JOSEPH DECOLATOR'S BLOG

It is a truly exciting time for this firm to have an opportunity to disseminate the message to Police Officers; Police Officers are afforded greater civil rights to sue than the majority of employees, either in the public or private sector, in line-of-duty accidents. General Municipal Law Section 205-e and General Obligation Law Section 11-106 provide strong, very well-defined rights of action for police officers injured in the line-of-duty. Yet, the majority of attorneys and clients do not understand the full import of these laws.

DCD has been contacted by numerous members of the service regarding viable line-of-duty personal injury third party claims after these officers had been informed by attorneys that they could not sue because their claims were barred by either Workers' Compensation or the firefighter's rule. Police Officers employed by the City of New York are not covered by Workers' Compensation. Instead, the City of New York acts as a self-insurer who pays a Police Officer's salary when they are out sick and also pays all authorized medical bills.

During the past twenty years, the New York State Legislature enacted laws which permit New York City Police Officers and their supervisors to sue third parties in line-of-duty accidents. Prior to the enactment of these laws, Police Officers were prohibited from suing third parties because they were barred by the firefighter's rule. Pursuant to that rule, a Police Officer injured in a line-of-duty accident would not be able to sue a third party if injuries occurred while the Police Officer took police action. The theory behind this rule was predicated upon the belief that "public policy" should prohibit police officers from suing those responsible for line-of-duty injuries because police officers were already compensated to face negligently created emergencies.

This very skewed view of the public policy of this State exposed injured Police Officers to the risks associated with an almost limitless array of negligent and even intentional conduct. For example, a Police Officer run down and injured by a drunk driver could not sue for his or her injuries because the risk of being run down by the drunk driver was "inherent" in the nature of police work. As such, the injured officer would have no financial recourse against the drunk driver, who would be totally civilly exonerated for his or her conduct as a matter of public policy. Also, a Police Officer attacked by an EDP or a criminal perpetrator would likewise be left totally without recourse.

All of this began to change with the 1989 enactment of Section 205-e of the General Municipal Law. (Ch. 346, L. 1989) That statute created a new cause of action for Police Officers injured in the course of their duties where none existed at common-law; Section 205-e did not merely redefine a statutory standard of care to be applied in a negligence action. *See, e.g.*, Mullen v. Zoebe, Inc., 86 N.Y.2d 135, 140 (1995). Similar to General Municipal Law Section 205-a (L. 1935, Ch. 800, amd., L. 1936, Ch. 251, eff. April 4, 1936), the companion firefighter's statute which had been in existence since 1936, Section 205-e imposes strict liability where a Police Officer is injured in the line-of-duty by reason of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any

relevant statute, code, ordinance, rule, order or requirement. Campbell v. City of New York, 31 A.D.3d 594 (2nd Dep't 2006).

Liability is imposed pursuant to this statute irrespective of whether the injury or death is caused "directly" or " indirectly" by lack of compliance. Therefore, to maintain a GML Section 205-e claim, proof of proximate cause is not required and the injured Police Officer need only show a "practical and reasonable" connection between the violation and the injury or death. *See*, Giuffrida v. Citibank Corp., 100 N.Y.2d 72 (2003); Mullen v. Zoebe, Inc., *supra*.

Section 205-e provides, in relevant part, as follows:

> **Right of action to certain injured or representatives of certain deceased police officers**
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> 1. In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or disease which results in death occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus . . .
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> 3. This section shall be deemed to provide a right of action regardless of whether the injury or death is caused by the violation of a provision which codifies a common-law duty and regardless of whether the injury or death is caused by the violation of a provision prohibiting activities or conditions which increase the dangers inherent in the work of any officer, member, agent or employee of any police department. (L. 1996, C. 703, Section 3)

After years of litigation in the Appellate Courts of this State regarding the scope of GML Section 205-e, the Courts of this State now universally hold that this statute is remedial in nature and that it must be construed broadly to afford a right of recovery to an injured police officer whenever possible. The Courts have held that the statute is remedial in nature because it was intended to eradicate the New York Court of Appeals' 1988 decision in Santangelo v. State of New York, 71 N.Y.2d 393 (1988). In that case, the Court applied the long-standing firefighter's rule to Police Officers injured in the line-of-duty. In Santangelo, *supra*, the Court stated that since Police Officers are trained and compensated to confront negligently created emergencies,

public policy dictates that, "they should be precluded from recovering damages for the very situations that create a need for their services." Santangelo**,** 71 N.Y.2d, *supra*, at 397. Prior to Santangelo, *supra*, police officers possessed an unqualified right to bring common-law negligence claims against both municipal and non-municipal defendants for injuries sustained in the line-of-duty. *See, e.g.*, Buckley/Lawrence v. City of New York, 56 N.Y.2d 300 (1982).

In 1935, the Legislature gave firefighters relief from the "harsh effects" of the firefighter's rule via the enactment of GML Section 205-a, which created a right of action for firefighters injured in the line-of-duty by reason of the violation of a relevant statute, code or regulation. Since firefighters had such long standing relief, the Legislature thought it only fair and equitable that Police Officers should possess the same right of action. Accordingly, this inequity was remedied by the Legislature with "unprecedented speed" with the enactment of GML Section 205-e which served "to correct a perceived misstatement of public policy by the Court of Appeals and restore fully the pre-Santangelo rights of action of police officers." Brown v. Harrington, 150 Misc. 2d 375 (App. Term 2d A.D., 11th District, 1990).

In the seminal case of Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 79 (2003), the Court of Appeals stated that GML Sections 205-a and 205-e were the "culmination of years of legislative effort designed to accomplish two main objectives: mitigate the harshness of the firefighter's rule by creating a cause of action where none previously existed, and encourage compliance with relevant statutes and ordinances by exposing violators to liability for injuries resulting directly or indirectly from noncompliance."

In Schiavone v. City of New York, 92 N.Y.2d 308, 311 (1998), the Court of Appeals stated that GML Section 205-e should be interpreted and applied by the Courts in accordance with its "plain language" and "legislative purpose." *Accord*, Ruotolo v. State of New York (II), 83 N.Y.2d 248, 258, 259 (1994). In rejecting New York City's claim that GML Section 205-e's 1994 revival provision (L. 1994, ch. 664) applied only to actions which were dismissed after July 17, 1992, the Court stated that "an expansive interpretation is consistent with the overall goals of this legislation, as demonstrated by the Legislature through its numerous amendments to the statute." Schiavone, 92 N.Y.2d, *supra*, at 317. The Court stated, "It would be anomalous for this Court to adopt the restrictive interpretation urged by the City when the Legislature has acted to preserve Police Officers' rights to sue through amendments to that statute . . .. When the Legislature's words and actions point out the correct interpretive path to follow, there is no justification for a Court of Law to follow another path." Schiavone, 92 N.Y.2d, *supra*, at 316, 317.

Likewise, in Gonzalez v. Iocovello, 93 N.Y.2d 539, 548 (1999), the Court of Appeals stated that the Courts should apply Section 205-e "expansively" so as to favor recovery by Police Officers whenever possible. In that case, the Court of Appeals stated that GML Section 205-e permits New York City Police Officers to maintain actions against their employer and fellow Police Officers for violations of the Vehicle and Traffic Law. The Court also found that injured officers could sue New York City for injuries occasioned by defective sidewalks.

Since GML Section 205-e is not a mere codification of common-law negligence principles and is to be applied in a manner which "favors" recovery for the injured Police Officer, certain defenses normally available in a common-law negligence action do not apply in any action brought pursuant to this statute. First, neither contributory negligence nor assumption of risk may be invoked as affirmative defenses to a GML Section 205-e action. Campbell v. City of New York, 31 A.D.3d 594 (2nd Dep't 2006). Second, even proof of intervening illegal acts are no defense to statutory liability. Lusenskas v. Axelrod, 183 A.D.2d 244 (1st Dep't 1992), *appeal dismissed*, 81 N.Y.2d 300 (1993), *citing*, Daggett v. Keshner, 7 N.Y.2d 981 (1960).

Moreover, because of its plain language and broad remedial purpose, the Courts have now consistently held that an action premised upon GML Section 205-e does not require the same proof of notice as would be required in a common-law negligence action. Anthony v. New York City Transit Authority, 38 A.D.3d 484 (2nd Dep't 2007); McCullagh v. McTurkin, 240 A.D.2d 713 (2nd Dep't 2000). In the seminal case of Lusenskas v. Axelrod, *supra*, the Court established the standard for determining the degree of notice required to sustain a GML Section 205-a (or, by implication, a Section 205-e) cause of action.

In Lusenskas, *supra*, the Court stated that while, "notice is clearly material to recovery under the statute . . . it is clear that it may be inferred." Lusenskas, 183 A.D.2d, *supra*, at 248. The Court stated that:

> To be sufficient under the statute, it is not necessary that the plaintiff prove such notice as he would be required to demonstrate in order to recover under a theory of common-law negligence, *viz*, actual or constructive notice of the particular defect on the premises causing injury. The statute requires only that the circumstances surrounding the violation . . . indicate that the violation was, in the words of the statute, 'a result of any neglect, omission, willful or culpable negligence' on the defendant's part. *Id*.

It is only where "a defendant could not have known of the existence of a condition which constitutes a violation of a statute or regulation . . . the requisite culpability for the application violation is lacking, and the plaintiff has not met his burden for the recovery of statutory damages." Lusenskas, 183 A.D.2d, *supra*, at 249.

The application and scope of GML Section 205-e continues to evolve in the trial and appellate levels. DCD has three matters pending in the appellate level which will further interpret GML Section 205-e parameters in police line-of-duty cases.

In the first case, Officer Maureen Cerati, 106th Precinct, and her partner had been dispatched to the Belt Parkway to secure the scene of a fatal accident which was caused by Oscar Berrios. Both Officers were told by their superior Officer to assist in securing the accident scene to prevent unauthorized access to that location until the Accident Investigation Squad ("AIS") arrived and had an opportunity to investigate the facts and circumstances of the loss. There was no proof that AIS had arrived and relieved the plaintiff at any time prior to Officer Cerati being

struck and seriously injured by an oncoming vehicle driven by Mr. Miller. Officer Cerati sued Mr. Miller and recovered the limits of his insurance policy.

Mr. Berrios later plead guilty to a violation of Penal Law Section 125.12 (Vehicular Manslaughter in the Second Degree) in connection with this incident and was sentenced to five years probation.

Officer Cerati asserted a cause of action against Berrios pursuant to GML Section 205-e, arguing that her severe injuries were, *at a minimum*, "indirectly" caused by Berrios' violation of Penal Law Section 125.12, as well as the concomitant violations of Vehicle and Traffic Law Sections 1180(a), 1192, 1212 and 375(1). The driver whose vehicle actually struck Officer Cerati was also sued.

Officer Cerati argued to the lower court that because GML Section 205-e is a remedial statute which created a cause of action where none existed at common-law, an injured officer is not held to the same burden of proof on the issue of causation as he would bear in a garden variety negligence action. Instead, by its express terms, absolute liability is imposed under that statute where the violation of any relevant statute or code "directly" or "indirectly" causes injury or death to an on-duty Police Officer. To establish an "indirect" connection between the violation and the injury, Officer Cerati argued that she need only show that the statutory violation alleged was "practically or reasonably" related to her injuries; such a "practical or reasonable connection" was shown where, as in the case of Officer Cerati, the violation played some part in bringing about the injury, "though not a primary cause . . .." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 80 (2003).

The Court below found that Officer Cerati had established such a "reasonable or practical" connection between Berrios' violation of Penal Law Section 125.12 and the plaintiff's injuries: "This violation of law led plaintiff, as a police officer, to respond and in setting up the flares and securing the accident scene, the accident occurred. . . Thus, an indirect connection between Oscar Berrios' statutory violation and plaintiff's injuries was raised . . .."

Berrios appealed and the case is now pending before the Appellate Division, Second Department and a decision is expected in the Spring of 2009. We have argued to that Appellate Court that GML Section 205-e liability is imposed where the statutory or code violations which merely brought about or "occasioned" the Police Officer's presence on the scene; the injured Police Officer is not required to show that the cited violations exposed him or her to additional hazards that were the immediate cause of the injury, as the Courts stated in Clow v. Fisher, 228 A.D.2d 11 (3rd Dep't 1997) and Aldrich v. Sampier, 2 A.D.3d 1101 (3rd Dep't 2003). In this case, the record is undisputed that because of Berrios' violation of Penal Law Section 125.12 the plaintiff and fellow officers were called to the location to secure what amounted to a quasi crime scene. Since Officer Cerati was severely injured in the context of that ongoing police action, Officer Cerati established, *at a minimum*, an "indirect" and "practical and reasonable" connection between the defendant's violation of the Penal Law and Vehicle and Traffic Law and her severe injuries.

In the second case, three Police Officers sought damages against the City of New York and Mine Safety Appliances Company pursuant to Section 205-e of the General Municipal Law, and under common-law negligence and strict product liability theories for hearing loss and related injuries as a result of their exposure to impulsive "noise" (the sound produced by gunfire). The Officers were not provided with adequate hearing protection during the course of bi-annual firearms qualifications at, among other ranges, the outdoor firearm's range at Rodman's Neck in the Bronx. Each Officer alleges that when they were injured, they were wearing "Noise For, Mark IV" sound barriers issued to them by the City and designed, tested and manufactured by MSA.

The Officers established that based upon MSA's own warning labels, the product was not fit and proper for use as protection against the harmful effects of exposure to impulsive noise. As proof, the Officers submitted literally volumes of documents which showed that for years prior to the dates when the Officers alleged they were injured, both the City and MSA knew that the "Noise Foe, Mark IV" headsets were not adequate for use as protection against impulsive noise; the records also showed that the NYCPD's Firearms and Tactics Section had repeatedly requested that alternative, safer sound barriers be purchased for use during the firearms qualification exercises. The Officers have maintained that the City and MSA should be held liable to the Officers under a number of legal theories for their egregious conduct in knowingly distributing to the Officers sound barriers which were not fit and proper for use as protection against the effects of impulsive noise.

Two of the Officers allege that they suffered hearing loss and tinnitus in discrete, traumatic incidents which occurred in March 1992. The other Officer alleges that he suffered hearing loss and tinnitus as a result of the culmination of exposure to impulsive noise during his tenure as a firearms instructor at the NYCPD outdoor range at Rodman's Neck from June 1989 to January 1991. This Officer has also alleged that his hearing loss was exacerbated in an isolated incident which occurred on September 26, 1990.

MSA and the City, however, claim that the complaints of all of the Officers should be dismissed as time barred because these Officers were allegedly injured when "first exposed" to impulsive noise during firearms qualifications which took place long before the isolated events which these Officers claim caused their injuries. As such, MSA and the City have maintained that the Officers should all be held to the harshest imaginable statute of limitations accrual doctrine- -the "first exposure rule"- -expressed by the Court of Appeals in Schmidt v. Merchants Despatch Trans. 270 N.Y. 287 (1936). Pursuant to that rule, an injured plaintiff is effectively obligated to bring claim before the plaintiff knows that he or she is injured.

The injured Officers prevailed in the Lower Court and the City and MSA appealed to the Appellate Division, First Department. In the Appellate Court, the Officers will show that the Lower Court properly rejected the arguments of MSA and the City regarding the expiration of the statute of limitations. The defendants did not meet their initial burden of showing that, as a matter of law, these Officers were not injured in isolated incidents as they maintain; the motion for summary judgment was not "properly supported," as the City would have the Court believe. The plaintiffs will show to the Appellate Court that there is not one shred of evidence in the nearly 5,000 page record in this case which proves otherwise. Therefore, the burden of proof never

shifted to the Officers to show that they were injured in discrete, traumatic events and the motion was properly denied regardless of the sufficiency of their opposing papers.

The Officers will also show that the defendants failed to present any evidence, medical or otherwise, that the plaintiffs' first exposure to impulsive noise in and of itself caused permanent hearing loss, as opposed to merely being a component of a repetitive injury.

In the third case, an Officer was shot in the leg by a fellow Officer while they were both in the locker room of a Manhattan South Precinct prior to roll call for the midnight tour of duty. The injured Officer was dressed in the locker room and was talking to another Officer. The subject shooter walked in to the room and proceeded to his locker to change into uniform. The Officer brought his Sig Sauer 9mm semi-automatic weapon to the command to be inventoried and, for reasons unknown, actually kept that gun loaded in his locker. The Officer was holding the Sig Sauer firearm when it fired and the bullet shattered the injured Officer's femur bone. The Officers' accounts contradicted each other with our client testifying at a deposition that the shooter called out his name, pointed the gun at him, and shot him. The other Officer claimed that he was moving his Sig Sauer to his storage locker when the firearm accidentally discharged. The Officer did not recall pulling the trigger, but conceded he must have.

The City of New York claimed that the injured Officer was precluded from suing the City because of the firefighter's rule in that the risk of injury by the "accidental discharge of a weapon is related to the dangers an Officer faces each and every day." The Lower Court agreed and dismissed the case even after having first found in the injured Officer's favor.

This firm has appealed the order dismissing the injured Officer's case. We intend to argue to the Appellate Court that the injured Officer has a valid cause of action against the City pursuant to both GML Section 205-e and common-law negligence. GML Section 205-e permits an Officer to bring a lawsuit where the cause of the Officer's injuries were "premised upon the violation of any statute, ordinance, rule or requirement of the Federal, State, County, Village or Town government or on any and all of their divisions and bureaus." (Schiavone v. New York, 92 N.Y.2d 308 1993). Courts have repeatedly held that violations of Penal Law Sections that prohibit specific acts, such as reckless endangerment, are proper predicates under GML Section 205-e. (McCormick v. New York, 2 N.Y.3d 352 (2004). The facts of this case clearly implicate the criminally reckless use of a firearm.

Although the offending Officer was never criminally charged, the law allows the plaintiff to plead that a criminal violation occurred. In this case, DCD alleged that the subject Officer violated either Penal Law Section 120.05(4) (Felony Reckless Assault Statute) or Penal Law Section 120.00 (2)(3) (Misdemeanor Reckless Assault).

We will also argue that the injured Officer has a valid common-law negligence claim against the City. The injured Officer in this case was merely talking to a fellow Officer in a locker room when he was shot. He did nothing to increase his risk of being shot by a fellow officer- -a necessary precondition to the dismissal of his common-law negligence claim under the remnants of

the “firefighter’s rule.” DCD will argue that there is nothing in the public policy of this State which supports the dismissal of the Officer’s common-law negligence claim.

The Appellate Court will decide whether there are sufficient facts in this case to have this matter fall within the purview of GML Section 205-e and to proceed at common-law, as well. DCD’s position is that the victim has alleged more than sufficient facts to compel the Appellate Division to have this case proceed to trial. A decision is expected in the Fall of 2009.