MARGOLIS EDELSTEIN

A PRIMER FOR PENNSYLVANIA MUNICIPAL LIABILITY ISSUES

Carol Ann Murphy, Esquire

HARRISBURG OFFICE
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-695-5064

MARGOLIS EDELSTEIN
Carol Ann Murphy, Esquire
170 S. Independence Mall West
Suite 400E
Philadelphia, PA 19106-3304
(215) 931-5881
FAX (215) 922-1772
cmurphy@margolisedelstein.com

SOUTH NEW JERSEY OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

NORTH NEW JERSEY OFFICE
300 Connell Drive
Suite 6200
Berkeley Heights, NJ 07922
908-790-1401

WILMINGTON OFFICE
750 Shipyard Drive
Suite 102
Wilmington, DE 19801
302-888-1112

A Primer for Pennsylvania Municipal Liability Issues

The following is summary of some of the nuances of governmental immunity and municipal liability defenses available in the Commonwealth of Pennsylvania. This document is, essentially an overview of some of the fundamentals with which any risk management or claim professional should be familiar. Questions are welcome via e-mail or telephone.

SOVEREIGN AND GOVERNMENTAL IMMUNITY

I. TWO STATUTES

The first step is to determine if the entity/agency is a Commonwealth/state agency or a political subdivision/local agency.

A. Commonwealth Party

1. 42 Pa. C.S. § 8501 defines Commonwealth party as "a Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment."

2. In order to determine whether an entity is a Commonwealth or local agency for immunity purposes, the Court looks to the entity's enabling legislation. Sweeney v. Merrymead Farm, Inc., 799 A.2d 972 (Pa. Cmwlth. 2002).

3. Southeastern Pennsylvania Transit Authority (SEPTA) and the Port Authority of Allegheny County (PAT) are Commonwealth parties. The Pennsylvania Supreme Court has held that "while these may both appear to be local agencies because they operate on a local, not statewide, level and both have the names that sound local, both have been adjudged by the Courts to be Commonwealth agencies for the purpose of immunity. Marshall v. Port Authority of Allegheny Cty, 568 A.2d 931 (Pa. 1990), re-argument denied, Feingold v. Southeastern Pennsylvania Transp. Authority, 517 A.2d 1270 (Pa. 1968).

4. As to independent contractors, it has been held that in determining whether a person is independent contractor or employee of government body for purposes of immunity, the Court is required to consider "control of the manner work is done; responsibility for result only; terms of agreement between parties; nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools, [method of payment] by time or by job; whether work is part of regular business of employer, and... right to terminate the employment at any time". Schuylkill County v. Maurer, 536 A.2d 479 (Pa.Cmwlth. 1988).

Section 8501 defines "employees" as:

"Any person who is acting or who has acted on behalf of a government unit, whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit, including any volunteer firemen or any elected or appointed officer, member of a governing body or other person designated to act for the government unit. Independent contractors under contract to the government unit and their employees and agents and persons performing tasks over which the government unit has no legal right of control are not employees of the government unit."

B. Local Agency/Political Subdivision

1. 42 Pa. C.S. § 8501 defines local agency as:

> A government unit other than the Commonwealth government. The term includes an intermediate unit; municipalities cooperating in the exercise or performance of governmental functions, powers or responsibilities under 53 Pa. C.S. Ch. 23, subch. A (relating to intergovernmental cooperation); and councils of government and other entities created by two or more municipalities under 53 Pa. C.S. Ch. 23 subch. A.

2. Examples of agencies found to be local agencies include city housing development corporation (See Weinerman v. City of Philadelphia, E.D. Pa. 1992, 785 F. Supp. 1174, reconsideration denied; Philadelphia Gas Works (PGW) (See Brennon v. Philadelphia Gas Works, 605 A.2d 475 (Pa. Cmwlth. 1992) appeal denied 621 A.2d 582, 533 Pa. 637; and Community College (See Community College of Allegheny County v. Seibert, 601 A.2d 1348 (Pa. Cmwlth. 1992) appeal granted 608 A.2d 32, 530 Pa. 658, aff'd 622 A.2d 285, 533 Pa. 314.

II. PRE-LITIGATION NOTICE

42 Pa. C.S. § 5522 requires that notice of intention to make a claim against either Commonwealth party or political subdivision must be made within six months after the cause of action accrued.

Under 42 Pa. C.S. § 5522(b) (2) "If a statement is not filed, any civil action shall be dismissed and forever barred from proceeding further thereon. The court shall excuse failure to comply with this requirement upon a showing of reasonable excuse for failure to file such statement." However, the notice of claim statute must first be raised by the governmental defendant as an affirmative defense, after which a plaintiff may set forth the reasons for his delay, shifting the burden to the defendant to aver specific facts alleged to constitute prejudice, and the trial court balances reason for the delay against the prejudice to the defendant. See Thomas v. The City of Philadelphia, 861 A.2d 1023 (Pa. Cmwlth., 2004). Also see Ramon v. PennDOT, 556 A.2d 919 (Pa. Cmwlth. 1989) aff'd 573 A.2d 1025 (Pa. 1989) in which the Court held that if a plaintiff can establish a "reasonable"

cause or excuse, the government must then prove it has suffered an undue hardship. See Yuecheko v. County of Allegheny, 243 A.2d 372 (Pa. 1968) for discussion of what constitutes undue hardship.

III. WHAT YOU NEED IN ORDER TO PROCEED AGAINST A SOVEREIGN OR GOVERNMENTAL ENTITY

A. Cause of Action

First, you need to have cause of action which would allow the recovery of damages, at common law, against a tortfeasor not otherwise shielded by governmental unity.

1. 42 Pa.C.S. § 8522(a) provides:

> **Liability imposed**. - The general assembly, ...does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in subsection 8528 (relating to limitations on damages), sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity. (Emphasis added). 42 Pa.C.S. Section 8522(a).
>
> (An example of where the Court found no cause of action is the case of Bufford v. PennDOT, 670 A.2d 751 (Pa. Cmwlth. 1996) where plaintiff was stopped by a police officer and arrested because of a foul-up by PennDOT in erroneously/negligently reporting that the defendant was driving with a significant number of violations and/or an invalid license. The plaintiff was arrested falsely and imprisoned and brought suit against PennDOT for negligently maintaining his driving records. The trial court granted summary judgment which the Commonwealth Court affirmed and held that there was no cause of action stated here nor did it fit within any of the eight categories of sovereign immunity.)

2. 42 Pa. C.S. § 8542 (a) provides:

> **Liability imposed** – A local agency shall be liable for damages on account of injury to a person within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
>
> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under § 8541 (relating to governmental immunity

general) or § 8546 (relating to defense of official immunity): and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in the subparagraph "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or wilful misconduct. (Emphasis added). 42 C.S. Section 8542 (a) (1) & (2)

3. **Burden of Proof** - Plaintiff seeking to impose liability on a local agency has the burden of showing that the common law or a statutory cause of action for negligence exists and the negligent act falls into one of the exceptions to governmental immunity enumerated in the code. Tyree v. City of Pittsburgh, 669 A.2d 487, (Pa. Cmwlth. 1995).

4. Examples of where the courts found no cause of action. The Courts have held that certain actions do not represent a cause of action and, therefore, their claim fails. In Clark v. SEPTA, 691 A.2d 988 (Pa. Cmwlth.1997), the Commonwealth Court held that the plaintiff's allegations of negligence for injuries sustained during the course of his arrest by SEPTA police officers did not fall within the exceptions of sovereign immunity. The Court in Clark cited Martz v. SEPTA, 598 A.2d 580 (Pa. Cmwlth. 1991) for the proposition that allegations such as these do not constitute a cognizable cause of action in Pennsylvania nor would other allegations in the complaint indicating that SEPTA failed to adequately supervise and control their employees or failed to train and instruct them. Also see Thomas v. City of Philadelphia, 668 A.2d 292 (Pa. Cmwlth. 1995) where the plaintiff decedent was killed while working for a construction company employed by the City. He was electrocuted while working. The trial court granted the City's Motion for Summary Judgment finding that there is no cause of action in the Commonwealth because of the special risk doctrine whereby the employee or an independent contractor (as here) can only impose liability on the entity that hired its employer if there was special risk at issue it did not disclose. The Court indicated that there was no vicarious liability for negligent acts of independent contractor within the framework of governmental immunity.

B. Exceptions to the Absolute Bar

Secondly, the cause of injury must fit into one of the categories set forth in:

1. 42 P.S. § 8522(b) provides:

The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(1) vehicle liability...;
(2) medical-professional liability...;
(3) care, custody or control of personal property...;
(4) commonwealth real estate, highways and sidewalks...;
(5) potholes and other dangerous conditions...;
(6) care, custody or control of animals...;
(7) liquor store sales...;
(8) national guard activities...;
(9) toxoids and vaccines....

2. 42 Pa. C.S. § 8542 (b) provides:

The following acts by a local agency or any of its employees may result in the imposition of liability on the local agency:

(1) vehicle liability...;
(2) care, custody or control of personal property...;
(3) real property...;
(4) tress, traffic controls and street lighting...;
(5) utility service facilities...;
(6) streets...;
(7) sidewalks...;
(8) care, custody or control of animals....

C. Strict Construction:

"Because the legislature's intent in both the Sovereign Immunity and Tort Claims Act is to shield government from liability, except as provided for in the statute themselves, we apply a rule of strict construction in interpreting these exceptions." Jones v. SEPTA, 772 A.2d 435, 440 (Pa. 2001) also see Kiley by Kiley v. City of Philadelphia, 537 Pa. 402, 506, 645 A.2d 184, 185-188 (Pa. 1994); and Snyder v. Harmon, 562 A.2d 307, 311 (Pa. 1989).

IV. DIFFERENCES BETWEEN THE STATUTES

Each act is independent of the other. Although the language of the exceptions is similar, there are differences. An exception to one act does not apply to the other.

A. Damages

1. Sovereign - $250.000.00

2. Local/Municipal - $500,000.00

B. Recovery of Intangibles

1. Sovereign Entities/Agencies.

No limit except the amount of damages.

2. Local Entities/Agencies

Pain and suffering is only permitted for permanent loss of bodily function, permanent disfigurement or permanent dismemberment where medical expenses exceed the sum of $1,500. See Walsh v. City of Philadelphia, 585 A.2d 445 (Pa. 1991). In this case, the Court found that the inability to do or perform a bodily act or bodily acts which the claimant was able to do or perform before sustaining the injury is permanent. Medical testimony is needed to establish this loss. Claimant's own testimony of self-limiting actions does not meet the standard. The Commonwealth Court in Boyer v. City of Philadelphia, 692 A.2d 259 (Pa. Cmwlth. 1997) found that the trial court erred in failing to remove a non-suit where the plaintiff's medical expert testified that as a result of being struck by a city leased vehicle, the plaintiff developed a permanent arthritic condition in her lower back that was likely to worsen with age.

C. Status of Claimant

The status of claimant is more important under the Tort Claims Act as a municipal defendant will remain immune if the claimant is found to be a trespasser. Sovereign immunity does not offer this protection for a Commonwealth defendant.

D. Notice Requirements

1. **Sovereign**

The Sovereign Immunity Act does not require notice where liability is premised on "a dangerous condition" of its real estate, highways and sidewalks. See 42 Pa. C.S. § 8522(b)(4). However, for "potholes and other conditions" 42 Pa.C.S. § 8522(b)(5) provides that ... "the Commonwealth agency" had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition."

2. **Local/Municipal**

Under the Tort Claims Act, a municipal defendant does not require notice for a liability claim arising from the "care, custody or control" of its real property. See 42 Pa. C.S. § 8542(b)(3). However, under this Act sections (b)(4), (5), (6) and (7) provide that a dangerous condition of trees, utility service facilities, streets and sidewalks... "that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition." See, 42 Pa. C.S.

8542 (b)(4), (5), (6) and (7).

E. Conditions of the Property

Under 8522(b)(4) the issue is "a dangerous condition" of Commonwealth agency real estate and sidewalks....whereas under 8542 the issue is "the care, custody or control" of real property in the possession of the local agency. An example of the differences between the two statutes and the Court holdings relating thereto, are reflected in the cases of Hanna v. West Shore School District, 717 A.2d 626 (Pa. Cmwlth. 1998) and Tallada v. East Stroudsburg University of Pennsylvania, 724 A.2d 427 (Pa. Cmwlth. 1999). In Hanna v. West Shore School District, supra, 717 A.2d 626 the court found that a wet floor on the corridor of the school was a condition which met the exception under 8542(b)(3). However, in Tallada v. East Strousburg University of Pennsylvania, supra, 724 A.2d 427, the court found that grease on the floor of a kitchen was not found to be an exception under 8522 (b).

V. EXCEPTIONS

The following discussion highlights some of the exceptions under 42 Pa. C.S. Section 8522 (b) and 8542(b) and case law relating thereto.

A. "Real Property" and sidewalk exceptions under both Acts

The real property exception of sovereign immunity (42 Pa. C.S. § 8522(b)(4)) as well as the real property and sidewalk exceptions of governmental immunity (42 Pa. C.S. §8542(b)(3) and (7)) have been the subject of much case law. There has been much debate regarding "of" versus "on" distinction.

In Jones v. SEPTA, 772 A.2d 435 (Pa. 2001), the Pennsylvania Supreme Court took the opportunity to eliminate any confusion regarding the debate of "of v. on".

In Jones, the plaintiff slipped on rock salt that had covered a train platform at a SEPTA station. SEPTA moved for summary judgment on the basis that the rock salt was not a condition "of" the train platform and, therefore, the real estate exception to sovereign immunity did not apply. The plaintiff then filed an appeal to the Pennsylvania Superior Court. Pennsylvania Superior Court affirmed the trial court. Thereafter, an appeal was taken to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court, in affirming the summary judgment, analyzed the previous case law concerning governmental immunity.

The Supreme Court acknowledged the confusion in the law and traced its development. The Court, after its review of the case law, concluded that the "of/on" distinction created over the years is "problematic and of little use or no use. Not only is it strange and confusing, it is also incorrect because it works to exclude claims

that fall within the parameters of the Act's real estate exemption. Therefore, we reject it. " Jones v. SEPTA, supra, 772 A2d at 443.

The Pennsylvania Supreme Court replaced the "on/of " test and concluded that:

> ...[a] claim for damages for injuries caused by a substance or an object on Commonwealth real estate must allege that the dangerous condition "derived, originated or had as its source the Commonwealth realty" itself, if it is to fall within the Sovereign Immunity Act's real estate exception. In other words, assuming all other requirements of 42 Pa. C.S. § 8522(b)(4) are met, the Commonwealth may not raise the defense of sovereign immunity when a plaintiff alleges, for example, that a substance or object on Commonwealth reality was the result of a defect in the property or in its construction, maintenance, repair or design. (Emphasis added) Id. at 443-444.

Additionally, the Pennsylvania Supreme Court indicated that the decision in Jones is consistent with both Snyder v. Harmon, 562 A.2d 307 (Pa. 1989) and Finn v. City of Philadelphia, 664 A.2d 1342 (Pa. 1995). The Pennsylvania Supreme Court in Jones found that Finn's essential holding that the application of 42 Pa. C.S. § 8542(b)(7) depends on the "legal determination that an injury was caused by a condition of the government realty itself, deriving, originating from or having realty as its source" is identical to the court's holding in Jones. Moreover, the Pennsylvania Supreme Court also clarified that the court's interpretation [in Jones] of 42 Pa. C.S. Section 8522 (b)(4) does not conflict with the interpretation of the Tort Claims Act's real estate exception, 42 Pa. C.S. Section 8542 (b)(3). That is, the court in Jones found the cases of Grieff v. Reisinger, 693 A.2d 195 (Pa. 1997) and Kilgore v. City of Philadelphia, 717 A.2d 514 (Pa. 1998) are still controlling on cases involving injury occurring on local agency-owned real property, noting that the statutory language of the real estate exception of the sovereign immunity was different than that of the Tort Claims Act. The Court in Jones noted:

As aptly noted in those cases, the language of the legislature chose for subjecting the Commonwealth to liability under 42 C.S. § 8522(b)(4)-- "a dangerous condition of Commonwealth agency real estate"- varies markedly from the language it chose for subjecting a local agency to liability under 42 Pa. C.S. § 8542(b)(3)-- "the care, custody or control of real property...." Id. at 444.

The Supreme Court in Jones also noted that the material words used in the Sovereign Immunity Act's real estate exemption mirror the material words used in the Tort Claims Act's sidewalk exception. 42 Pa. C.S. § 8522(b)(4); 8542(b)(7).

It should be noted that there is a distinction between 8542(b)(3) and 8522(b)(4).

B. The property must be real property for the exception of real property to apply

under both Acts

In Blocker v. City of Philadelphia, 763 A.2d 373 (Pa. 2000), plaintiff was injured when a bleacher upon which she was sitting to watch a concert collapsed. The plaintiff sued the City of Philadelphia under the real property exception of the Tort Claims Act. The Pennsylvania Supreme Court found that the moveable bleachers which had collapsed were not attached to the property and, therefore, was personalty, not real property. Therefore, the Court held that the real estate exception did not apply as there must be some fixture or permanent attachment for an object to be considered "realty". Id. In Blocker, there was an issue that the City intended to make the bleachers permanent. The Court held that such a consideration was not relevant as the bleachers had to have been permanently affixed to the ground at the time of the plaintiff's accident.

In Rieger v. Altoona School District, 768 A.2d 912 (Pa. Cmwlth. 2001), a student during cheerleading practice sustained injuries as a result of a failed cheerleading move. Plaintiff filed suit against the school district claiming the real estate exception to the Tort Claims Act. The school district filed a motion for summary judgment which was granted. The Commonwealth Court affirmed the summary judgment. The plaintiff on appeal had argued that gymnastic mats are an integral part of a gymnasium hardwood floor when used to practice the gymnastic-type stunts that are routinely performed in moderating cheerleading. The plaintiff relied on the decision in Singer v. School District of Philadelphia, 513 A.2d 1008 (1986). However, the Commonwealth Court in Rieger found that the Singer decision had been overruled by the Pennsylvania Supreme Court, sub silentio, by reason of the Court's decision in Blocker v. City of Philadelphia. The Commonwealth Court in Rieger found that in light of the findings in Blocker, the Singer holding is no longer viable. The evidence in Rieger showed that the gymnasium mats in question were in no way affixed to the real property and, as such, merely constituted personalty. Therefore, the Court found that even assuming that failure to provide mats in a cheerleading practice area amounted to a negligent act causing plaintiff's injury, such negligent conduct would not fall within the real property exception to the Act.

In LoFurno, a Minor v. Garnet Valley School District, 904 A.2d 980 (Pa. Cmwlth. 2006), plaintiff alleged injury as a result of operating a vertical belt sander in a class. The parties in this case agreed that in order for the plaintiff to prevail plaintiff had to show that the sander was a fixture in order to come under the real property exception. The evidence revealed that the sander had originally been bolted to the floor, connected to a dust collection system and plugged into a 220 volt electric outlet. The evidence further showed that the sander was unhooked from the dust collection system and moved or slid across the floor for cleaning from time to time. It was also moved to accommodate other equipment in the classroom. Originally, the trial court found, after an evidentiary hearing, that the sander was, as a matter of law, a fixture and "permanently affixed" to the floor. However, the Commonwealth Court held that the trial court's findings and conclusions were not supported by the record. The Commonwealth Court noted that although the sander was bolted to the floor, there was no evidence of hardwiring, dedicated electric lines or permanent attachment to a dust collection system. The Commonwealth Court noted that the evidence showed that the equipment was moved for cleaning and there was no

evidence that the room had been physically altered to accommodate the electrical requirements of the sander. Therefore, the Court held that evidence of bolting alone was insufficient to support a conclusion that the school district intended the sander to be permanently affixed to the real estate and reversed the trial Court.

C. Vehicle liability

The "motor vehicle liability exception" to local agency immunity is one of eight exceptions set forth in the Act. Under the Act, the following acts by a local agency or any of its employees may result in the imposition of liability on a local agency . . . (1) Vehicle Liability - the operation of any motor vehicle in the possession or control of the local agency. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by a rail, through water or in the air. 42 Pa.C.S. §8542(b)(1).

The Commonwealth Court case of Speece v. Borough of North Braddock, 604 A.2d 760 (Pa.Cmwlth. 1992) is particularly instructive on this issue of "operation" of a motor vehicle. In Speece, the plaintiff brought suit against the Borough of North Braddock and two fire companies, alleging that the Borough and fire companies dispatched two fire trucks to the scene of a fire and while at the scene, the defendants caused water to be pumped through a hose which was connected to each of the defendants' fire trucks, and in the course of the application of water pressure on the hose, the hose in question or its component parts burst, as a result of which the hose swung out of control, striking the plaintiff and causing him to sustain serious and permanent injuries. Speece, 604 A.2d at 761. As a result of the filing of the Complaint, the defendants in that case filed Preliminary Objections in the nature of a demurrer and Motion to Strike plaintiff's Complaint for failure to set forth facts sufficient to bring the claim within any of the enumerated exceptions to governmental immunity under 42 Pa.C.S.A. §8542. The trial court sustained the Preliminary Objections and entered an Order dismissing the plaintiff's Complaint with prejudice. Thereafter, the plaintiff filed an appeal to the Commonwealth Court, which affirmed the lower court's ruling. Id. at 763.

In affirming the lower court's ruling to sustain the Preliminary Objections, the Commonwealth Court reviewed the motor vehicle liability exception to local agency immunity and advised that the crux of their analysis was whether the fire trucks were in "operation" as that term had been judicially defined by appellate courts of the Commonwealth. Id. at 762. The Court cited the case of Love v. City of Philadelphia, 543 A.2d 531 (Pa. 1988), and noted that the definition of "operation" of a vehicle is distinguished from the phrase "maintenance and use of a motor vehicle" under the Pennsylvania Motor Vehicle Insurance Act, Id. The plaintiff, Speece, had argued that, as an attachment to a motor vehicle, a hose is part of the vehicle itself and thus negligent operation of the hose affords a cause of action against the generally immune Borough and fire companies under the Code. In addition, Speece also argued that the act of pumping water through fire trucks, in conjunction with operation of the attached hose, represents "operation" of the fire truck itself for purposes of the vehicle liability exception. The Commonwealth Court rejected Speece's arguments, and noted that the term "operation"

as used in §8542(b)(1) is to be strictly construed to mean "actually putting a vehicle in motion". Therefore, acts taken after cessation of vehicular operation are insufficient to invoke an exception to immunity. Id. at 762 . The Court noted that in its case, at the time the hose burst, the two fire trucks at issue were stopped and were being used to pump water to the fire and were clearly not being "operated". Furthermore, the Court stated that none of the acts involved via the use of the attached hose was even remotely connected to driving or movement of the fire trucks. The Court explicitly held that, "Any acts associated with use of the hose are ancillary to operation of either vehicle and are insufficient to justify penetrating the cloak of immunity afforded to governmental agencies under the code". Id. at 762-63.

Margolis Edelstein successfully defended an action against the Borough of Conshohocken and the Washington Fire Company in the matter of Soppick v. Borough of Conshohocken and Washington Fire Company. In said case, the plaintiffs alleged that husband plaintiff was hit directly in the face by a stream of water coming from the fire truck and component ladder jet hose which was being operated by a fire fighter of defendant, Washington Fire Company. At the time of plaintiff's incident, the fire truck in question was stopped. Margolis Edelstein, on behalf of the borough and fire company, argued that the case of Speece was directly on point and, therefore, said defendants were entitled to immunity and the complaint against said defendants should be dismissed. It was argued that the use of the water jet hose on one of the fire trucks did not constitute "operation" of the motor vehicle for purposes of the vehicle exception to the political subdivision tort claims act. The Montgomery County Court agreed with our position and dismissed plaintiffs' complaint based upon the defense of immunity which was raised by preliminary objections.

D. Utility service facilities 42 Pa. C.S. § 8542(b)(5)

In Pietrak v. Certain Underwriter at Lloyds, 2006 Philadelphia Court of Common Pleas, LEXIS 219 (May 26, 2006), the owner of a property brought suit against the City claiming that the City had been negligent in failing to properly inspect and repair a fire hydrant which malfunctioned and allegedly allowed flames to destroy the property. Under 42 Pa. C.S. § 8542(b) an exception to governmental immunity is "a dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within the rights of way except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice....".

In this case, the plaintiff was only able to demonstrate that the fire hydrant malfunctioned at the time of the accident but was unable to provide any evidence that the City had notice of the inoperative fire hydrant before the fire. Therefore, the trial court granted summary judgment in favor of the City of Philadelphia.

VI. INVESTIGATION TO BE DONE IN COMMONWEALTH AND LOCAL AGENCY CASES

The following is a list of items, not inclusive, of investigation to be considered in these cases:

1. Look at the site.

2. Any police report.

3. Is an expert needed early.

4. Has the notice requirement been met and if not is there any undue prejudice.

5. As to damages, know the statutory damage caps $250,000 (Commonwealth) versus $500,000 (political subdivision/local agencies); and if political subdivision/local/municipal, then plaintiff must establish, for a pain and suffering recovery, permanent loss of bodily function, permanent disfigurement or permanent dismemberment or medical expenses exceed the sum of $1,500. Does the plaintiff have the medical expert to establish the alleged permanent condition.

6. Does the plaintiff have the right defendants, correct name; do you, the defendant, need to join anyone, including a person or entity that may have an easement or right of way, etc.

7. Any prior losses or incidents at the location in question.

8. Any work that was done by the specific agency, including any inspections.

9. Any applicable codes, ordinances, regulation or statutes.

10. Any records concerning construction, design or maintenance, including any contracts between any governmental agency and/or others.

11. In addition to the 8522 and 8552, are there any other statutes that bar the case such as the Recreational Use of Land and Water Act (RULWA).

12. Secure as many facts as possible concerning the incident, including location, entities, control, possession, ownership, contracts, work performed, inspections.

13. Is notice required under 8522 or 8542 (such as potholes) and if so did the entity have notice of the alleged condition.

14. Is the property real property or is it affixed to the property. If this is an issue, you need to determine if the property in question is permanently affixed, moveable, temporary.

15. Status of the claimant regarding the political Subdivision/Tort Claims Act, that

is, is the claimant a trespasser.

If you have any questions, need additional information or need copies of any cases, please feel free to contact me at cmurphy@margolisedelstein.com, my direct dial at (215) 931-5881 or my cell phone at (215) 803-0356. Thank you. Carol Ann Murphy, Esquire.