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LEGAL ADVISORY: *Cormier v. City of Lynn*, 479 Mass. 35 (February 27, 2018)

Supreme Judicial Court Decides School Not Liable for Injuries Sustained by Elementary Student who was Bullied by Schoolmates

I. Introduction

In *Cormier v. City of Lynn* the Supreme Judicial Court ("SJC") determined that the City of Lynn and school officials were not liable under the Massachusetts Tort Claims Act ("MTCA"), M.G.L. c. 258, for serious injuries sustained by an elementary school student who had been pushed down a school stairway by a schoolmate. The student became a quadriplegic. The injuries occurred in March of 2008, two years prior to the adoption of the anti-bullying statute, M.G.L. c. 71, §37O. Although "bullying is a persistent, pernicious problem in our schools," the SJC concluded that the MTCA shielded Lynn and its employees from negligence claims. In the final footnote, the SJC wrote: "It remains to be seen whether the regulatory mechanisms of the [new] anti-bullying statute provide sufficient incentives for schools to develop and adhere to adequate measures to protect students from" bullying by classmates. This is a clear warning that future decisions may not be so favorable for schools.

II. Discussion

The case was appealed to the SJC for further appellate review after a Superior Court Judge allowed Lynn's motion to dismiss ("MTD") all claims, and the Appeals Court affirmed. When deciding a motion to dismiss, the courts must accept as true all of the allegations contained in the plaintiff's complaint. In this case that meant, for purposes of the motion, the Lynn Public Schools and Lynn officials effectively acknowledged that they had been negligent in their supervision and control of students, such that the bullying was not prevented. While this does not mean that Lynn would have conceded these facts on the merits of the case if it went to trial, for the purposes of the MTD argument, Lynn agreed that everything factual claimed by the plaintiff was true, but argued about the applicability of certain exclusions for liability contained in the MTCA.

First, the court undertook a historical survey of Massachusetts law leading to the adoption of the MTCA in 1978. The law expressly established "that government units shall be liable for injury or loss of property or personal injury or death… in the same manner and to same extent as a private individual under like circumstances." *See* M.G.L. c. 258, §2. The court then reviewed a series of exceptions to the rule establishing liability. The exceptions are contained in Section 10 of the law. Although it has been said that "Section 10(j) presents an interpretative quagmire," Section 10(j) maintains immunity for public entities and employees for tort liability resulting from a failure "to prevent harm from the wrongful conduct of a third party unless the condition or situation was originally caused by the public employer." *Cormier, citing Brum v. Dartmouth,* 428 Mass. 684, at 692, 695 (1999). Thus, the general rule establishing liability for public employee negligence is inapplicable where the injuries result from actions of third parties, unless the public employee took an affirmative act that could be determined to be the original cause of a condition or situation. An original cause "must have materially contributed to creating the specific condition or situation that resulted in the injury." *Cormier, citing Kent v. Commonwealth*, 437 Mass. 312, 319 (2002). An earlier school case, for example, determined that school playground injuries were foreseeable and actionable due to the Principal's decision to have outdoor recess on a concrete playground. *See Gennari v. Reading Public Schools*, 77 Mass. App. Ct. 430 (2010).

As to the facts of this case, the plaintiffs acknowledged the injuries resulted from the action of a third party, but asserted that school employees originally caused the dangerous situation. For example, the plaintiffs argued that the student "and his tormentors" were required to attend school and were placed in the same class. The SJC rejected these conditions as "too remote as a matter of law to be the original cause" of the student's injuries, and thus, could not have materially contributed to the creation of a specific condition. Further, the plaintiffs' alleged that the school failed to protect the student or negligently failed to diminish the harm caused by these injuries as a result of a poor follow up in school when, after the fall, the student complained. Because these claims are based on the school's failure to act rather than an affirmative act, they could not be said to be the original cause of the injury. The plaintiffs also argued that the elementary school's morning lineup procedure was the affirmative act that put the students in close proximity and created the situation leading to the student being pushed down the stairs. This claim was also fatally flawed as, in essence, it alleged that the school officials had failed to prevent harm. Recognizing a claim based on a failure to prevent harm, wrote the court, "would undermine the principle purpose of the Section 10(j)" exception. According to the SJC decision, the Lynn school system and the defendants are not liable for failing to act in a manner that insured the [student's] safety."

III. Comment

This decision should be cold comfort for school officials. The SJC clearly recognizes the pernicious effect of bullying in schools. The court was obviously constrained by the exemption in the Tort Claims Act and the absence of an applicable bullying statute in 2008, when the case arose. Given the extensive and detailed requirements of the anti-bullying law, one cannot say with a reasonable degree of certainty that a future school system will evade liability when sued under M.G.L. c. 258 for injuries sustained in a school bullying incident. Schools should undertake annual training and professional development relating to bullying, and review their bullying plans at least every year. The applicable bullying regulations can be found at 603 CMR 49.00 et. seq. *See also*, Anti-Hazing regulations at 603 CMR 33.00, based on M.G.L. c. 269, §19.

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