground Safety Inspectors who assist towns developing a checklist for the in-house review of playground conditions.

Initial Inventory: Retain a professional to inventory existing playgrounds and evaluate compliance. The inventory should be updated whenever there are major changes. Specifically identify the different pieces of apparatus, manufacturer, date of manufacture, location, age appropriateness, and details

on the protective surface. A separate file should be established for each playground.

Annual Audits: At the beginning of the year, review the file and perform a detailed physical examination of each playground. The audit should be the responsibility of someone who has received the necessary training. All repairs should be made before opening for the season. A similar audit should occur at the end of the season to begin planning for the following year.

Monthly Inspection: Inspections should be conducted at least monthly (or more frequently depending on usage) by maintenance personnel specifically trained to identify hazards and initiate repair procedures. If the repair cannot be performed on site, the apparatus should be taken out of service so that it can't be used until it is satisfactory. All inspections should be documented along with corrective actions.

Bicycle Safety

- Since 1975, deaths among cyclists age 20 and older have increased fivefold, although deaths among bicyclists younger than age 20 have declined 88% (ihhs.org).
- 1,155 bicyclists were killed in traffic crashes with motor vehicles in 2023, the highest number ever recorded (ihhs.org).
- Bicyclist deaths have increased 15% since 1975, and have increased 86% since reaching their lowest point in 2010 (ihhs.org).
- Bicycle helmets reduce the risk of head injury by 85% and brain injury by 88% (aap.org).
- Universal use of helmets could prevent one death every day and one brain injury every four minutes (biausa.org).
- New Jersey requires that children under 17 wear helmets while bicycling, in-line skating, and other wheeled activities (nj.gov).

Senior Citizens

Older individuals are more vulnerable to injury and can have a reduced chance of recovery.

- **Slips and Falls:** More than one third of adults age 65+ fall each year, and falls are the leading cause of injury deaths among seniors. Each year, almost 2 million seniors are treated in emergency departments for nonfatal injuries from falls, and more than 400,000 are hospitalized. Rates of fall related deaths have increased significantly over the past decade.
- **Motor Vehicles:** Today's seniors are mobility-minded and elect to drive longer. However, some older drivers are unable or unwilling to assess their driving capabilities.

- **Pedestrians:** Seniors account for 18% of pedestrian fatalities, the highest rate of any age group. Seniors often have difficulty hearing or seeing cars and are especially vulnerable at intersections because they need more time to cross the street.
- **Suicide:** Suicide among the elderly is becoming an increasing problem. High rates of alcohol involvement have been found among individuals who commit suicide.
- **Fire:** Older adults suffer twice as many fire deaths as the general population. People age 85+ are four times as likely to die in a fire as other groups. When a fire starts, the elderly need more time and may need assistance from others to escape from a fire area.

Addressing the Issue: Begin by compiling the accident rates for your community and talk to the Police, Fire, Ambulance, and Health Departments about the issue. Reach out to senior groups and seek their views. For example, are there particular intersections that need safety improvements to accommodate the needs of senior adults? Where should sidewalks be improved? What other services can the community provide seniors?

There are numerous organizations that provide educational material including the Brain Injury Alliance, the Centre for Disease Control (CDC), the National Highway Traffic Safety Administration, and many others.

Pedestrian Safety

Each year, approximately 70,000 pedestrians are injured and more than 4,000 killed in motor vehicle-related accidents in the United States.

Defining the Problem: Pedestrian accidents are caused by a mix of physical and human factors. For example, pedestrian accidents are more frequent in urban areas, but more likely to be fatal on rural roads. Children are also involved disproportionately.

- For children under the age of 5, the frequency is relatively low, but these accidents are often fatal. Tragically, two young children are killed each week by backing vehicles. Children are especially vulnerable to accidents in driveways. This is known as the “bye-bye” syndrome and involves a child who runs towards a car driven by someone who is a parent or close relative 70% of the time.
- Starting at age 5, the accident rate increases significantly because children begin to explore their neighborhood. A significant contributing factor is the inability of young children to locate a moving object through hearing. This is known as auditory localization and is typically not developed until a child is 9 or 10 years of age. As a result, young children are not aware of

traffic unless they are literally looking directly at a vehicle. One of the most common types of accidents in this age group is the “mid-block dart out.” Because children lack auditory localization, they tend to impulsively run across the street without stopping to look. Often parked cars complicate the situation by hiding a child from the passing motorist, who may not see the child until it is too late to stop.

- By age 10, children become more mobile, and the accident rate increases accordingly. During this age, children experience significant numbers of accidents at intersections and in parking lots.
- Starting at age 16, drugs and alcohol become a factor in pedestrian accidents. Teens along with people in their early 20s are more apt to risky behavior because the area of the brain that cautions against these behaviors is not yet fully developed. In fact, the pedestrian accident rate does not drop significantly until the brain has fully matured, usually in the mid-20s.
- At age 25, the overall accident rate drops. However, this is deceptive because people walk less as they age. The fatality rate, as opposed to the overall accident rate, peaks for pedestrians 75 to 84 years of age. Seniors are far more likely to be seriously injured or killed in a pedestrian accident than young people. Seniors are especially vulnerable in intersections because they cannot cross the street quickly and often fail to notice vehicles in turning lanes. Peripheral vision and auditory localization skills decrease as we age, making older adults even more vulnerable to pedestrian accidents.

Increased speeds put all pedestrians at risk. If a car going 20 mph hits a pedestrian, there is a 95% chance the pedestrian will survive. However, the fatality rate increases to 15% at 40 mph, and 32% at 50 mph. Reducing speeds in residential and business districts must have a priority in any pedestrian safety campaign.

Distracted driving is also becoming a frequent contributing factor in pedestrian accidents. In 80% of all accidents, the driver was looking away from the road or doing something else for at least 3 seconds prior to the accident. Research has determined that at any time, 11% of all motorists are talking on cell phones. The use of a cell phone, even a hands-free phone, quadruples the risk of an accident.

The mind is like a computer and can process only so much data at one time. Even if you are not distracted, your mind can't process all the information it receives while driving. Talking on a cell phone puts the brain into information overload making it impossible to safely operate a vehicle. For example, research shows that a motorist on a cell phone tends to look only straight ahead and stops scanning the road. This results in the loss of peripheral vision, and the driver often fails to see things coming in from the side such as a pedestrian or another car. Texting is even more dangerous because motorists literally take their eyes off the road and their hands off the steering wheel.

Cell phones and other electronic devices are also a problem for pedestrians. A Los Angeles study found that pedestrians talking on cell phones are less likely to look for traffic and take longer to get to the opposite side when crossing the street.

Solving the Problem

Evaluation: The process of making your community “pedestrian friendly” begins with an evaluation of your community’s experience. Start by reviewing pedestrian accident reports and marking their location on a map. This exercise will help you identify accident “hot spots” in your community. Visit these locations to get a better understanding of how the accidents occurred.

Research has identified reoccurring accident factors:

- Intersections with two or more lanes in each direction have significantly more pedestrian accidents than intersections where there is only one lane in each direction.
- Left turning vehicles are involved in more pedestrian accidents at “T” intersections than standard “X” intersections. That is because left turning vehicles at “T” intersections have no oncoming traffic to delay their turn.
- Two-way streets have significantly more pedestrian accidents than one-way streets.
- Sun glare is a contributing factor at intersections facing in certain directions and particularly at certain times of the year.
- Terrain is another factor. Intersections on downhill grades are prone to speeding while intersections on uphill grades are especially prone to sun glare.

Mark speed limits on the map noting where speed limits change. Motorists are less likely to obey lower residential and school zone speed limits on roads where the speed limit was higher just before these “slow” zones.

Locate major walking routes. It is a good idea to walk these routes and identify issues such as missing or damaged sidewalks, overhanging shrubbery and other hazards that should be corrected. Look for places where pedestrians have worn a path by the side of the roadway – a telltale sign that sidewalks are needed.

Place the location of schools on the map, trace the walking routes to schools, and locate the crossing guard stations. School zones have emerged as a significant pedestrian safety problem. Forty years ago, 50% of children walked to school. Today, 46% are driven by parents, 40% ride the school bus, and only 14% walk. School zones are clogged with far more traffic than they were designed to handle.

This is why school officials and parents must be included in the planning and implementation of the community's safety program.

Finally, ask for public input from senior citizens and youth organizations. Where do they congregate and what problems do they experience when walking in the community?

Engineering: Armed with this information you can study possible engineering solutions. Traffic engineering is complex and the solutions that are appropriate in one situation may not work in another. Seek professional assistance when designing a pedestrian safety program.

Recent research now questions the effectiveness of many common pedestrian safety practices.

Crossing Signals: For example, most pedestrian crossing signals are set so that when the light turns green, both pedestrians and traffic are allowed to go at the same time. However, research shows that in many situations this timing sequence does not result in fewer accidents.

Research also shows that the effectiveness of pedestrian crossing signals can be improved by changing the sequence for pedestrians so that it is different than the timing for motorists. In some cases, pedestrians are released first, or vice versa, depending on the intersection configuration. In another variation, pedestrians are only allowed to cross when traffic is stopped in both directions. Obviously, the decision on how to change the sequencing of traffic and pedestrian signals requires professional evaluation.

Crosswalks: Researchers have also determined that merely painting crosswalks is not effective by itself. A community must go beyond painting lines. For example, coupling crosswalks with pedestrian crossing signs, especially on roads with only one travel lane in each direction, can help alert motorists. All school crossing stations should have these signs at a minimum. They are also useful in congested business zones.

Caution: Some studies have concluded that painting crosswalks at intersections with two or more travel lanes in each direction can increase the risk of pedestrian accidents unless other safety features are installed. The problem is that pedestrians are subject to multiple threats. In one common sequence, a car in the curb lane stops to let a pedestrian cross, but the car in the next lane does not stop and hits the pedestrian emerging from in front of the stopped vehicle. Where multiple threats are an issue, seek the assistance of a professional Traffic Engineer. For example, one possible solution is placing the stop line at least 20 feet before the crosswalk.

Pedestrian Islands: For multi-lane roads, serious consideration should be given to installing a pedestrian island, or refuge, so that walkers can safety

stop halfway across the intersection. This gives pedestrians the opportunity to check for vehicles coming from the opposite direction before finishing their crossing. This also gives slower pedestrians, such as senior citizens, a place to safely wait until the next light cycle if they need additional time.

Research also shows that properly engineered mid-block crosswalks are effective, especially where there are substantial concentrations of senior citizens. The advantage of mid-block crossings is that pedestrians do not have to contend with complicated vehicle turning movements.

Traffic Calming: Traffic calming involves physical measures to reduce traffic speed to improve safety and livability. In the U.S., traffic calming was practiced as early as the late 1960s and early 70s in such places as: Berkeley, California; Seattle, Washington; and Eugene, Oregon. Properly designed speed tables can reduce accidents by over 40%.

Traffic can also be slowed by visual treatments that appear to narrow the roadway. Engineers call this a “roadway diet.” For example, this can be achieved by paving the shoulder with a different color material, or painting a line that appears to narrow the traveled portion of the road.

Traffic calming can be especially effective if designed into a project at the design stage, for example, extending the curbs at intersections. Many communities have also retrofitted curb extensions to slow traffic.

Parking Lots: Many pedestrian accidents occur in parking lots. Because the size of a new building is often limited by the number of parking spaces, developers try to squeeze in as many parking spaces as possible with little thought given to pedestrian circulation. Planning and Zoning Boards must be the town’s first line of defense against this practice. All parking lots should have clearly marked pedestrian walkways, and consideration should be given to using diagonal parking wherever possible.

Bus Stops: Transit bus stops are another area with high concentrations of pedestrian accidents. The classic bus related accident involves a pedestrian who crosses the street in front of a stopped bus into the path of a passing car coming from the rear. Too often neither the motorist nor the pedestrian sees each other until it is too late.

Work with the appropriate authority to engineer safe bus stops that do not impede traffic. For example, place bus stops after the crosswalk where possible so that motorists passing the bus from the rear can see pedestrians in the crosswalk.

Education: Police Departments often have a community resource officer who conducts educational programs for children. Safety training should also be offered to senior citizens – both as drivers and as pedestrians.

Another problem is the high frequency of accidents where school crossing guards are the victim. The position of school crossing guard has become one of the most dangerous occupations in local government. Many school crossing guards are senior citizens who are reaching the high-risk age because of losses in hearing, eyesight, and general mobility. Many of these accidents also occur at times when visibility for both motorists and crossing guards is restricted due to inclement weather. The School Crossing Guards Association website includes a form with recommended medical requirements.

Each crossing station should also be periodically inspected by the municipal engineer and police department to determine what can be done to improve visibility and slow traffic. It is also critical to consider visibility issues caused by sun glare at different times of the year.

Enforcement: Police departments must take a leadership role in addressing pedestrian safety. Your community should have a reputation for strictly enforcing traffic laws, such as speeding as well as distracted and impaired driving.

Stop arms are now nearly universal on school buses and have been highly effective in reducing the number of motorists that fail to stop. However, strict enforcement is essential because children assume motorists will stop. This is why ignoring a stopped school bus must be treated as a very serious traffic offence.

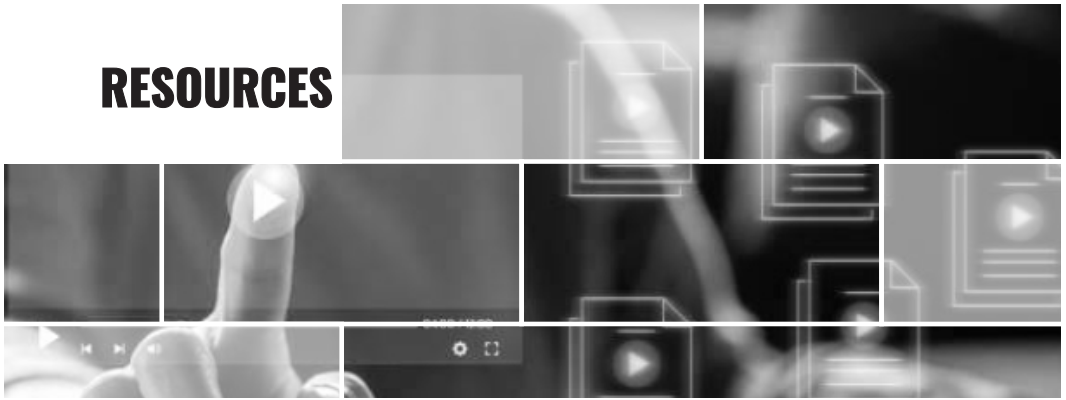
In New Jersey, ice cream vending trucks are also required to have stop arms. Each community should adopt an ordinance limiting vending trucks to streets with low density traffic.

Towns that ban overnight on-street parking in residential zones report substantially fewer mid-block pedestrian accidents. A nighttime ban also results in less daytime parking, reducing the risk that a motorist's vision will be blocked by parked vehicles. To be effective, these ordinances must be enforced. Unfortunately, some communities are unable to prohibit overnight parking on municipal streets because many older residential zones were built without adequate off-street parking. Obviously, traffic calming, and educational programs are more important where on-street parking is permitted.

The Gloucester Township New Jersey Police established a Safe Area Review Program (SAR) that was implemented whenever there was a report of a pedestrian safety issue or a pedestrian accident. Some of the major components included:

1. Check regulatory and traffic sign conditions (speed limit, watch children, etc.) to ensure they are in proper condition.
2. Review available files and ordinances to ensure that signs that are supposed to exist are still there.
3. Compare existing state law and/or local municipal code to ensure that the speed limit signs that are posted are legal and supported by state law or local ordinance/regulation. Often it is found that a sign, even a speed limit sign, was installed by public works many years ago that has no legal backing.
4. Ensure highway paint – center lines, shoulder lines, crosswalks, etc. are in good condition.
5. Street lighting survey – have the area checked at darkness to determine if any street light bulbs need replacing and document the request for them to be repaired. There are meters available to measure ambient light as well, but we only did this for the most serious crashes.
6. Survey the area for abandoned, unregistered, or improperly parked vehicles as well as any trash or debris that may create a hazard or obstructed view.
7. Finally, the municipality could consider investing in a Traffic Data Recorder which measures volume and speed to help determine what actions a police department and municipality should consider.

RESOURCES



A special page on the MEL website has been created to accompany this book as a resource page to allow you to access and download model policies, documents, forms, and helpful links to MEL and other organization websites.

Go to NJMEL.org and click on the “**Resource Center**” menu tab, then navigate down and click on “**BOOK: Risk Management for Local Officials - How to avoid being sued.**”

Some of these items include:

- The Model Personnel Policies and Procedures Manual
- Model *Title 59* Resolution Approving Plan Design
- Model Resolution Creating and Implementing a Long-Range Plan to Address (Sidewalk or Drainage) Issues.
- Model Indemnity Ordinance
- Checklist to Manage Special Events
- Banking Best Practices
- Model Resolution (or Ordinance) Concerning Meeting Decorum
- Model Policy Concerning the First Amendment Right to Record
- Model Joint Insurance Fund Documents
 - Resolution to Join
 - Resolution to Renew Membership
 - Indemnity and Trust Agreement
 - Model Risk Manager Contract
 - Enabling Statute (N.J.S.A. 40A:10-36 et. seq.)

Website Resources

- NJMEL.org
- MELSafetyInstitute.org
- CyberJIF.org
- NJEJIF.org

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