PERSPECTIVES ON THE LAW

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Can a Police Officer Be Personally Liable for a City's Police Dog?

Limiting Plaintiff's Counsel to Just One Bite!

— by Rudy Lachenmeier

I just concluded the last hearing at the trial level of a case bound for the Court of Appeals. It involves a really sad situation in which a police officer for a city had his canine partner with him in his own backyard when it tragically bit his young niece in the face, after she wandered in through an open section in the police officer's fence. It appears that the City's insurance carrier could have settled the claim pre-filing by tendering its $200,000 tort claims exposure and obtaining a Release for both the City and the police officer individually. That insurance carrier, however, balked at making that offer while simultaneously agreeing the value of the injury for the bite to this young girl's face was worth all of it. The adjuster believed the police officer's homeowner's insurance carrier should pay half of the claim, because it occurred "off duty" while the officer was hauling and placing pavers for a patio in his back yard

The City's carrier's refusal to settle caused plaintiff's counsel to not only file suit against the City, but eventually to add the officer individually to the suit alleging fault based on his failure to supervise the dog while "off duty", seeking non-economic damages of $2,000,000. !

The case is more bizarre because the carrier for the City that originally agreed to pay one attorney to defend both the City and the police officer, later insisted that attorney throw the police officer to the wolves and try to prove that this incident did not occur in the course and scope of the officer's employment or duties. While that could be the subject of an article all by itself, and was shocking to this defense counsel, it is plaintiff's counsel's attempt to get two "bites" at recovery, one against the City for their police dog, and one against the officer for his negligence "off duty" that is the subject of this article.

After the City's attorney hired by the carrier resigned, as he had to do because of the ethical conflict the carrier created, I began representing the police officer. The issue was this: Can a police officer be individually liable for a police dog's bite, assuming no intentional conduct by the officer that caused the incident?

Factually the City owned the dog, paid the officer extra compensation to care for it, paid for a kennel to keep the dog at the officer's house, gave the officer credit each week for exercise time, and in retrospect most importantly, had a General Order requiring that: "While off duty, the canine master will insure the canine is supervised or within a secure area."

ORS 30.265 provides in relevant part that:

> …every public body is subject to actions or suit for its torts and that of its officers, employees, and agents acting within the scope of their employment or duties… The sole cause of action for any tort of any officer, employee or agent of a public body acting within scope of their employment or duties . . . shall be an action against the public body only. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any such officer, employee or agent of the public body whose acts or omissions within the scope of the officer's employees or agents employment or duties gives rise to the action or suit. No other form of civil action or suit shall be permitted.

The other statute of particular interest is ORS 30.285 which states in relevant part:

> The governing body of any public body shall defend, save harmless and defend any of its officers, employees and agents, whether elective or appointive against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

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Perspectives… *(Continued from previous page)*

The essence of plaintiff's claim was that the police officer was wearing two hats: one as an officer in charge of his canine, albeit off duty, and secondly, as a homeowner totally independent of his employment with the City.

The essence of the defense was that this incident occurred in course of his "duties" as a canine officer to care for the dog, whether or not the officer was viewed as in the "course and scope of employment" at the time.

Against that background, I tendered the defense and then cross-claimed against the City alleging this incident occurred in the course and scope of his "duties" as a canine trainer and canine officer whether or not he was viewed as "on duty or off duty" at the time of the incident, because he was a police officer required to be in charge of the dog 24/7 when it was not in the kennel. I then moved for summary judgment against the plaintiff claiming plaintiff's only remedy was against the City per the statute and against the City claiming it owed indemnity to the officer since the incident occurred in the course of his duty to supervise the dog.

Plaintiff argued that the dog belonged to the City so the City was liable, but that the officer was "off duty" working in his yard so he had personal liability. I argued that the officer was required to be in charge of the dog at the time of the incident, no matter what else he was doing. If he performed that duty negligently the City was liable, but he was not. The same conduct could not both be in the course of his duties and outside his duties. Figuratively you can not be ½ pregnant. The trial court agreed and dismissed the plaintiff's claims against the officer and that issue is now on appeal.

As to the City, I just prevailed on the crossclaim for indemnity and attorney's fees from the date of my tender to the City, as the court ruled that since the incident occurred in the course of a "duty," the statute provided for indemnity, not withstanding the City's attorney arguing that the homeowners policy of the officer should pay part of the fees. Whether the City will appeal remains to be seen. After our motion for summary judgment was granted, the City did pay it's $200,000 ($100,000 each for economic and non-economic damages). The City then took a release for the City and the officer, reportedly "to the extent the officer was within the course and scope of his duties." Whether the City could take such a "partial" release and not defend the plaintiff's appeal remains to be seen since the statute requires the defense and indemnity of even "groundless" claims. Stay tuned for "The rest of the story". ❖

— If you have any questions feel free to contact the author, Rudy R. Lachenmeier by phone at 503-768-9600, or by email at Rudy@lerlaw.com.

Case Study

Calculation of UIM Benefits Determined by Court of Appeals

— *by* Jeffrey D. Eberhard

Claims Pointer: *UIM benefits are calculated by subtracting the amount received by the insured from any other insurance policies from the limits of the UIM policy. The fact that plaintiff's total damages exceed the UIM policy limits is irrelevant in the calculation of benefits.*

The Oregon Court of Appeals finally provided certainty as to the calculation of UIM benefits. Any amounts the insured receives from other policies are to be deducted from the UIM policy limits. This is supported by the policy considerations behind UM/UIM insurance. UM coverage was intended to provide benefits where the tortfeasor had no insurance at all. It follows that UIM coverage extends to cover the difference between amounts paid by the tortfeasors liability policy and the UIM policy limits.

Vogelin was injured in an automobile accident with a car driven by James. James' insurer paid Vogelin the policy limits of $25,000. Vogelin then made a UIM claim with her insurer American Family Mutual Insurance Company (American Family) for her policy limit of $100,000. Upon American Family's denial of Vogelin's claim, she brought an action for breach of contract seeking $100,000.

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Case Study… *(Continued from previous page)*

After trial, the jury determined Vogelin's damages were $304,000. The trial court held a hearing to determine whether the judgment should be for the policy limit of $100,000 or whether the amount should be reduced by the $25,000 Vogelin received from James' insurer. Stated differently, the question was whether the $25,000 should be deducted from plaintiff's total damages or the policy limits of plaintiff's UM insurance. The trial court found that the deduction should be taken from the UIM policy limits and entered judgment for plaintiff for $75,000.

On review, the Oregon Court of Appeals examined the interplay between ORS 742.502(2)(a) and ORS 742.504(7)(c) to determine the proper calculation of the amount payable to Vogelin. Vogelin argued that under ORS 742.504(7)(c), the phrase "any amount payable under the terms of this coverage," as interpreted by the Supreme Court in Bergmann v. Hutton, required that payments from any source must be deducted from the insured's total damages and not the UM policy limits. Defendant urged the Court to look to ORS 742.502(2)(a) which provides that UIM benefits must equal UM benefits "minus the amount recovered from other automobile liability insurance policies."

In agreeing with American Family, the Court of Appeals cited Mid-Century Ins. Co. v. Perkins for the proposition that an insurer's liability should "never exceed an amount totaling the benefits available under UM coverage, i.e. the policy limit, minus the amount that the insured recovers from other policies." Thus, the Court held that the amount of UIM benefits due to an insured is calculated by subtracting the amount that the insured recovers from other policies from the UIM policy limit. The decision of the trial court was affirmed. ❖

Full case available @ http://www.publications.ojd.state.or.us/A132051.htm

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