

MINUTES OF COMMISSION MEETING

March 21, 2024

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Edward Hartnett, of the Seton Hall University School of Law, attending on behalf of Interim Dean John Kip Cornwell; Professor Bernard W. Bell, of the of Rutgers University Law School, and Grace C. Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Johanna Bond.

Public Participants

Also in attendance were Sheryl Seiden, Esq., Seiden Family Law; Matt Shapiro, President of the New Jersey Tenant's Organization; Victor Monterrosa, Esq., Managing Director, Rutgers University Law School, Housing Justice and Tenant Solidarity Clinic; and Elias Bull, Student Attorney, Housing Justice and Tenant Solidarity Clinic.

Minutes

On the motion of Vice-Chairman Bunn, seconded by Commissioner Rainone, the Minutes of the February 15, 2024, meeting were unanimously approved by the Commission.

State Home for Boys and Girls

Samuel Silver explained that on December 21, 2023, the Commission released a Tentative Report setting forth proposed modifications to the New Jersey statutes N.J.S. 30:4-85 and 48:12-109. As a part of the outreach on this project, Staff contacted 40 individuals and agencies and requested their comments and recommendations on the proposed modifications. These individuals and agencies are identified on page five of the Draft Final Report. Mr. Silver thanked Christina Broderick, Chief of Legal and Regulatory Affairs for the Juvenile Justice Commission (JJC) as well as Dr. LeBaron, the Acting Executive Director of the JJC, for their comments.

Mr. Silver noted that in subsection (b) the opening sentence has been updated to refer to the New Jersey juveniles waiver statute. In addition: the term "inmate" is replaced with "person who is incarcerated"; the anachronistic references to State Home for Boys and for Girls have been replaced with references to facilities operated by the JJC; and the transfer language has been updated to reflect, as a destination, any facility specified in the statute or institution designated by the Commissioner of the Department of Corrections as a place of confinement.

In subsection (c), there are two options are presented for Commission consideration. IN the first, in addition to the removal of the term inmate, the anachronistic references to the State Home for Boys and the State Home for Girls have been updated to reflect the current names of the correctional facilities where persons may be incarcerated. The second option also removes the term "inmate" and the anachronistic references to facilities. In addition, it reflects comments received from Doctor LeBaron, and replaces the references to specific DOC facilities with more general language like that used in the sections dealing with JJC facilities.

Subsection (d) also contains two options on which Commission guidance was sought. Option 1 proposes shifting the statutory reference to the transfer of women of a certain age to its own subsection and updates the statutory reference to the facility formerly known as Clinton to the Edna Mahan Correctional Facility for Women. Reference have been updated to accurately reflect “facility operated by the JJC pursuant to NJS 52:17B-170.”

In option 2, there is a cross-reference to N.J.S. 30:4-91.2 and the subsection incorporates statutory language granting the Commissioner the authority to designate any available, suitable, and appropriate institution or facility as a place of confinement. The cross-reference to N.J.S. 30:4-91.2 also acknowledges the Commissioner’s legislative authority to transfer a person from one place of confinement to another.

Subsections (e) and (f) reflect the Commission’s recommendation regarding the replacement of the word inmate with person first language.

Staff asked for the Commission's guidance regarding the options. Mr. Silver explained that Staff had received a comment from the JJC that expressed support for the proposed modifications and indicated that by revising the statutory references to include general, rather than specific references to institutions, the New Jersey Law Revision Commission’s proposal creates a dynamic statute that will not be to be updated when the facilities are replaced or renamed additionally. They also indicated support for the removal of the term “inmate.”

Also, with regard to the second statute addressed in the Report, Staff advised that it did not receive any objections to the proposed changes. The JJC requested that the reference to the Director of Juvenile Parole and Transition Services be updated to reflect the current job title – Juvenile Justice Commission, Director of Parole. That modification was made and appears on the top of page 16 of the Report and in footnote 104.

Vice-Chairman Bunn stated that he agreed with the JJC that option two is better because it doesn't have the built-in inevitable obsolescence that option one has. Commissioner Hartnett agreed with Vice-Chairman Bunn and asked if Staff had an explanation regarding the age difference for juvenile males and females that are being transferred. He noted that he would not be able to support this Report without a justification as to why the age of transfer for males is 15 and the age for females is 16.

Chairman Gagliardi said that he does not know why the JJC chose those ages, but noted that the difference in the ages is not central to the Commission’s project, and it may be beyond the scope of the Commission’s role to make determinations about it. He noted that if the Commission requested information from the JJC to explain or justify the distinction, the Commission does not have a basis on which to disagree with any age chosen by the JJC. Commissioner Bell added that he assumed that the reason was administrative and connected to the population numbers in the facilities. He further noted that when the language is changed to be more general, that highlights the discrepancy and seems to require an explanation. Vice-Chairman Bunn suggested addressing the discrepancy in a comment stating that unless there is a reason for the age difference the Legislature might want to consider making both the male and female transfer ages the same.

Mr. Silver explained that when Staff examined the distinction in the context of equal protection, the cases dealing with this issue did not focus on the age of the transfer but as a determination that the Commissioner can make based on the population, size, and availability of facilities. The equal protection arguments that have been made in the case law focus on the access of individuals in the facilities things such as education, vocational facilities, and medical resources. No commenter has commented on the age disparity.

Commissioner Bell proposed adding a footnote suggesting that the ages should be the same and explaining that doing so would leave the Commissioner discretion or make the ages the same and to decide what age is appropriate for the transfer of women based on the facilities. Chairman Gagliardi suggested releasing the Final Report with both ages the same and directing Staff to speak with the JJC to see if the age should be 15 or 16. He said that if the JJC objects, or thinks that the ages should be different, then Staff can bring this matter back to the Commission for additional consideration.

On the motion of Vice-Chairman Bunn, seconded by Commissioner Long, the Commission unanimously released the Final Report, as amended, including incorporating option two of the choices presented by Staff.

Definition of “Rent” in Landlord Tenant Law

Whitney Schlimbach discussed with the Commission an Update Memorandum regarding the results of preliminary outreach conducted to determine whether N.J.S. 2A:18-18-53 and N.J.S. 2A:18-61.1 would benefit from a modification to reflect the holding in *Opex Realty Management, LLC v. Taylor*. Ms. Schlimbach explained that New Jersey has a public policy of strong protections for tenants that is reflected in its eviction laws. Pursuant to N.J.S. 2A:18-53 and N.J.S. 2A:18-61.1, tenants may be evicted only if one of the statutory grounds is established, including failure to pay “rent.” New Jersey also permits parties to define the terms of a lease as they wish “absent some superior contravening public policy,” which may include rent control.

The New Jersey statutes do not define “rent” in landlord-tenant law, but municipalities may define the term “rent” in their own ordinances. *Opex* addressed whether non-payment of late and legal fees, which fell within the definition of “additional rent” in the lease, could be the basis of an eviction proceeding premised on failure to pay rent, when the amount of “additional rent” would cause the total monthly rent to exceed the maximum allowed by Newark’s rent control ordinance. The *Opex* Court held that “rent, additional or otherwise, may not ever exceed the maximum allowable cost provided by an applicable rent control ordinance.”

The Commission previously authorized targeted outreach to find out whether the issue addressed by *Opex* arises often in New Jersey. Outreach was conducted to numerous individuals and organizations, many of whom provided responses and attended the Commission meeting.

Judge Mahlon L. Fast, (Retired), co-author of the *Guide to Landlord-Tenant & Related Issues* in the Superior Court of New Jersey with Bruce Gudim, submitted written comments that directed Staff’s attention to the many tenants’ rights waiver statutes in New Jersey’s landlord tenant

law and indicated that, “[i]n his opinion there is no need to define the word ‘rent’ in either statute” as doing so would likely necessitate incorporating “undue verbiage” into the statute.

Matthew Shapiro, President of the New Jersey Tenants Organization, appeared at the meeting and expressed reservations regarding the codification of the *Opex* holding, cautioning that attempting an amendment to the statute risked reducing the rights tenants currently have as a result of the case law in this area.

Professor Emeritus Jack Feinstein expressed support for amending the statute in written comments submitted in advance of the meeting, but noted that there are only a small percentage of municipalities with rent control ordinances in the State, and added that an amendment to the statute should go further than the *Opex* holding and exclude additional charges like attorney's fees from the definition of “rent.” Professor Feinstein advised that N.J.S. 2A:18-61.1(f) would benefit from a modification clarifying the “unconscionable rent increase” standard.

The Vice-President of Legislative and Regulatory Affairs of the New Jersey Apartment Association (“NJAA”), Nicholas Kikis, submitted written comments indicating that the NJAA does not “believe that this would be a useful undertaking for the [C]ommission” given that courts have long imposed limitations on what can be characterized as ‘additional rent’ in eviction proceedings,” as well as the fact-specific nature of such proceedings and that rent control is governed by local ordinance. Mr. Kikis added that if the Commission does move forward, “any . . . statutory recommendation [should] make clear that while certain fees may not be considered ‘additional rent’ they may . . . be equitably charged and would be due and owing.”

The Staff also heard from the Rutgers Law School Housing Justice and Tenant Solidarity Clinic. The Clinic represents many “eviction defense clients liv[ing] in Essex County municipalities which have enacted rent control ordinances” and provided that “[i]n the Clinic’s usual region of operation, the issue of ‘additional rent’ exceeding permissible rent under a rent control ordinance is prevalent and one that the Clinic regularly raises.” The Clinic indicated that it “supports modification of N.J.S. 2A:18-53 and N.J.S. 2A:18-61.1 to establish that the total monthly amount may not exceed the amount authorized by local ordinance” and urged the Commission to further review how leases may define ‘additional rent’ in light of the strong public policy considerations in favor of tenant protection” even outside the context of rent control.

Legal Services of New Jersey (“LSNJ”), which represents low-income individuals in various housing proceedings, including eviction defense, civil disputes over rent and security deposit, and rental discrimination complaints and has served as amicus curiae “in virtually every New Jersey Supreme Court decision regarding the Anti-Eviction Act,” also provided written comments in advance of the meeting. LSNJ indicated that it “does not believe that amendment to the statute is necessary in this matter, as the law regarding rent, and the authority of a municipal rent control ordinance in establishing what rent is legally due and owing, is already well established.” LSNJ particularly expressed concern that the proposed modification references municipal rent control ordinances only and does not reflect the full range of considerations necessary when determining if in fact a rent charge is legally due and owing.

Ms. Schlimbach then stated that in light of the response received from commenters, Staff requests guidance from the Commission regarding the continued direction of the project.

Chairman Gagliardi invited the members of the public present to comment on the proposed project. Victor Monterrosa, Managing Director, Rutgers University Law School, Housing Justice and Tenant Solidarity Clinic, introduced student attorney, Elias Bull, from the Rutgers Law School Housing Justice and Tenant Solidarity Clinic. Mr. Bull explained that the Clinic often represents tenants in eviction defense proceedings, and that many of these tenants live in municipalities which have enacted rent control ordinances. Therefore, the *Opex* holding is part of the Clinic's typical defense activities. Mr. Bull said that landlords often fail to allege the appropriate amount of rent that is due and owing, prompting the Clinic to move to dismiss.

Mr. Bull stated that codification of the *Opex* holding would help make tenant protections in this area clear. Mr. Bull noted, however, that rent control is only established in around 115 of the state's 564 municipalities, leaving many tenants unprotected by the codification of the holding. He further stated that no tenants should be evicted for nonpayment of "additional rents" or fees, such as legal fees or late fees, that currently form the basis of judgments for possession due to nonpayment. Such a practice places landlords in a position different to that of any other creditor. He explained that no other creditor is allowed to use eviction as a remedy for repayment, noting that, in fact, eviction is not an adequate remedy for payment since it is a judgment for possession only, not a money judgment. Given the housing shortage in New Jersey, a superior contravening public policy should be present to deter the use of nonpayment of fees as "evictable rent." For these reasons, the Clinic supports the codification of *Opex*, but believes that the underlying issue is the fact that "additional rents," and fees, provide a ground for eviction to begin with, since they should be a separate category that landlords should pursue in debt collection proceedings, a remedy already available to them.

Matthew Shapiro, President of the New Jersey Tenants Organization, agreed with Mr. Bull's comments. He added that the modifications do not define "rent," and instead just establish that the rent must be legal when attempting to evict someone. Mr. Shapiro emphasized the limited scope of the *Opex* holding and expressed that though codification would be helpful, he has reservations about moving forward with codification not knowing what could happen in the Legislature. Mr. Shapiro noted that an amendment here could lead to legislative pressures from both sides of the issue and changes outside of the scope of the *Opex* holding, which could cause further issues for tenants.

Commissioner Long stated that she would abstain from participation and voting on this matter because she is on the Board of Legal Services of New Jersey which has taken a position on the matter.

Commissioner Rainone asked Ms. Schlimbach to clarify whether there was any law that would preclude municipalities from defining "rent" in their ordinances. Ms. Schlimbach said that

municipalities are free to define “rent” in their ordinances noting that Newark does define rent. Commissioner Rainone stated his concern that leases are freely negotiated contracts between parties, and local ordinances that can regulate such contracts to a certain extent. As a result, he is not sure there is room for the Commission to work in this area as it is ultimately likely to require a policy determination from the Legislature. Chairman Gagliardi, Vice-Chairman Bunn, and Commissioner Bertone agreed.

Commissioner Bell commented that he is not sure the project exclusively concerns rent control and may implicate the state Anti-Eviction Act and the basis for eviction, which seems to be a State policy issue. He agreed with Commissioner Rainone’s comment. Finally, Commissioner Hartnett added that the law appears clear here with no apparent need for Commission clarification, but he ultimately agreed with the consensus of the Commission.

It was the unanimous consensus of the Commission that it would not proceed further in connection with this proposed project.

TCA - Applicability of Notice Provision to Contribution and Indemnification Claims

Whitney Schlimbach discussed with the Commission a Revised Draft Tentative Report proposing modifications to N.J.S. 59:8-8 of the Tort Claims Act and N.J.S. 2A:15-5.2 and -5.3 of the Comparative Negligence Act, reflecting the holding in *Jones v. Morey’s Pier, Inc.* Ms. Schlimbach explained that N.J.S. 59:8-8 in the Tort Claims Act requires a party to provide notice of claim to public entity within 90 days of the accrual of a cause of action and the failure to comply bars recovery. Additionally, the Comparative Negligence Act allows damages to be allocated among parties to a lawsuit and provides that a prevailing party may collect the total amount of damages from any party found at least sixty percent liable. Pursuant to the Joint Tortfeasors Contribution Law, a party may obtain contribution from joint tortfeasors.

In *Jones*, the New Jersey Supreme Court addressed whether a defendant may bring a contribution or indemnification claim against a public entity despite failing to provide notice of the claim within 90 days of the accrual of the underlying cause of action. The *Jones* Court first addressed applicability of the 90-day notice provision to contribution and indemnification claims and held that, based on legislative intent of Tort Claims Act, the plain language of N.J.S. 59:8-8, and cases interpreting statutory language, failure to serve a notice of claim within 90 days of accrual of underlying cause of action bars recovery from a public entity for contribution or indemnification.

The Court acknowledged that its holding could deprive defendants of their right to pursue contribution claims against joint tortfeasors before they even know of a claim. The Court analyzed the Comparative Negligence Act and the Joint Tortfeasors Contribution Law in the context of a defendant who failed to comply with Tort Claims Act’s notice provision regarding a contribution or indemnification claim.

The Court held that, although fault is generally not allocated to absent tortfeasors, the *Jones* defendants should be permitted to seek an allocation of fault to the absent public entity tortfeasors, given the underlying goals of the three relevant statutory schemes.

The Court also addressed the provision in the Comparative Negligence Act that allows the prevailing party to recoup the total amount of damages from any party found at least sixty percent liable and held that, in circumstances like *Jones*, where a defendant is deprived of the ability to collect any contributory amount from a public entity tortfeasor, defendants will only be liable for their own proportion of fault even if that proportion meets or exceeds the sixty percent threshold in the Comparative Negligence Act.

Ms. Schlimbach further explained that modifications were proposed to both the Tort Claims Act in N.J.S. 59:8-8 and the Comparative Negligence Act in N.J.S. 2A:15-5.2 and -5.3 reflecting the holding in *Jones*. Proposed language was added to the TCA in N.J.S. 59:8-8 clarifying that: contribution and indemnification claims are subject to 90-day notice provision; the 90-day notice period begins from accrual of underlying cause of action; and despite defendant's failure to comply with notice provision, the court may permit an allocation of fault to an absent public entity tortfeasor if certain conditions laid out in the statute are met. Pursuant to the proposed language, the Court may also mold the judgment to reduce the total damage award by the percentage allocated to the absent public entity, notwithstanding the Comparative Negligence Act provision authorizing a party to recover the full amount from any party found to be at least sixty percent liable.

Language was also added to the Comparative Negligence Act in N.J.S. 2A:15-5.2(a)(2), which governs allocation of fault to parties to a lawsuit. The modifications state that fault may be allocated in accordance with the Tort Claims Act if a party's contribution claim is barred by a failure to comply with notice provisions in the Tort Claims Act.

Finally, language was added to the Comparative Negligence Act in N.J.S. 2A:15-5.3(a) clarifying that the provision permitting recovery of the full amount of damages from a party found to be at least sixty percent liable is applicable except as provided in the Tort Claims Act.

Vice-Chairman Bunn stated that the Report was excellent, that it addresses a complex area of the law, that its recommendations make sense, and it is effective in providing clarification. Chairman Gagliardi agreed and added that codification was important because the average citizen or practitioner would not likely be able to determine the interaction of the relevant statutes and thus the project is a classic example of the type of scholarship expected from the Commission as it works to clarify laws that can be very confusing to the public.

Commissioner Bell agreed with the comments and thanked the Staff for implementing many of the comments and recommendations from the Commission, a number of which were raised by Commissioners Bell and Rainone.

Commissioner Hartnett further agreed with the prior comments and inquired about the Commission's consensus on the bracketed language in the Appendix, which Commissioner Bell

previously recommended the Commission remove. Commissioner Hartnett indicated he agreed with removal of the bracketed language. Chairman Gagliardi also agreed and asked for a motion to release the project as a Tentative Report with the bracketed language omitted.

With the modifications proposed by the Commission and on the motion of Commissioner Bertone, seconded by Commissioner Bell, the Commission unanimously released the work, as amended, as a Tentative Report.

Use of the Term “Maiden Name” in New Jersey Statutes

Samuel Silver discussed a Draft Tentative Report based on work begun after a member of the public inquired about the use of the term “maiden name” in the New Jersey statutes and court forms. In the relevant New Jersey statutes, the State Registrar is responsible for creating and maintaining a comprehensive and continuous index of all vital records.

Mr. Silver explained that the term “maiden name” is found in five statutes, three of which deal with personal identifying information, and the other two deal with marriage and adoption. In the context of personal identifying information, the Legislature has enacted statutes that seek to protect an individual’s personal identity. Included in the information that the government uses to identify an individual is the birth name of the individual's mother. The “maiden name” of an individual's mother is used as personal identifying information in the code of criminal justice, the civil service statute, and the health and vital statistics statutes. In New Jersey, the Registrar is responsible for creating and maintaining a comprehensive and continuous index of all vital records including those pertaining to marriage and adoption. Noting the cultural shift toward an individual's choice with regard to their identity, the Report recommends that the terms characterized as gender-biased and anachronistic be replaced by those focusing on individual choices regarding identity.

Mr. Silver explained that in February, Staff was asked to examine whether the term “maiden name” is used at the federal level. Research revealed that the term “maiden name” can be found in three federal statutes. 18 U.S.C. 2557(b)(2) and 2557A(b)(2) require that producers of sexually explicit content for interstate or foreign distribution document the names of all performers including their “maiden name.” Sensitive personal information as defined in 38 U.S.C. 5727(19)(B) encompasses information that can identify an individual, including the individual’s maiden name. A search of the Internal Revenue Code indicates that the term is not found there.

The proposed modifications set forth in the Appendix concerning personal identifying information provides bracketed language containing options. The first option refers to the personal identifying information relating to an individual's mother at birth, divesting the reference from marriage or civil union. Option two references the mother's last name before marriage or civil union. This option does not reflect that the individual's mother may never have changed their name, that there may have been subsequent marriages, or that they changed their name to something entirely different.

Mr. Silver noted that Staff received comments from Commissioner Bell on March 14, 2024, that proposed using a new term “premarital name” or “premarital last name.” This would

remove gender references and incorporate a definition of the new term “premarital name” as “the last name under which the person applied for a marriage license the first time such person married or entered a civil union.”

Staff corresponded with Commissioner Bell to discuss a third option “parent(s) last name at birth.” This would eliminate references to gender and would be consistent with the type of information that the Legislature seeks to protect.

With regard to the statute discussing the duty of the Registrar to maintain a comprehensive record of marriages by last names, Staff suggested language that reads “In the case of marriages, the last names of the parties at birth.” That would eliminate references to gender, identify the genealogy of the participants, and manage vital statistics (such as a population demographics, family lineage, and instances of multiple marriages involving the same individual). It would also allow the Registrar to track individuals for purposes of inheritance, property rights, and spousal benefits.

As concerns the adoption of children, the proposed modifications remove references to maiden name and includes a reference to either the last name at birth of the female adopting parent or the last name before marriage or civil union of the female adopting parent. Consistent with Commissioner Bell’s recommendations Staff suggested a third bracketed item which would be each party’s last name at birth.

Access to each party's last name at birth helps accurately identify the child's legal parent(s) and family lineage and provides clarity regarding the child's legal identity. Including the parent or parent's birth name may also be of assistance should the family wish to compile the child's medical history for future medical care and genetic counseling. In addition, it uncouples the identifying information from marriage or a civil union status and focuses upon the individual identity of the adopting parent.

There are currently no pending bills that address the removal of the term maiden name from the New Jersey Statutes. It was brought to Staff’s attention that there are pending bills changing “father and mother” to “parents” and “son and daughter” to “children.”

Vice-Chairman Bunn stated that the use of the term “at birth” might cause potential confusion. He explained that, on a Birth Certificate, the term “name at birth” might raise the question of whether it refers to the birth the child or the mother’s name at birth. Commissioner Rainone agreed and stated he had concerns with the term “name at birth” – noting that someone’s maiden name might not be the same name at birth, and that issues may arise in adoptions. Chairman Gagliardi stated there may be some issues with the term “name at birth”. He noted that last name before marriage or civil union is what the Commission is striving for.

Chairman Gagliardi added that the term “maiden name” may be an old term, but everyone seems to know what that means. He said that this project is a good project, but the Commission must be careful with its choice of a replacement term. Commissioner Harnett stated that Commissioner Bell’s suggestions make sense and suggested that Staff consider them, as well as the concerns raised by the Commission regarding “last name at birth,” and bring back a revised

report at a future meeting. Commissioner Bell mentioned that the term “maiden name” was focused on the person’s name before marriage and suggested reaching out to the Bureau of Vital Records to ask their view about changing the term.

The Commission unanimously directed Staff to proceed with additional research and outreach and to advise the Commission of the results of this work at an upcoming meeting.

Affidavit of Merit Statute – Application to Respondeat Superior Claims

Carol Disla-Roa discussed with the Commission a Draft Tentative Report proposing modifications to N.J.S. 2A:53A-27 of the Affidavit of Merit Statute, reflecting the holding in *Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc.*, 250 N.J. 368 (2022). Ms. Disla-Roa noted that Sameer Ahmad had conducted the preliminary work on this project during his tenure as a Legislative Law Clerk in the summer of 2023.

The Affidavit of Merit (“AOM”) statute in New Jersey, at N.J.S. 2A:53A-27, requires that a plaintiff filing a malpractice or negligence claim against a licensed individual must submit an AOM by an appropriately licensed person, affirming a “reasonable probability” of the claim’s merit. The statute does not explicitly address whether an AOM is necessary for vicarious liability claims against licensed facilities due to the actions of their unlicensed employees. This issue was addressed by the New Jersey Supreme Court in *Haviland v. Lourdes Medical Center of Burlington County, Inc.*, 250 N.J. 368 (2022).

The *Haviland* Court considered whether an AOM was required for a vicarious liability claim against a licensed healthcare facility based solely on the negligence of an unlicensed radiology technician. The plaintiff sued Lourdes Medical Center for vicarious liability stemming from an unlicensed radiology technician’s alleged negligence. The trial court dismissed the claim because the plaintiff failed to provide an AOM from a radiologist. The Appellate Division reversed, finding that an AOM wasn’t necessary for vicarious liability claims that do not implicate the licensed facility’s standard of care.

The Supreme Court upheld this decision, reasoning that pursuant to respondeat superior, an employer is vicariously liable for an employee’s negligence within the scope of their employment, without directly implicating the employer’s standard of care. The Court explained that pursuant to N.J.S. 2A:53A-27, an AOM is required where: a plaintiff’s claim is for personal injuries, wrongful death, or property damages; the personal injuries, wrongful death, or property damages result from an alleged act of malpractice or negligence; and the alleged act of malpractice or negligence is carried out by a licensed person in the course of practicing the person’s profession. The *Haviland* Court determined that N.J.S. 2A:53A-27 did not require an AOM in order to maintain a vicarious liability claim against a licensed health care facility based on the conduct of its non-licensed agents or employees. The Court reasoned that, under these circumstances, the focus should be on the nature of the underlying conduct responsible for a plaintiff’s injuries.

Ms. Disla-Roa said that the proposed modification to the statute, set forth in the Appendix, reflect the Court’s ruling in *Haviland*. The proposed language emphasizes that AOMs are not required for vicarious liability claims based solely on the conduct of non-licensed employees or

agents. Ms. Disla-Roa noted that there are no bills pending before the Legislature to amend N.J.S. 2A:53A-27.

In 2023, when this project was initially presented to the Commission, opposition was received from the New Jersey Civil Justice Institute (“NJCJI”), which advocated for a requirement of AOM submission even in vicarious liability cases involving non-licensed employees’ malpractice.

Commissioner Hartnett said that the draft looked good, and suggested that “or agency” be eliminated at the end of the first line of the proposed language. He also suggested that each undesignated paragraph should be lettered (a) – (c). Vice-Chairman Bunn, Commissioner Long and Chairman Gagliardi all agreed with these recommendations. In addition, Commissioner Long recommended that the introductory clause that begins the newly designated paragraph (b) be deleted. Commissioner Bell inquired whether the use of the word “agency,” in this paragraph is misplaced. Vice-Chairman Bunn explained that the term “agency” can be deleted.

Commissioner Bell also asked whether claims based on negligent hiring should be included. Vice-Chairman Bunn agreed that negligent hiring does not fall with vicarious liability or agency. Ms. Disla-Roa noted that vicarious liability and negligence claims are distinct claims under the theory of respondeat superior.

Commissioner Bell asked whether the Court explained why it included claims predicated on agency. Ms. Disla-Roa answered that this may be based on the Court’s analysis of the *McCormick v. State*, 446 N.J. Super, 603 (App. Div. 2016) case in which a state prisoner sued the State alleging negligent treatment by prison medical staff. Although the plaintiff argued he was not required to serve an AOM on the State because it was not a licensed person under the statute, the court rejected that literal reading. Commissioner Bell suggested that the language be removed as duplicative with an explanation regarding the Court’s addition regarding agency.

Vice-Chairman Bunn suggested that the newly designated paragraph (b) begin with the language on the second line as “Claims based solely on the conduct of non-licensed persons...” and continue to the proposed end of the sentence. He reasoned that the statute does not have to address each theory that is advanced by a litigant. Commissioner Long concurred with Vice-Chairman Bunn’s recommendation. Commissioner Bell asked that a footnote be added to the Report to indicate the Commission’s modification and note that the modification is intended to capture the Supreme Court’s decision.

With the modifications proposed by the Commission, and on the motion of Vice-Chairman Bunn, seconded by Commissioner Bertone, the Commission unanimously voted to release the work as a Tentative Report.

Religious Divorce in the Context of Divorce Proceedings

Laura Tharney presented a Memorandum to the Commission concerning a request from the New Jersey State Bar Association (“NJSBA”). In a letter dated October 31, 2023, the NJSBA requested that the NJLRC review the issue of the withholding of a “Get” – Jewish decree of divorce

– in response to two court opinions issued last year. The NJSBA provided a memo explaining that a Jewish marriage must be dissolved by way of a religious divorce (“Get”) because Jewish law does not recognize a civil marriage or civil divorce, and religious ceremonies for both are required.

To obtain a religious divorce, the parties must participate in a proceeding before a rabbinical court and the husband must provide the wife with a Get, which is a dated and witnessed document expressing his intention to divorce his wife that the husband must then deliver to his wife. If, even after a civil divorce, a husband refuses to provide his wife with a Get, he is free to remarry but his wife is not. In addition, it seems that there are also religious impacts on the children, which the N.J. Practice Series has characterized as “essentially ostrac[izing]...[the]... children from the mainstream of Jewish life.”

Ms. Tharney explained that her goal is to provide context for the Commission’s consideration of this project, as well as a preliminary indication of the guidance available in the event the Commission determines that this is an appropriate area for Commission work. She also noted that the NJSBA Family Law Executive Committee has formed a task force and the NJSBA suggested in its memo that collaboration by the NJLRC “would be very helpful.” The focus of the project is whether a husband may be compelled to provide a Get to his wife in the context of a civil divorce between the parties.

Ms. Tharney provided a brief summary of the available guidance on this issue. New Jersey does not currently have any statutory or other provision that either permits a court to recognize or enforce any provision of a religious marriage contract or authorizes a court to compel a party to cooperate in obtaining a religious divorce.

She explained that the case law in this area is limited and contradictory. Although the concept of the Get was mentioned in decisions dating to the early 1900s, the earliest analysis of this issue occurred in *Minkin v. Minkin* in 1981. In *Minkin*, the Chancery Division considered the parties’ “ketubah” (or marriage contract) and decided whether compelling the husband to obtain a Get violates the First Amendment Free Exercise Clause. The *Minkin* Court analyzed the *Nyquist* factors and concluded that an order compelling the Get passed constitutional muster, finding that a Get was a release document devoid of religious connotation.

In 1987, the Chancery Division decided *Burns v. Burns*, and cited *Minkin* approvingly. The *Burns* Court determined that compelling a husband to submit to the jurisdiction of the rabbinical court was within the equity powers of the court. The Court noted that that the ultimate decision whether a Get would be issued would be made by the rabbinical court.

However, in 1996, the Chancery Division rejected the reasoning of *Minkin* in *Aflalo v. Aflalo*. The *Aflalo* Court stated that the *Minkin* approach was not persuasive because (1) “it examined the problem against the backdrop of the Establishment Clause and not the Free Exercise Clause”; (2) “the conclusion that an order requiring the husband to provide a ‘get’ is not a religious act nor involves the court in the religious beliefs or practices of the parties is not at all convincing;”

(3) “the conclusion that its order concerned purely civil issues is equally unconvincing”; and (4) “Minkin fails to recognize that coercing the husband to provide the “get” would not have the effect sought” adding that “[i]f a ‘get’ is something which can be coerced then it should be the [rabbinical court] which does the coercing.”

Following the decision in *Aflalo*, New Jersey courts do not seem to have addressed the substantive issue again until 2023, when the Appellate Division considered whether a Get could be compelled in *Satz v. Satz*. In *Satz*, the Court focused on the validity and interpretation of the parties’ Marital Settlement Agreement (“MSA”), and largely sidestepped the constitutional issue. The *Satz* Court explained that “civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, but that they may not resolve such controversies if resolution requires the interpretation of religious doctrine.” The Court concluded that the trial court did not violate the defendant's constitutional rights by ordering him to fulfill his contractual obligation under the MSA, which required him to sign an arbitration agreement implementing the results of the independent rabbinical court proceedings.

In *S.B.B. v. L.B.B.*, the Appellate Division considered a different aspect of the issue when it reviewed a Final Restraining Order entered against a wife who had made and disseminated a video asking community members to press her husband to deliver a Get. The Court found that her speech and actions were protected by the First Amendment and were not criminal.

Ms. Tharney also mentioned that in 2002, the New Jersey Chancery Division enforced the provisions of an Islamic Mahr agreement, concluding that it was nothing more or less than a simple contract between two consenting adults.

New York is the only state with a statutory provision pertaining to religious divorce. The New York statute was enacted in 1983 and is facially neutral, focusing on removing the barriers to remarriage. The commentary indicates that it was enacted to curb the withholding of Gets by vindictive spouses or those seeking an economic advantage. There are cases mentioning religious or Jewish divorce in about thirty-five states in addition to New Jersey, but as those cases are not referenced in secondary sources, it may be that they offer limited guidance in this area.

Ms. Tharney indicated that neither the ALI or the ULC seem to provide guidance in this area. Secondary sources with a national scope generally indicate that a spouse seeking dissolution is not entitled to an order compelling a Get, and those focused on New Jersey law suggest that a statutory provision permitting a court to recognize or compel cooperation with religious law would be unconstitutional. A 2018 article in *New Jersey Lawyer Magazine* noted that certain rabbis will not preside over a wedding unless the parties sign an agreement agreeing to a Get. The article also explained that this practice is not common among Hassidic or Orthodox communities and, therefore, has potentially limited impact on the affected population.

Ms. Tharney stated that there are no bills pending that pertain to Gets or religious divorces more generally and requested guidance from the Commission regarding whether Staff should engage in further work in this area.

Chairman Gagliardi invited the members of the NJSBA in attendance to provide additional information. Sheryl Seiden, Esq., who co-authored the NJSBA's memorandum that was supplied to the Commission, explained that the NJSBA has recognized that this is an important issue that often comes up in family law practice. She informed the Commission that the Task Force created by the NJSBA is well advanced on the research of this issue and plans to propose legislation similar to that found in New York. She added that the NJSBA has been in contact with rabbis and religious organizations related to this project and hopes to have the support of the Commission going forward.

Commissioner Rainone expressed support for working on what he characterized as an important and fascinating project but added that the constitutional dimension of the issue will likely be difficult to overcome. Commissioner Bell agreed that the project is extremely important and working it with the NJSBA would greatly increase the chances of success in the Legislature. He also agreed that the constitutional issue is significant.

Ms. Seiden added that, given the serious constitutional implications, the NJSBA is also prepared to explore other avenues to remedy the impact of a withheld religious divorce. Commissioner Hartnett expressed similar reservations regarding the gravity of the constitutional element of this project and noted that, even when crafting alternative remedies, it is likely that constitutional rights would be implicated. Commissioner Bell suggested that, while the constitutional issues raised by the project may be difficult, the Commission is uniquely situated to assist the Legislature in understanding them and providing an assessment of the viability of the various approaches to this issue. He also observed that New York's statute has withstood scrutiny for several decades.

Chairman Gagliardi confirmed that the consensus of the Commission is to respond favorably to the NJSBA's request for assistance on this project.

Miscellaneous

Laura Tharney advised the Commission that the bills based on the Commission's work concerning motor vehicles overtaking certain pedestrians and persons operating bicycles and personal conveyances passed the Senate 37-0 on February 12th and passed the Assembly 68-7-0 on March 18th. There were no amendments in either house, and the bill was forwarded to the Governor for his signature.

Additionally, she stated that she had the opportunity to attend Seton Hall University Law School's Spring Symposium on post-conviction relief. She complimented the program and mentioned that during one of the panel discussions, Professor Emeritus Michae Reisinger commented favorably on the Commission's Mistaken Imprisonment Act project.

Ms. Tharney also advised that the Commission has hired two Legislative Law Clerks for the summer.

Executive Session

On the motion of Commissioner Bell, seconded by Commissioner Bertone, the Commission unanimously retired into an Executive Session.

On the motion of Commissioner Bell, seconded by Commissioner Long, the Commission unanimously returned to the public session.

Adjournment

On motion of Commissioner Bell, seconded by Vice-Chair Bunn, the meeting was unanimously adjourned by the Commission.

The next meeting of the Commission is scheduled for April 18, 2024, at 4:30 p.m. and will be held remotely.