

Answering Common Questions about
the **MASSACHUSETTS**
CHARITABLE CAP



1

What is Mass. General Laws c. 231 § 85K, commonly referred to as the Massachusetts Charitable Cap?

The “Charitable Cap” is a statute, Mass. Gen. Laws c. 231 § 85K, which went into effect on September 16, 1971. Section 85K abolished the defense of charitable immunity, which was a common law defense that immunized charitable organizations from tort damages if the tort was committed while the entity was acting in furtherance of its charitable mission. For most torts (i.e., civil wrongs) Section 85K places a \$20,000 limit on the tort liability of a corporation, trust, or association “if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association.”¹ However, in the context of medical malpractice claims against a nonprofit organization that provides healthcare, tort damages are capped at \$100,000 if the elements of § 85K are satisfied. Section 85K is intended to apply in the aggregate to all claims arising out of the same occurrence irrespective of the number of plaintiffs who may recover.²

2

What is the purpose of the Cap?

Simply stated, the Massachusetts Legislature’s purpose in enacting § 85K was “to protect the funds [and other assets] of charitable institutions so they may be devoted to charitable purposes.”³ According to Massachusetts courts, charitable entities have a strong interest in preserving their assets in order to carry out their charitable work; therefore, those assets should be protected to some extent.⁴

3 To whom does the Cap apply?

The text of § 85K indicates that the limitation on tort damages applies to “charities.”⁵ The Massachusetts Supreme Judicial Court has said that an institution is “charitable” if the “dominant purpose of its work is for the public good” and it benefits a large, indefinite group of people.⁶ Under this definition, hospitals, schools, religious institutions, and other non-profit corporations, trusts, or associations might constitute charitable organizations depending upon how they are organized and missioned. Whether or not an organization is a charity under § 85K turns on the purpose of the organization. A charity is more likely to be classified as such if its work benefits a large group of people. This is a fact-specific and case-specific determination.

4 To what kind of claims and suits does the Cap apply?

The plain language of § 85K states that the limitation on tort damages applies to tort claims asserted against a charity. A tort is a civil wrong. Some common torts include assault, battery, and negligence. Massachusetts courts have applied § 85K to unintentional (i.e., accidental) torts such as negligence,⁷ and to intentional torts such as slander and intentional interference with advantageous relations.⁸

Torts are different from other claims, and Massachusetts courts have refused to apply § 85K to claims that are not based in tort. For example, the courts have declined to apply § 85K to contract-based claims against a charitable entity,⁹ to statute-based employment discrimination claims against a charitable entity,¹⁰ and to statute-based Consumer Protection Act claims against a charitable entity.¹¹

5 What kind of activities typically fall within the ambit of the Cap?

Section 85K indicates that the limitation on tort damages for charitable entities applies to any tort committed during the course of “any activity carried on to accomplish directly the charitable purposes of such corporation.”¹² While the language may appear to be relatively straightforward, its interpretation in the courts can be complex and is always case-specific. As a general rule, the courts tend to separate activities “carried on to accomplish directly the charitable purposes” of a charitable entity (which activities typically enjoy the protection of § 85K)¹³ from activities that are primarily commercial in nature, i.e., are aimed at merely generating revenue (which activities typically do not enjoy the protection of § 85K). In making such determinations, the courts will usually scrutinize the conduct in question in light of the entity’s charitable purposes.¹⁴

6 When are tort damages capped at \$20,000 versus \$100,000?

On November 4, 2012, the Massachusetts Legislature amended § 85K to raise the cap to \$100,000 “in the context of medical malpractice claims against a nonprofit organization providing health care.”¹⁵ As with other claims, the tortious activity must be committed during “any activity carried on to accomplish directly the charitable purposes of” the charitable entity in order for § 85K to apply to medical malpractice claims¹⁶. Therefore, the test for determining whether § 85K applies to a charitable entity’s particular conduct in the medical malpractice context is the same test used in other tort contexts. The only difference is that, if § 85K is found to apply to medical malpractice claims, then the tort damages will be capped at \$100,000 instead of \$20,000.

7 Does the Cap apply to employees, agents, or volunteers of a charitable entity if they are sued individually?

Massachusetts courts have indicated that employees of a charitable entity who are sued individually are not protected by § 85K.¹⁷ This is because the purpose of § 85K is to protect the funds and assets of charitable institutions so those assets can be devoted to charitable purposes.¹⁸ The protections afforded by § 85K exist to protect the charitable employer, so employees do not enjoy § 85K's benefits if they are sued individually.¹⁹

8 Does the Cap apply to the directors and/or officers of a charitable entity if they are sued individually?

The plain terms of § 85K “[do] not purport to limit the individual liability of a charitable corporation’s officers or board members.”²⁰ However, even though § 85K does not apply to officers or board members of a charitable entity who are sued individually, a different Massachusetts statute, M.G.L. c. 231, § 85W, might offer some protections against tort liability for individual officers, directors, or trustees of a nonprofit charitable organization under certain circumstances.²¹ For example, in order for § 85W to offer any protection, the individual officer, director, or trustee²² must be uncompensated, and the conduct in question must relate solely to the performance of his or her duties as an officer, director, or trustee. Plus, § 85W will “not apply to any acts or omissions intentionally designed to harm or to any grossly negligent acts or omissions which result in harm.” Questions of intentional misconduct and gross negligence are highly fact specific and are most often addressed on a case-by-case basis.²⁴

9 Does the Cap apply to torts committed in the distant past?

Section 85K went into effect on September 16, 1971 and applies to tort claims that arose on or after that date. In other words, § 85K is not retroactive.²⁵ For tort claims that arose (i.e., occurred) before September 16, 1971 against a charitable entity, the common law doctrine of charitable immunity instead might insulate that entity from tort liability if the charitable entity is able to satisfy the requirements of charitable immunity.²⁶

10 Does the Cap apply automatically to a charitable entity?

No. While the Cap operates as a limitation on tort liability, the Massachusetts Supreme Judicial Court has treated it as an “affirmative defense” which a charitable entity must affirmatively plead.²⁷ This means that a charitable entity has the burden to prove “both that it is a charitable organization and that the tort complained of fell within the range of activities covered by the cap.”²⁸ The courts want charitable entities to assert § 85K early enough in the course of litigation to prevent unfair surprise and prejudice to the plaintiff,²⁹ and it is most often raised initially in the response to a complaint. A failure to raise and assert § 85K in a timely manner can have serious adverse consequences for a charitable entity, including forfeiture of this defense.³⁰

NOTES

- ¹ M.G.L. c. 231 § 85K.
- ² *Missett v. Cardinal Cushing High School*, 43 Mass. App. Ct. 5, 12 n. 12 (1997).
- ³ *Keene v. Brigham and Women's Hospital, Inc.*, 439 Mass. 223, 238 (2003).
- ⁴ *Connors v. Northeast Hospital Corp.*, 439 Mass. 469, 473 (2003).
- ⁵ M.G.L. c. 231, § 85K.
- ⁶ *New England Legal Foundation v. Boston*, 423 Mass. 602, 609–10 (1996).
- ⁷ See e.g., *Goldberg v. Northeastern University*, 60 Mass. App. Ct. 707, 712–13 (2004); *Connors v. Northeast Hospital Corp.*, 439 Mass. 469, 478–80 (2003).
- ⁸ See *St. Clair v. Tr. of Boston University*, 25 Mass. App. Ct. 662, 668 (1988).
- ⁹ See *Geller v. Temple B'Nai Abraham*, 11 Mass. App. Ct. 917, 918 (1981).
- ¹⁰ See *Ayash v. Dana–Farber Cancer Institute*, 443 Mass. 367, 391 (2005); *McMillan v. Mass. Society for the Prevention of Cruelty to Animals*, 140 F.3d 288, 307 (1st Cir. 1998).
- ¹¹ *Linkage Corp. v. Trustees of Boston University*, 425 Mass. 1, 27 (1997).
- ¹² M.G.L. c. 231, § 85K.
- ¹³ See, e.g., *Missett v. Cardinal Cushing High School*, 43 Mass. App. Ct. 5 (1997); *Harlow v. Chin*, 405 Mass. 697, 715 (1989); *Connors v. Northeast Hospital Corp.*, 439 Mass. 469 (2003).
- ¹⁴ *Mason v. Southern New England Conference Ass'n of Seventh–Day Adventists*, 696 F.2d 136, 140 (1st Cir. 1982); see also *Carpenter v. YMCA*, 324 Mass. 365, 367 (1949) (operating a playground retained immunity); *Enman v. Trustees of Boston University*, 270 Mass. 299, 300 (1930) (running a dormitory retained immunity).
- ¹⁵ M.G.L. c. 231, § 85K (emphasis added).
- ¹⁶ M.G.L. c. 231, § 85K.
- ¹⁷ *Morrison v. Lennett*, 415 Mass. 857, 864 (1993); *Mullins v. Pine Manor College*, 389 Mass. 47, 63 (1983).
- ¹⁸ *English v. New England Medical Center*, 405 Mass. 423, 429 (1989).
- ¹⁹ *Morrison v. Lennett*, 415 Mass. 857, 864 (1993).
- ²⁰ *Morrison v. Lennett*, 415 Mass. 857, 863 (1993).
- ²¹ M.G.L. c. 231, § 85W.
- ²² M.G.L. c. 231§ 85W; *Lynch v. Roxbury Comprehensive Community Health Center, Inc.*, 94 Mass. App. Ct. 528, 536 (2018).
- ²³ M.G.L. c. 231, § 85W; *In re Boston Regional Medical Center, Inc.*, 328 F.Supp.2d 130, 163–64 (D. Mass. 2004); *Altman v. Aronson*, 231 Mass. 588, 591 (1919).
- ²⁴ See *Christopher v. Father's Huddle Café, Inc.*, 57 Mass. App. Ct. 217, 231 (2003).
- ²⁵ *Higgins v. Emerson Hospital*, 367 Mass. 714, 715 (1975); *Ricker v. Northeastern University*, 361 Mass. 169, 172 (1972).
- ²⁶ See, e.g., *Doe v. Levine*, 77 Mass. App. Ct. 117, 119 (2010).
- ²⁷ *Keene v. Brigham and Women's Hospital, Inc.*, 439 Mass. 223, 239 (2003).
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ See *Larkin v. Dedham Medical Associates, Inc.*, 93 Mass. App. Ct. 661, 664 (2018).



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