

MINUTES OF COMMISSION MEETING

September 15, 2022

Present at the New Jersey Law Revision Commission meeting, held at 153 Halsey Street, Seventh Floor, Newark, New Jersey 07103, were: Chairman Vito A. Gagliardi, Jr.; Vice Chairman Andrew O. Bunn; Commissioner Virginia Long; and Professor Bernard W. Bell, of Rutgers University School of Law, attending on behalf of Commissioner Rose Cuison-Villazor.

In Attendance

Jim Hunt, a member of the New Jersey Bike/Walk Coalition, and SFC David Guinan, Unit Head, Safe Corridor Unit, New Jersey State Police, were in attendance.

Minutes

The Minutes of the July 21, 2022, meeting were unanimously approved by the Commission, on the motion of Commissioner Bunn, seconded by Commissioner Bell.

Personal Conveyance

Samuel Silver discussed with the Commission a Draft Final Report recommending modification of N.J.S. 39:4-92.4 to clarify the definition of the term “pedestrian” and to define the term “personal conveyance” to eliminate potential ambiguity.

Mr. Silver explained that N.J.S. 39:4-92.4 was enacted in August of 2021 to protect pedestrians and “vulnerable road users” from the possibility of being injured by motor vehicles while using New Jersey roadways. When it enacted this statute, New Jersey joined forty-two other states and the District of Columbia in requiring that motor vehicles leave either a minimum distance or safe distance, ranging from three to four feet, when passing a bicyclist. Effective March 01, 2022, the statute requires that a motor vehicle must approach pedestrians, bicycles, scooters, and any other lawful conveyance with due caution. Each of these personal transportation devices is defined in Title 39, except personal conveyance. Mr. Silver noted that the absence of a statutory definition of personal conveyance means that the term may be subject to competing interpretations of what constitutes a lawful personal conveyance for purposes of violating the statute.

Staff sought comments from knowledgeable individuals and organizations about the proposed modifications contained in the Commission’s Tentative Report. The Commission received opposition to the proposed modifications from a private practitioner who indicated that the statute is self-explanatory and called for a repeal of the statute. Another private practitioner provided an alternative definition of the term personal conveyance. The proposed definition would define a personal conveyance as “a vehicle not required to have motor vehicle insurance weighing less than a certain amount.”

Staff received support from the Policy Director of the League of American Bicyclists. The Director thanked the Commission for providing the League with a copy of the Tentative Report

and expressed his appreciation for the level of detail it contains. He stated that “there’s a somewhat visceral reaction to seeing ‘bicycle’ grouped with ‘personal conveyances’ and noted that a lot of states will be having this type of discussion in the near future.” He opined that “grouping bicycles with personal conveyances is in line with how we’ve discussed vulnerable road user definitions for several years, so grouping it there makes sense.” Staff also received support from The Unit Head for the Safe Corridor Unit of the New Jersey State Police who expressed his support for the Commission’s proposed modifications.

Mr. Silver stated that on September 13, 2022, he received a telephone call from a member of the law enforcement community who asked if the term “bicycle” could be removed from the definition of personal conveyance and returned to subsection a. as a stand-alone definition. According to the commenter, the National Highway Safety Administration collects and filters bicycle and pedestrian crashes for statistical analysis. This research can be used to recommend roadway improvements for both groups. In response to this request, Staff prepared a Supplemental Appendix for the Commission’s consideration that incorporated the proposed modifications.

Mr. Hunt from the New Jersey Bike/Walk Coalition thanked the Commission for allowing him to participate and for all the work that has been done on this project. He stated that the outreach conducted by the Commission has placed a spotlight on the statute and has better defined both pedestrian and personal conveyance. Mr. Hunt noted that the Commission’s Report places a focus upon the protection of the vulnerable road user and not the object they are using for transportation. He suggested that the addition of the words “person operating” before word “bicycle” and “personal conveyance” would clarify that the statute protects the people who are using these devices and not just the objects themselves. Mr. Hunt also recommended that the term “shoulder lane” be added to the language of subsection b. after the term roadway because the shoulder is not included in the definition of the term roadway. Mr. Hunt stated that the law should identify the shoulder as part of the roadway to protect anyone riding or walking on the roadway or shoulder. Finally, he suggested that the title of the Report be amended to “Approaching and Passing a Pedestrians and the Use of the Term Personal Conveyance and Pedestrian in N.J.S. 39:4-92.4.”

Chairman Gagliardi thanked Mr. Hunt for his comments and inquired whether the Commissioners preferred the modifications contained in the Appendix that accompanies the Draft Final Report or whether they would like to replace it with the Supplemental Appendix. Commissioner Bell stated that he preferred the Supplemental Appendix. He agreed with Mr. Hunt that the Commission should further modify the language in the Draft Final Report to include the protection of those travelling on the shoulder of a roadway and amend the title of the Report.

Commissioner Long stated that she too agreed with the proposed modifications. She asked, however, that Staff make all the proposed modifications and conduct additional research so that the Commission can view them in a final form before deciding to release the Report. Chairman Gagliardi agreed and directed that Staff make the modifications and list the Revised Draft Final Report on the Commission’s October agenda.

Re-enrollment in PERS

Whitney Schlimbach presented a Revised Draft Final Report recommending the modification of N.J.S. 43:15A-57.2b.(2) to clarify the scope of the “teaching role” exception to re-enrollment in the Public Employees’ Retirement System (PERS).

The PERS statute requires retired members to re-enroll in the PERS when they return to work after retirement unless they meet one of the exceptions set forth in N.J.S. 43:15A-57.2. The “teaching role” exception in subsection b.(2) exempts those in qualifying teaching roles from re-enrolling without regard to the compensation earned. The “salary cap” exception in subsection b.(1) exempts those earning less than \$15,000 a year.

A Tentative Report was released by the Commission in March 2022. In June of 2022 a Draft Final Report was presented and the Commission requested additional research to determine whether the \$15,000 figure in salary cap exception was outdated or had been modified by the Director of the Division of Pensions and Benefits.

The teaching role exception does not impose a salary limit. It does, however, reference a \$10,000 annual salary, which was the limit in salary cap exception when the statute was enacted. The salary cap exception sets a \$15,000 annual compensation limit which has not been updated since the statute was amended in 2001.

The teaching role exception was drafted as a continuation of existing salary cap exception and it exempted members returning to qualifying teaching roles even if compensation exceeded \$10,000 per year. It was enacted with the \$10,000 reference in 2001. The Legislature, however, amended salary cap exception later that year to increase limit to \$15,000 and eliminated the source of the \$10,000 reference in the teaching role exception. Statements made by legislators make it clear that teaching role exception is intended to apply regardless of compensation. The parallel administrative code section does not reference a salary amount and exempts any retired member returning to qualifying teaching role.

The salary cap exception was amended in late 2001 to increase salary limit from \$10,000 to \$15,000. The parallel administrative code provision references the annual limit contained in the statute but does not specify a dollar amount. Recently administrative decisions have relied on the \$15,000 figure in the statute and there is no indication that PERS Board is using a different figure.

Ms. Schlimbach discussed the proposed statutory modifications with the Commission. She stated that in subsection a. the statutory language was modified to be gender neutral and was also divided into further subsections to improve clarity. In Subsection b.(2) the proposed modifications eliminate reference to the \$10,000 annual salary in teaching role exception and add language that provides that retired members who return to qualifying teaching roles are exempt “regardless of the amount of compensation.”

Staff conducted outreach regarding the proposed statutory modifications and did not receive any objections to the Report. Ms. Schlimbach noted that after the June meeting Staff conducted targeted outreach to the Division of Pensions and Benefits to see if there have been any

changes to the \$15,000 limit in the statute since 2001. At the time of the Commission's meeting, she had not received any response from the Division.

Commissioner Bell suggested that the Report bring to the Legislature's attention that the \$15,000 annual compensation limit was established by the Legislature in 2001. He opined that the cost of living has increased in the twenty-one years since this figure was used in the statute and that the Legislature may wish to consider modifying this amount. Chairman Gagliardi agreed with Commissioner's Bell recommendation.

On the motion of Commissioner Bell, seconded by Commissioner Long, the Commission unanimously agreed to release the Revised Final Report.

Self-Representation

Samuel Silver presented a Draft Tentative Report addressing the issue of self-representation in proceedings concerning the termination of parental rights and the involuntary commitment of sexual violent predators. The issues were brought to Staff's attention after a review of the New Jersey Supreme Court decisions *In the Matter of Civil Commitment of D.Y.*, 218 N.J. 359 (2014) and *New Jersey. Division of Child Protection & Permanence v. R.L.M.*, 236 N.J. 123 (2018).

Mr. Silver provided an overview of both cases. In *D.Y.*, the defendant was convicted of sexual assaults on minors in both federal and state courts, and the State petitioned to involuntarily commit him. The defendant did not want to be represented by a court appointed attorney and the Court denied the request to proceed *pro se*. The defendant appealed the denial, and the Appellate Division affirmed the decision of the trial court.

The New Jersey Supreme Court considered the legislative intent behind N.J.S. 30:4-27.29(c), which provides "[a] person subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel." The Court held that individuals subject to involuntary commitment must either be fully represented by counsel, or have standby counsel when they appear in court. Mr. Silver explained that the law provides that a defendant must clearly and unequivocally waive the right to counsel and that the waiver must be knowing, intelligent, and voluntary. The statute, however, is silent concerning how or when the defendant must notify the court or when the court should conduct the relevant inquiry.

Mr. Silver then explained that in *R.L.M.*, a father who had lost the rights to his five older children was the subject of a proceeding to terminate his parental rights as to his youngest daughter. He wavered between self-representation and the desire for counsel and was also disruptive during the proceedings. The Court ultimately terminated his parental rights and he appealed. The Appellate Division affirmed the decision of the trial court and the Supreme Court granted certification on the issue of self-representation only.

The *R.L.M.* Court noted that N.J.S. 30:4C-15.4(b) does not contain mandatory language requiring parents to be represented by counsel during termination proceedings. The Court compared the language of the statute to the mandatory language contained in N.J.S. 30:4-27.29(c).

The Supreme Court issued the following guidance on the issue of self-representation: (1) the right to self-representation must be asserted in a timely manner; (2) it must be clear and unequivocal; (3) the waiver of counsel must be knowing, intelligent, and voluntary; (4) a court may, in its discretion, appoint standby counsel, or (5) take remedial action if the defendant is disruptive. Mr. Silver stated that the same concern that arose in *D.Y.* arose here - that the statute is silent with regard to how someone must timely, clearly, or unequivocally assert the right to self-representation.

The proposed modifications contained in the Appendix to the Report attempt to balance New Jersey's respect for a civil litigant's right to self-representation with the Legislature's intent to permit a competent individual to represent themselves provided that the support of standby counsel is available to assist the litigant in navigating the complex issues and liberty interests involved in such a case. Mr. Silver stated that the proposed definition has been synthesized from the *D.Y.* Court's discussion of the role of standby counsel in SVPA proceedings. He also indicated that the same modifications were made to both the SVPA and the termination of parental rights statutes.

Commissioner Bunn inquired whether there was any definition of standby counsel in either the New Jersey statutes or Federal Code. Mr. Silver replied that both sets of statutes are devoid of such a definition. Commissioner Long added that in her experience judges do not consult any particular statute or rule when conducting the self-representation colloquy. Chairman Gagliardi noted that it would be beneficial to distill the common law definitions of standby counsel into a single definition.

Commissioner Bunn stated that it would be useful if the definition of standby counsel could be generic enough to be applied in different contexts as needed and asked whether the proposed language could be modified to achieve that. Chairman Gagliardi recommended that the modifications contained in the Report remain unchanged until after the Commission has had the opportunity to benefit from public comment.

Commissioner Long directed Staff to a recent Supreme Court directive that set forth the Court's policy concerning accessible and inclusive language and suggested that the proposed recommendations contained in the Commission's Report be reconciled with the Supreme Court's directive. Commissioner Long left it Staff to determine whether it was appropriate to use "who" or "whom" in subsection e. which appears on page eleven of the Appendix

Commissioner Bell stated that on page fifteen he preferred option number two because it was a broader statement of the rule. He explained that when modifications are made that align with what courts are already doing, providing more flexibility or discretion to the court is appropriate. Commissioner Bunn disagreed, explaining that he preferred the first option and that the court be required to make a finding given the gravity of the situation the statute addresses. Both Commissioners agreed, however, that both options should be made available for public comment. The Commissioners also agreed that the requirement that the court make a "finding" should be incorporated into the proposed modifications.

On the motion of Commissioner Bunn, seconded by Commissioner Bell, the Commission unanimously agreed to release the Revised Final Report.

Intentional Wrong

Whitney Schlimbach discussed a Draft Tentative Report addressing the scope of the “intentional wrong” exception in N.J.S. 34:15-8 in the Worker’s Compensation Act (WCA). Ms. Schlimbach noted that the statute does not define the term, nor does it specify what “intentional wrong” encompasses.

In *Bove v. AkPharma*, the Appellate Division addressed whether the Plaintiff’s injuries – allegedly caused by a nasal spray developed and recommended to the Plaintiff by his employer – fell within the intentional wrong exception to WCA coverage. Ms. Schlimbach explained that, because the exception is not defined, the *Bove* Court examined the common law including three seminal New Jersey Supreme Court cases: *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161 (1985); *Laidlow v. Hariton Machine Co.*, 170 N.J. 602 (2002); and *Van Dunk v. Reckson Associates Realty Corp.*, 210 N.J. 449 (2012). The Appellate Division concluded that, in addition to violations of safety regulations or failure to follow good safety practices, an intentional wrong requires “something more,” like deception, affirmative acts to defeat safety devices, or willful failure to remedy past violations.

Ms. Schlimbach explained that N.J.S. 34:15-8 was amended in 1961 to add the intentional wrong exception from exclusive recovery under the WCA. Until the 1985 decision in *Millison*, courts interpreted the exception as allowing recovery outside the WCA only when an employee demonstrated a deliberate intent to injure. The *Millison* Court expanded the intentional wrong exception to include a “substantial certainty of injury,” which involved a two-pronged analysis of the conduct that led to the harm and its context. Under *Millison*, courts must determine whether the conduct gives rise to a “substantial” or “virtual” certainty of harm; and the circumstances and harm are a “fact of life” of industrial employment or “plainly beyond” what the Legislature intended the WCA to cover. Ms. Schlimbach noted that the *Millison* Court held that the knowing exposure of employees to asbestos was not an intentional wrong, but that concealing from employees, through company doctors, that they had already developed asbestos-related illness was an intentional wrong.

Ms. Schlimbach then turned to the New Jersey Supreme Court’s decision in *Laidlow*, which phrased the *Millison* standard as follows:

- (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and
- (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers’ Compensation Act to immunize.

The Court in *Laidlow* addressed an injury that occurred after a safety guard on a rolling mill was tied up (moving it out of the way) to increase speed. The Court considered prior close calls,

although there were no prior accidents, and noted that the employer replaced the safety guard when OSHA conducted safety inspections. The *Laidlow* Court found that there was an intentional wrong.

Finally, the *Bove* court examined the New Jersey Supreme Court's decision in *Van Dunk*, which addressed an injury that occurred when an unsecured trench collapsed on an employee right after he entered it. In *Van Dunk*, the on-site safety supervisor admitted to OSHA violations immediately after the accident and OSHA issued a "willful" violation citation. The Court declined to find that a subsequent willful violation finding by OSHA established an intentional wrong. Rather, the Court distinguished the facts from prior successful intentional wrong claims because there was no affirmative action to remove a safety device, no prior violations of OSHA, no deliberate deceit, and no prior injuries or complaints.

Ms. Schlimbach then addressed the proposed modifications contained in the Appendix. First, Staff proposed dividing the statute into lettered and numbered sections to improve accessibility. In subsection a., Ms. Schlimbach proposed replacing the language "such agreement" with "an agreement as described in Section 34:15-7." Originally, Sections 7 and 8 were consecutive but during the intervening years, statutes were added between them, obscuring the connection between the "such agreement" language in Section 8 and the worker's compensation agreement described in Section 7.

In subsection b., it was proposed that "as set forth in subsection c." be added to the end of the section to make clear that the parameters of the intentional wrong exception are set forth in subsection c.

Finally, in subsection c., which is an entirely new section, language is proposed that defines the scope of the "intentional wrong" exception as discussed by the Supreme Court in *Millison* and *Laidlow*. Ms. Schlimbach recommended two subsections to separately address the two possible avenues of establishing an intentional wrong - deliberate intent and substantial certainty. The "deliberate intent" language in the first subsection is derived from the *Millison* Court's description of the original intentional wrong standard.

The subsection addressing the substantial certainty standard is further divided into two subsections setting forth the "conduct" and the "context" prong. In subsection (c)(2)(A) – the conduct prong – the language is essentially the same as used in *Laidlow*. In subsection (c)(2)(B) – the context prong – it is proposed that the colloquial phrase "fact of life" be replaced with equivalent language, such as "known and accepted risk," and that the phrase "industrial employment" be replaced with "in the industry" to make clear the exception covers various employment contexts.

Ms. Schlimbach explained that although Staff considered language in subsection (c)(2)(A) providing a non-exhaustive list of employer conduct consistently recognized as giving rise to a substantial certainty of injury, as well as language in subsection (c)(2)(B) used by the Appellate Division to describe the rare circumstances that have met the context prong, Staff ultimately concluded that it was appropriate to use language developed by the New Jersey Supreme Court and consistently applied in the Appellate Division.

Commissioner Bell questioned why staff chose the Supreme Court language rather than listing the results in the Appellate Division cases. Ms. Schlimbach noted that there are several Appellate Division cases in which the plaintiff has been unsuccessful their intentional wrong cases. She also added that the Appellate Division generally uses the Supreme Court's language.

Laura Tharney added that Staff attempted to be cautious in drafting. Since the cases in which the exceptions apply are supposed to be rare, Staff was concerned that if the language of the Appellate Division opinions giving examples was incorporated in the proposed statutory drafting, it might imply that any case that fell within an identified category should be an exception. Commissioner Bunn stated that he agrees with the approach in the draft and codifying the Supreme Court language requires finders of fact to be disciplined in their analysis and word choice.

On the motion of Commissioner Long, seconded by Commissioner Bunn, the Commission unanimously agreed to release the Tentative Report.

Rescue Doctrine

Samuel M. Silver and Whitney Schlimbach discussed with the Commission a Memorandum that examined the common law rescue doctrine and the current state of the law concerning the extension of this doctrine to property as discussed in *Samolyk v. Berthe*, 251 N.J. (2022).

Mr. Silver stated that the rescue doctrine was first announced in the New York Court of Appeals case of *Wagner v. International Railway*, 133 N.E. 437 (N.Y. 1921). The rescue doctrine permits a civilian rescuer to recover damages for injuries they sustain because a culpable party placed themselves in a perilous position which invited rescue. In New Jersey, the Appellate Division has consistently applied the doctrine to cases in which a rescuer is injured rescuing a person. The doctrine is based upon the tort concepts of duty and foreseeability. Pursuant to this doctrine, liability attaches if the actor should reasonably anticipate that others might attempt to rescue him from the self-created peril, and the rescuer is injured.

In *Samolyk v. Berthe*, 251 N.J. 73 (2022), the New Jersey Supreme Court was asked to consider whether the rescue doctrine should be extended to those who voluntarily choose to expose themselves to a significant danger in an effort to safeguard the property of another.

In *Samolyk*, the property sought to be protected was a canine. The plaintiff fell into a canal while attempting to rescue her neighbor's dog. The Court noted in this case of first impression that the majority of the states extend the rescue doctrine to both real and personal property. There are, according to the Court, a number of states that have elected not to expand the rescue doctrine to include property, holding that sound public policy does not support expanding the rescue doctrine to imbue property with the same status and dignity conferred upon human life. Applying the same rationale, the New Jersey Supreme Court declined to expand the rescue doctrine to include injuries sustained to protect property. The Court did, however, recognize that an exception should be made in settings in which the plaintiff has acted to shield human life.

Ms. Schlimbach discussed New Jersey's treatment of animals in similar contexts. To this time, New Jersey treats animals as property – albeit a special form of property. This special status is an acknowledgment that pets have value in excess of that which would ordinarily attach to property because they are not fungible.

In *McDougall v. Lamm*, 211 N.J. 203 (2012), the New Jersey Supreme Court determined that non-economic loss does not extend to the death of a pet. The Court noted that recognizing such a cause of action would conflict with the Legislature's statutory scheme for regulating dog owners and dangerous dogs.

New Jersey's animal cruelty statutes regarding police dogs were enacted to offer protection to police officers who use police animals in the performance of law enforcement duties. The sponsor's statement implies that heightened protection afforded to law enforcement animals is related to their role as a law enforcement tool.

A similar logic applies to the criminal statutes that protect service animals. These statutes, according to Ms. Schlimbach, provide an aggrieved owner with the ability to seek restitution for the value of the guide dog; replacement and training or retraining expenses and other expenses for the guide dog and handler; and lost wages or income. This implies that the service animal is property, while acknowledging its increased value stemming from the handler's investment and the purpose of the animal as an assistive tool.

Mr. Silver noted that the refusal of the *Samolyk* Court to extend the doctrine raises three issues. First, despite being part of the social fabric it has never been codified. Next, while the majority of states have adopted the Restatement's expansion of the rescue doctrine, New Jersey has chosen the minority view on this subject. Finally, the Court created an exception for instances in which the plaintiff acted to protect a human life. This exception, however, is not yet well-defined.

To this time, there are no bills pending in the 2022-2023 legislative session to codify the rescue doctrine.

Commissioner Bell noted that cases involving the rescue doctrine may be so infrequent that it may take a long time to develop the nuance necessary to clarify the Court's exception. Once the Legislature does codify the doctrine, the judiciary may be reluctant to further develop this area. In addition, he noted that the Commission does not generally make a recommendation that would reverse the holding of the New Jersey Supreme Court.

Chairman Gagliardi noted that this was a very interesting issue, but that it appears to involve a policy determination best left to the Legislature. Commissioner Bunn noted that the *Samolyk* decision contains a policy that the Court made and on which the Legislature is silent. He suggested that the Commission bring this issue to the attention of the Legislature.

Commissioner Long stated that there may have been a middle ground that could have provided an exception for the protection of property such as domesticated animals. While noting that this issue involves a policy decision, she said that the Commission may wish to provide the

Legislature with a survey of how many states follow the Restatement and how many provide a middle ground for the protection of property.

The Commission authorized Staff to engage in additional research to determine how the Restatement approach is utilized in other states and then report back to the Commission.

Recommendations for Project Conclusion

Laura Tharney discussed with the Commission a Memorandum that set forth a number of projects identified as being apparently appropriate for conclusion.

In advance of the July 2022 Commission meeting, Staff examined the full list of Commission projects and identified seventeen projects that began in or before 2018. The Commission Staff was asked to prepare a Memorandum to bring a number of these projects to the attention of the Commission for consideration. Ms. Tharney identified nine such projects: Collateral Consequences of Conviction; Communications Data Warrants and Electronic Communications; Consumer Fraud Act; Definitions of Under the Influence (including Cannabis); Expungement; Franchise Practices Act; Frivolous Litigation; Public Health and Safety – Seatbelt Usage; and Theft of Immovable Property.

Chairman Gagliardi advised that he supported the termination of each project set forth in the Memorandum, with the exception of the Commission's work on Consumer Fraud. Commissioner Bunn explained that he considered whether it was practical, given the resources of the Commission and its Staff, to address the issue under consideration in each project. Despite his interest in each, he agreed with the recommendation to conclude work on all of the projects in the Memorandum. Commissioner Bell expressed an interest in the Commission's work on the Collateral Consequences of Conviction project. He noted that the intersection of moral turpitude and immigration law was of interest but that if federal law controls, the Commission cannot address these matters. Commissioner Bell also noted that the limited resources of the Commission do not realistically permit the project to continue.

Commissioner Bunn stated that the conclusion of these projects provides Staff with the ability to focus on current projects, provides an accurate list of open projects, and does not foreclose the possibility of future Commission work when an issue is brought to the Commission's attention. The Commission authorized Staff to discontinue work on each of the projects set forth in the Memorandum.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, seconded by Commissioner Long.

The next Commission meeting is scheduled for October 30, 2022, at 10:00 a.m., at the office of the New Jersey Law Revision Commission.