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When Statutes Collide: Supreme Court Clarifies The Interplay Between Governmental Immunity Act And Provision In No-Fault Act Authorizing Third-Party Tort Suits.

By Drew Broaddus

The Governmental Immunity Act, MCL 691.1401 et seq., limits the exposure of the state, its agencies, and its political subdivisions to tort liability. There are six exceptions to the Act's broad grant of governmental immunity, including the motor vehicle exception, MCL 691.1405. Under the motor vehicle exception, governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner.

Meanwhile the No-Fault Act, MCL 500.3101 et seq., generally abrogates tort liability arising from the ownership, maintenance, or use of a motor vehicle, unless the damages fall under an enumerated exception. MCL 500.3135(1), (2), and (3)(b) allow third-party tort actions for noneconomic damages if the death, serious impairment of body function, or permanent serious disfigurement threshold is met, while MCL 500.3135(3)(c) allows third-party tort actions for certain kinds of economic damages, specifically damages for allowable expenses, work loss, and survivor's loss in excess of the daily, monthly, and 3-year limitations contained in the sections applicable to those three types of no-fault benefits.

Last year the Court of Appeals considered these provisions in two published decisions. In *Hannay v MDOT*, 299 Mich App 261, 270 (2013) the panel affirmed a jury verdict that included, among other things, work-loss damages that exceeded "the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3)." The work-loss award included, in part, damages for lost earning potential; the plaintiff testified that she had aspired to become a dental hygienist but at the time of the accident she had not yet been accepted into any program. In *Hunter v City of Flint*, 300 Mich App 229 (2013), the panel held the plaintiff could not recover noneconomic damages for pain, suffering, shock, or emotional damage. This was despite the fact that a question of fact existed as to whether the plaintiff's physical injuries met the § 3135 threshold. Although not directly at odds, there was some tension between the two decisions. *Hannay* arguably allowed the plaintiff to recover more than what § 3135 allows when the defendant is a governmental agency (i.e., lost earning potential), whereas *Hunter* seemed to construe § 1405 as placing an additional limitation on top of § 3135 (i.e., a "corporeal or material" injury limitation, see *Hunter*, 300 Mich App at 236).¹

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Hannay holds that a plaintiff may bring a third-party tort action for both economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements under MCL 500.3135 have been met.

"The scope of governmental immunity is construed broadly, while exceptions to it are construed narrowly." *Linton v Arenac County Road Com'n*, 273 Mich App 107, 112 (2006). Therefore, it makes sense that the damages compensable under MCL 691.1405 would not be any broader than those compensable under MCL 500.3135.

MCL 691.1405 does not contain a threshold, *Hannay*, Slip Op at 26, but MCL 500.3135 controls "the damages available in a third-party tort action ... when the tortfeasor is a governmental entity." *Hannay*, Slip Op at 28.

¹ Prior to *Hunter* it had long been understood, at least in the non-governmental context, that "mental injuries" are compensable under § 3135 when "the impairment was serious [and] flowed from the accident." *Beard v City of Detroit*, 158 Mich App 441, 450 (1987). See also *Luce v Gerow*, 89 Mich App 546, 550 (1979).

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The Supreme Court granted leave to resolve the apparent tension and, in a detailed opinion signed by six Justices (Justice Cavanagh concurred in the result only) held that neither panel got it entirely right. After a lengthy analysis of both Acts, the Court found that § 1405 represents a partial waiver of governmental immunity for “bodily injury” that the agency would otherwise be liable for under § 3135. Although “bodily injury” under the Governmental Immunity Act means a “physical or corporeal injury to the body,” *Hannay*, Slip Op at 15, “injury” and “damages” are not the same thing. *Id.* at 16. Therefore, notwithstanding this definition, “pain and suffering and mental and emotional distress damages” can still be recovered under § 1405, so long as they flow from a physical “bodily injury,” *Id.* at 17, and for this reason the Court of Appeals holding in *Hunter* was reversed. (However, the injury must still meet the § 3135 threshold;² the *Hunter* Court of Appeals panel erred by categorically ruling out non-physical damages before considering whether there was a threshold injury.)

While the Court of Appeals disallowed too much in *Hunter*, the Supreme Court held that the Court of Appeals had allowed too much in *Hannay*. Specifically, the Supreme Court confirmed that § 1405 does allow for the recovery of work-loss damages that exceed the statutory personal protection insurance benefit maximum, as would otherwise be allowed in non-municipal cases per § 3135(3). However, the Court of Appeals panel in *Hannay* erred by allowing for the recovery of loss of earning *potential*, which § 3135 did not allow under the facts of this case because the plaintiff’s future earnings were too speculative. “[C]ourts must be cautious in considering wages that the plaintiff could not have earned before the accident in calculating the wage-loss award because of the risk that a calculation based on such wages will be contingent and speculative and, therefore, barred under Michigan law.” *Hannay*, Slip Op at 35.

In summary, in *Hannay* the Supreme Court affirmed that portion of the Court of Appeals’ opinion that allowed for the recovery, against a governmental entity, of economic damages exceeding the statutory maximum affirmed. However, that portion of the Court of Appeals’ opinion, which had affirmed the trial court’s work-loss damages award, was reversed by the Supreme Court. The Supreme Court remanded *Hannay* to the trial court for recalculation of the work-loss award. In *Hunter*, the Court of Appeals’ conclusion that noneconomic damages are not compensable under the motor vehicle exception was reversed, and the case was remanded to the trial court for further proceedings.

²See *No-Fault Newslines*, October 19, 2010, “Court of Appeals Offers First Interpretation of New *McCormick* No-Fault ‘Serious Impairment’ Standard,” by Drew Broadus.

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