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By: Thomas G. DiCianni
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
Chicago

Fire Service Liability and Immunity

This column has discussed on several occasions how government immunity often involves interplay between several statutes and statutory provisions. A prime example of such interplay is in the labyrinth of enactments that affect tort immunity of fire service operations. Fire protection districts and municipal fire departments and their employees enjoy various immunities in their operations under Article V of the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act), 745 ILCS 10/5-101 to 5-106, which expressly covers "Fire Protection and Rescue Services." However, other provisions in the Tort Immunity Act and other statutory immunity sources that overlap or supplement Article V's coverages sometimes require careful analysis to reconcile.

Operation of Vehicles

A major risk in the fire service comes from moving large vehicles and heavy equipment at high speeds in emergency, life or death situations. Under §5-106 of the Tort Immunity Act, there is no liability for operating a "motor vehicle or firefighting or rescue equipment" when responding to an emergency call except for willful and wanton conduct. This immunity applies even if responding to a false alarm, *Young v. Fargas*, 308 Ill. App. 3d 553, 720 N.E.2d 360 (4th Dist. 1999), and when transporting a person to a medical facility. Note that this immunity would not apply after the emergency call has been answered, so that although negligent driving cannot cause liability while going to the fire, it could when returning from the fire.

Public entities and employees have immunity either responding to or returning from a call for damage to roads and bridges, relieving firefighters from any concern that a particular route taken could not support the weight of the equipment. 745 ILCS 10/5-104. Under §5-103, there is immunity when injury results from a condition of "fire protection or firefighting equipment or facilities," except for motor vehicles traveling on a public way. *C.D.L. Inc. v. East Dundee Fire Protection District*, 252 Ill. App. 3d 835, 624 N.E.2d 5 (2nd Dist. 1993). A water main that leads to a fire hydrant does not fall within "firefighting equipment or facilities," such that a municipality is not immune under §5-103 for injury or damage caused when such a water main fails. *Independent Trust Corp. v. City of Chicago*, 295 Ill. App. 3d 811, 693 N.E.2d 459 (1st Dist. 1998).

Fire Suppression and Rescue

Section 5-102 of the Tort Immunity Act creates absolute immunity for failure to suppress a fire, so that property damage or personal injury resulting from a fire crew's failure to completely suppress a fire cannot result in liability. This is true even if the failure results from inadequate or insufficient

personnel or equipment. Failure to save someone trapped in a fire is also absolutely excluded as a possible source of liability, not under Article V, but under the discretionary immunity of §2-201 of the Act. *Crowley v. City of Berwyn*, 306 Ill. App. 3d 496, 713 N.E.2d 1194 (1st Dist. 1999); *Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 807 N.E.2d 606 (1st Dist. 2004). Of course, whenever the versatile discretionary immunity of §2-201 applies to a situation – where the injury results from a discretionary judgment by a policy-making employee – it may provide protection from liability not found elsewhere or trump gaps in other immunity provisions. In *Harinek v. 151 N. Clark St. Ltd. Partnership*, 181 Ill.2d 335, 692 N.E.2d 1177 (1998), a city fire marshal was immune from liability under §2-201 for placing the plaintiff in a position where she was injured when struck by a door abruptly opened during a fire drill.

Although there can be no liability for a failure to save someone, when a person is injured by the willful and wanton conduct of a firefighter in the course of fighting the fire, the firefighter and his or her employer can be liable. 745 ILCS 5-103(b). Thus, while the passive failure to save someone from a burning building cannot result in liability, the affirmative act of injuring a person while fighting a fire, if the injury is the result of what qualifies as willful and wanton conduct, could still lead to liability.

EMS Activity

The Illinois Emergency Medical Services Systems Act (the EMSSA), 210 ILCS 50/1, *et seq*., governs the liability of emergency medical services (EMS) personnel in the course of their activities. The EMSSA contains a comprehensive regulatory system for EMS systems, covering licensing of emergency medical technicians, paramedics, and other healthcare professionals who provide emergency medical care, EMS systems tied to a resource hospital for specific geographic areas, administrative processes for reviewing and disciplining EMS practitioners, instruction and training, and a host of other provisions regarding various aspects of EMS systems. Under §3.150 of the EMSSA, all entities and individuals who are certified, licensed or authorized to provide emergency medical services are immune from liability in providing such services unless their actions constitute willful and wanton misconduct. 210 ILCS 50/3.150. The EMSSA applies to public entities and employees as well as private sector entities such as ambulance companies.

The Tort Immunity Act also provides some immunities that apply to EMS services, some less protective than the EMSSA's negligence immunity, but some creating absolute immunity even for acts that under the EMSSA could result in liability for willful and wanton conduct. Although Article V was written specifically for fire service operations, Article VI, which deals with "Medical, Hospital and Public Health Activities," contains a number of immunities that potentially apply to what the EMSSA defines as "emergency medical services." Section 6-105 is an absolute immunity for public employees and entities that fail to "make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health and safety of himself or others." 745 ILCS 10/6-105. Section 6-106(a) provides immunity, also absolute, for injury that results from "diagnosing or failing to diagnose" or "failing to prescribe" for mental or physical illness or addiction. Subsections (c) and (d) of §6-106 clarify that this immunity does not apply once the public employee undertakes to "prescribe for mental or physical illness or addiction, or administers any treatment," so that there is no immunity, even for negligent acts, once diagnosis ends and treatment begins.

Thus, the scope of immunity for delivery of emergency medical services requires precisely identifying the service allegedly wrongfully conducted and determining which immunity provision applies to that specific action. Distinctions are sometimes subtle and can turn on the particular nuances of the conduct alleged to have been wrongful.

For example, in *Abruzzo v. City of Park Ridge*, 374 Ill. App. 3d 743, 870 N.E.2d 1012 (1st Dist. 2007), the court recognized the overall legislative scheme in which the Article VI provisions of the Tort Immunity Act create absolute immunity for pretreatment EMS activities such as diagnosing, failing to diagnose, misdiagnosing, or failing to prescribe. *Abruzzo* involved EMS personnel responding to a call of an unresponsive teenager who, it was suspected, had overdosed on drugs. The plaintiff alleged a series of misdiagnoses and failures in taking appropriate action to respond to the teenager's condition, causing his death.

The court reviewed a series of cases that had addressed the pretreatment/treatment distinction under the Tort Immunity Act but had not reconciled it with the EMSSA's limited immunity, and found the EMS personnel absolutely immune for their alleged pretreatment under §6-106(a). The court also rejected an argument that the services at issue had gone beyond the diagnosis stage, and therefore beyond the absolute immunity of §6-106 because the teenager had already been diagnosed as "unresponsive." The court, relying on definitions of "diagnosis" from prior case law, rejected the plaintiff's argument and held that the finding of unresponsiveness was a description of a symptom rather than a diagnosis of an underlying condition or disease. (Note that as of this writing, a petition for leave to appeal *Abruzzo* is pending in the Illinois Supreme Court.)

9-1-1 Systems

Under the Illinois Emergency Telephone Systems Act (the EMTSA), 50 ILCS 750/15.1, those fire service operations that act as 9-1-1 call centers can face liability for an injury or death that results from willful and wanton conduct in "developing, adopting, operating or implementing" a 9-1-1 system. There have been only infrequent applications of the EMTSA in contexts relevant to fire service operations. In *Galuszynski v. City of Chicago*, 131 Ill. App. 3d 505, 475 N.E.2d 960 (1st Dist. 1985), the court found that a dispatch mistake that classified an urgent call as non-emergency, resulting in a delayed response, was a police service that fell under §4-102 of the Tort Immunity Act rather than the EMTSA. *Galuszynski*'s reasoning was criticized and rejected in *Barth v. Board of Education*, 141 Ill. App. 3d 266, 490 N.E.2d 77 (1st Dist. 1986). In *Shefts v. City of Chicago*, 238 Ill. App. 3d 37, 606 N.E.2d 90 (1st Dist. 1992), the court found that failure to dispatch an ambulance in response to a call for a heart attack fell within the EMTSA, although there was no willful and wanton conduct. In *Harrell v. City of Chicago Heights*, 945 F.Supp. 1112 (N.D. Ill. 1996), failure to dispatch an ambulance in response to a call of a possible heart attack, resulting from uncertainty by the dispatcher over whether the caller was within the geographical area that the 911 system served, was found to fall within the EMTSA and subjected the defendant city to potential liability for willful and wanton conduct. The court came to the same conclusion in *Chiczewski v. Emergency Telephone System Board of DuPage County*, 295 Ill. App. 3d 605, 692 N.E.2d 691 (2nd Dist. 1997), although finding that the defendant's action was not willful and wanton conduct.

Conclusion

The exact contours of liability and immunity for 911 emergency dispatch and response promises future litigation to reconcile the interplay between the EMSTA, the Tort Immunity Act and in some circumstances the EMSSA as well.

About the Author

Thomas G. DiCianni is a partner in the law firm of Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. He concentrates his practice in general litigation, defense of government entities and public officials, municipal law, and the representation of governmental self-insurance pools.