

Public Safety First Responder – Legal Aspects

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Some Legal Aspects of Emergency Medical Care;³

A First Responder has many legal duties. In December, 2003, the President issued Homeland Security Directive 8, establishing policies for preventing and responding to terrorist attacks, major disasters, and other large-scale emergencies. This defines the term “first responder” as:

“ ... those individuals who in the early stages of an incident are responsible for the protection and preservation of life, property, evidence and the environment, including emergency response providers as defined in section 2 of the Homeland Security Act of 2002 as well as emergency management, public health, clinical care, public works, and other skilled support personnel (such as equipment operators) that provide immediate support services during prevention, response, and recovery operations.”

The term “emergency response providers” is defined in the Homeland Security Act of 2002 as:

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² DISCLAIMER: This material is intended only to raise issues, and sensitize students to **some** of the legal aspects of providing initial care to the sick and injured. ***It is not legal advice and may not be relied upon as legal advice.*** For legal advice, see a licensed attorney who can provide it after full disclosure of the relevant facts.

³ See, e.g., LEGAL ASPECTS OF EMERGENCY MEDICAL SERVICES (1998), by Bruce M. Cohn, JD, EMT-CC and Alan J. Azzara, JD, EMT-P; also: Rick Petrie, EMT-P, (Publisher: W. B. SAUNDERS COMPANY (Harcourt, Brace), Philadelphia – ISBN 0-7216-7014-8).

“Federal, State, and local emergency public safety, law enforcement, emergency response, emergency medical (including hospital emergency facilities), and related personnel, agencies and authorities.”

THE DUTY TO ONESELF AND OTHERS OF DISCIPLINE: First Responders are our heroes, and most lawyers know better than to sue the good guys. But even good guys can make mistakes, and some of the more serious ones can lead to legal liability. Self-discipline to stay within the scope of practice, do a complete job on the scene, to maintain confidences (unless there is a need -to -know) and to stay current on techniques, is your legal protection. ***You best protect yourself with proper documentation of your work; that is one of your duties.***

VIOLATING A LEGAL DUTY CAN RESULT IN A LAWSUIT: Lawsuits against First responders are very rare, but they do happen. Lawsuits can impose legal liability on a First Responder *and* his or her company or agency, and require the payment of money damages for tort “negligence,” which is

- 1) A Duty’s
- 2) Breach, that
- 3) Causes
- 4) Harm.

These are the four elements of a case for injury to a person, or property including reputation, one’s “good name”: 1) Duty, and a 2) Breach of that Duty, and 3) the Causation of 4) Actual Harm by the Breach.

Examples of a legal duty include obeying traffic signals and signs, and pulling over to permit a fire engine or police car with flashing lights and

siren to get by. By contrast, a public safety vehicle with sirens blaring and lights flashing may no longer have a legal duty to stop at red lights or stop signs, but still must otherwise avoid negligence.

A First Responder has a primary duty, while “on duty,” to act to help others according to the applicable protocols of his or her job: to provide emergency medical attention.⁴

THE SCOPE OF PRACTICE AND THE DUTY TO STAY WITHIN IT: A primary duty of a First Responder is to remain within the “scope of practice.” That means that a First Responder has a legal duty to avoid and abstain from any procedure or action which he or she is not trained, certified and authorized to do. The authority usually comes from local “protocols” which are procedures set forth in writing about what to do and not to do in particular situations. In other words ***a First Responder should do no more than he or she is authorized to do.*** In the normal course, Responders with more complete scopes of practice will soon be on the scene. In a multiple casualty situation, a First Responder will have so much to do within his or her scope of practice for so many people that there will be little opportunity to exceed the scope of practice.

It is, however, an old saying that a little knowledge is a dangerous thing. Here, the temptation to be avoided is for a First Responder to put his or her knowledge to work by doing a procedure for which he or she is neither trained nor authorized. For example, a First Responder is trained

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A 2008 case provides an example of a court’s definition of professional EMT negligence:

“Emergency medical technicians are health care providers protected by the Medical Injury Compensation Reform Act. Negligence of EMT in operating an ambulance qualifies as professional negligence when the EMT is rendering services that are identified with human health and for which he or she is licensed.” *Canister v. Emergency Ambulance Service*, 160 Cal.App.4th 388 (Cal.App. 2 Dist., 2008 -- construing MICRA; Civil Code, 3333.1 *etc.* limiting liability; an ambulance-driving EMT hit a curb, injuring a passenger).

in the Heimlich technique to dislodge a foreign object from the airway. A First Responder who, instead, does a surgical tracheotomy, cutting into the airway at the trachea, has exceeded his or her scope of practice, violated a legal duty, and put an injured patient at even more risk of death. A big-time lawsuit is a likely result in this situation, even if the patient lives. On the other hand, an authorized paramedic or a physician can do an emergency tracheotomy without legal consequences, because it is within their scopes of practice. A good working rule comes from the Doctors' Hippocratic oath: "First, Do No Harm..."

Related to the scope of practice is a duty to stay in communication, if possible, with medical authority or the medical director for the service. Any question that can be resolved by the medical director should be put to the medical director. The instructions of such a higher authority should be implemented, which also protects the First Responder.

THE DUTY TO ASSESS AND MONITOR SCENE SAFETY: A First Responder is often first on the scene. The "scene" is a most important concept for safety and for avoiding legal liability. Assessing and maintaining "scene safety" is part of the job of all public safety personnel, and especially company officers such as a Lieutenant on a responding fire engine, or others who are "in charge." Some questions are: What are the risks? What can change? Where are the Exits? Is something changing?

THE DUTY TO FIND THE VICTIMS: Then comes a duty to search the scene (after rendering immediate life-saving aid to stabilize patients). In accidents, fires and earthquakes, it is all too easy to find some victims, get involved, and miss others. While effective search is ultimately the responsibility of the company officer, all personnel share this legal duty. As in most situations, once one starts to do something, a duty arises to do it right. Having a public responsibility as a First Responder on a scene creates a duty to do a complete and thorough, as well as a

technically competent job. Many accident scenes can hide unconscious victims, especially children (who, in fear, sometimes hide themselves). Some injured people wander away from accident scenes. In fires, victims, especially children, sometimes try to escape from the flames and smoke in ways that can make them hard to find: deep in closets, under beds and behind furniture. A thorough search may find them in time to make a difference (ask: “is this space big enough to hide a small child?” *i.e.*, capacity equals reality). Failure to do a thorough search may result in a lawsuit when somebody else finds them dead later. Accident victims may sometimes be confused about the involvement of others, or even lie about it. Accident victims are often traumatized, injured and distracted themselves, and not the best sources of information. Their reports cannot be trusted and reliance on accident victims’ responses to questions at the scene could be misplaced. Victims at a crime scene may have a motive to lie, especially if they are, or fear being, accused of being, a perpetrator. Nothing can substitute for a thorough search, without creating some legal exposure.

A child seat found in a car in a crash calls for a search for a child because they are all too often ejected out a window. A vehicle that can hold more people than known victims calls for a search for more, possible ejected or wandering victims. Any fire scene large enough to hold a victim, particularly a child, should be searched. A First Responder will have the legal duty to continue to search unless and until a higher level person takes charge of the scene. Failure to find a victim can give rise to liability to the victim, his or her family, and possibly to his or her estate. The argument would be: “But for the breach of the duty to search, my husband/wife/child could have been saved...” That is a claim that could elicit sympathy from a jury.

A Cautionary Tale: OREGON MOTORIST SAW PRIEST, FRIEND
DRIVE OFF ROAD – HE CALLED 911 WITHIN MINUTES, DESCRIBED
SPOT, LEFT HIS NUMBER “ ... Just minutes after a Jesuit priest

drove his car off a highway and down an embankment in a wooded area of Oregon, a witness who saw the accident called 911 and gave authorities a nearly precise location where the car left the roadway, according to Oregon State Police. But emergency crews sent to the scene were unable to find the accident and called off the search, said Gregg Hastings, public information officer for the state police. It wasn't until nearly three weeks after the witness' call [that] the bodies of David Schwartz, a priest from Garden Grove, and Cheryl Gibbs, an investigator for the Alameda County coroner's office, were pulled from the wreck ..." (S.F. *Chronicle*, July 3, 2007, by Diana Walsh).

Another Cautionary Tale: PARENTS SUE RESCUERS WHO DIDN'T FIND TEENAGER IN CAR "Jean Dvorak, 17, was trapped with extensive internal injuries in the back seat of a crashed BMW for at least half an hour before emergency workers found her and pulled her out..." (S.F. *Chronicle*, May 29, 2000, by Henry K. Lee).

THE DUTY TO OBTAIN CONSENT: "Consent" (or not) may give rise to legal issues. Treatment of a person who knowingly refuses treatment violates the duty not to touch and interfere with others (which is legally speaking a "battery" as in "assault and battery"). Of course, First Responders usually have been summoned by someone, which implies consent. They are expected to act quickly. Consent is generally implied for life -saving efforts. Any unconscious or disoriented person impliedly consents to treatment, as does any child. Any person well enough to say "I do not want treatment" is well enough for a First Responder to leave alone, unless obviously demented and a danger to themselves. Yet someone who says "stop" but is suffering from major bleeding, internal or external, or who is going into shock, is sufficiently impaired to justify treatment on the basis of implied consent. In other words, there is little chance of legal liability for a First Responder who treats such a person within his or her scope of practice.

THE DUTY TO MAINTAIN LIFE SAVING EQUIPMENT: A common problem in practice is the unreliability of technical equipment. Failure to keep batteries charged and to have back-up batteries, for equipment such as a defibrillator, can give rise to liability. It is a First Responder's duty to make sure that the equipment that he or she uses to work within the scope of practice works as well as it can. Bad batteries are all too common, and the problem shows itself at the worst possible time: when the equipment is about to be used. A dead defibrillator may mean a dead patient. *A dead radio may mean a dead First Responder* as well as a dead patient. Any call for emergency help that is frustrated by a dead radio battery is likely to have serious consequences, the least of which may be legal.

THE DUTY TO AVOID INFECTION OF OTHERS: “Body Substance Isolation” (BSI) procedures protect the First Responder from pathogens from patients (*e.g.*, HIV, hepatitis virus, etc.). BSI also protects patients from pathogens from medical personnel. There are cases of physicians who caused infection in patients by failure to wear a mask. A First Responder’s patients may be particularly vulnerable to infection from open wounds, or CPR rescue-breathing, or diminished immune response. Any First Responder who knows that he or she is HIV positive, or has active Tuberculosis antibodies reflecting recent exposure, ought to be in another line of work. To continue patient contact under such circumstances would give rise to legal liability, not only for any infection caused in a patient, but also possibly for the distress to the patient of fearing to catch such an infection.

THE DUTY OF CONFIDENTIALITY: When all victims have been located, and all work done within the scope of practice, a further duty arises and continues. That is the duty of confidentiality. The California Constitution and other laws provide everyone with a right of privacy. First Responders and other medical personnel often become aware of private and intimate facts about their patients and others. Unnecessary

disclosure of these facts is an invasion of privacy, and inaccurate “disclosure” may be defamation and slander, *e.g.*, “he looks like he has syphilis.” Some disclosure is necessary and part of the duties of the job. For example, a First Responder handing -off a patient to Paramedics, would and should tell them that the patient has said that she is HIV positive. But telling that same information to a newspaper reporter, or even a family member of the patient, would be a breach of the duty of confidentiality and an invasion of the privacy of the patient. The Paramedics have a “need to know” but the newspaper reporter does not.

THE DUTY TO DISCLOSE ABUSE: On the other hand, there are duties to make certain disclosures. Becoming aware of facts leading to suspicion of child abuse or elder abuse gives rise to such a duty under a mandatory reporting statute. Failure to comply will give rise to administrative or criminal liability. A civil lawsuit by the victim may also arise, unless there is no one competent to prosecute the case because the victims are too young or old and incapacitated to sue. So, criminal or administrative sanctions are more likely, but any number of people related to an abuse victim could bring a lawsuit on his or her behalf.

A Cautionary Tale: *Doe v. Doe*, Court of Appeals of Michigan, Sept. 17, 2009: “The facts are undisputed: ...John Doe I... while an employee of ... Superior Ambulance Service, sexually assaulted plaintiff’s 14 year old daughter, Jane Doe, in the back of an ambulance ... *** [an] issue of fact existed whether [ambulance attendant John Doe II] breached his statutory reporting duty *** and whether [John Doe II] was negligent in failing to protect Jane Doe.” (2009 WL 2974767).

A Further Cautionary Tale: PARAMEDIC ‘IS A DREAM JOB FOR A SEXUAL PREDATOR’ “Scores of EMTs nationwide accused of sex crimes, some while in back of ambulance.” (S.F. *Chronicle*, Dec. 12, 2008).

THE DUTY OF DIGNITY: There is also a duty of dignity in practice. Less than respectful treatment of any person, even the repetitive abuser of the system (*e.g.*, the “meds-seeker”) can be cast as a failure to treat the public with respect. There may be administrative sanction or liability, on a theory of negligent or intentional infliction of emotional distress. The claim would be that the patient was already in bad shape, then the medic insulted and abused her, making it worse. A stronger case would arise if a patient is a member of a protected class by reason of, say, race. Then, a discrimination lawsuit might be prosecuted.

A Cautionary Tale: ACTIVIST SUES FIREFIGHTER RESCUER –
PROTESTER SUES FIREFIGHTER OVER TREATMENT 50 FEET UP “An activist who put a bicycle lock around her neck and attached it to a billboard has sued San Francisco, claiming firefighters ‘inflicted emotional distress’ when they tried to coax her down.” (S.F. *Chronicle*, June 11, 2001 by Peter Hartlaub).

THE LIMITS OF “GOOD SAMARITAN” IMMUNITY: Volunteers, *e.g.*, an “off-duty” First Responder, are often protected by “Good Samaritan” laws that provide lawsuit immunity for providing CPR and the like. Professionals are subject to the negligence rules. But Good Samaritan laws do not protect from liability for “gross negligence.” Ordinary mistakes do not give rise to liability, but acts that both cause harm and also exceed the scope of practice may be gross negligence. Good intentions will not be a defense. In California, the Health and Safety Code sec. 1799.102, provides that “no person who in good faith, and not for compensation, renders emergency care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission.”⁵ But the Good Samaritan Law does not protect “nonmedical

⁵ A Federal Good Samaritan Law is 49 U.S.C. sec. 44701 “Sec. 5. Limitations on Liability ... (b) Liability of individuals. --An individual shall not be liable for damages in any action brought in a Federal or State court arising out of the acts or omissions of the individual in

care”: *Van Horn v. Watson*, 45 Cal.4th 322 (2009). A young woman who pulled a co -worker from a crashed vehicle wasn’t immune from civil liability because the care she rendered wasn’t medical. The woman allegedly worsened the injuries suffered by her co -worker, when she “yanked her ‘like a rag doll’ from the wrecked car.” Now, the “Good Samaritan” faces possible liability for injuries suffered by the co-worker, *who was rendered a paraplegic in the accident*. The court held that the law that the law only protects people from liability if they are administering emergency medical care. The court said a person is not obligated to come to someone’s aid, but if “a person elects to come to someone’s aid, he or she has a duty to exercise due care” adding that “if the ‘scene of an emergency’.. .means a scene where ‘an individual has a need for immediate medical attention’.. .it logically follows that the Legislature intended for the phrase ‘emergency care’.. .to refer to the medical attention given to the individual who needs it.”

DISASTERS AND MASS CARE MAY CALL FOR DIFFERENT STANDARDS OF CARE: San Francisco has had earthquakes and may well have more. This sort of natural risk, and man -made risks from hazardous materials and terrorism, may leads to disasters, mass emergency care, and recovery operations. The Institute of Medicine has suggested “crisis standards of care” recognizing “a substantial change in usual healthcare operations and the level of care it is possible to deliver [in] a pervasive ... or catastrophic disaster.”⁶

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providing or attempting to provide assistance in the case of an in-flight medical emergency unless the individual, while rendering such assistance, is guilty of gross negligence or willful misconduct.”

⁶ See *New Developments in Liability Protections for Providers During a Disaster ...* by Jennifer Ray, JD, in *AHLA Connections*, February, 2010, published by the American Health Lawyers Association.

[An e-mail] To Bart Lee , From Cptn. William Long

November 11, 2003,

re Legal Aspects of Emergency Care:

Hi Bart, Thanks again for taking the time to pass on invaluable advice regard the legal aspects of emergency care! Your insights will help my future First Responders, EMT's & Paramedics in this class.

- 1) do your job as trained
- 2) do only your job
- 3) keep your mouth shut
- 4) be nice.

Great but simple points to remember!

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