

Liability of Emergency Medical Services Providers - How and When an Ambulance Service Can be Liable for Negligence

By Daniel Flanzig, Flanzig and Flanzig, LLP

It is a quiet weekday night when your volunteer ambulance service receives a call for a 45-year-old male found unconscious in his home. Your ambulance is dispatched to the call, consisting of a crew of three. The crew is in the house, and you make an excellent response time. Upon entering the home you find the man on his couch unresponsive with shallow respiration and a faint heartbeat. Your crew administers oxygen, quickly boards the patient, and begins transport to the local community hospital. En route the patient codes. Your crew immediately starts CPR and arrives at the hospital in under five minutes. The code was run successfully and was uneventful; however, despite your best efforts, the patient never regains consciousness and dies. This scenario happens to ambulance services in New York state on a frequent basis. However, can the ambulance service be legally responsible for the patient's death?

In New York State Public Health Law §3013 provides immunity from liability for volunteer emergency medical services. The law states that a voluntary ambulance service or voluntary life support first response service and any member who is a certified first responder, an emergency medical technician, or an advanced emergency medical technician who voluntarily and without the expectation of monetary compensation renders medical assistance in an emergency to a person who is unconscious, ill, or injured shall not be liable for damages for injuries alleged to have been sustained by said person or for damages for the death of such person alleged to have occurred by reason of any act or omission in the rendering of medical assistance in an emergency. However, the statute holds if it is established that such injuries were or such death was caused by **gross negligence** on the part of such certified first responder or emergency technician, the department may be liable.

Now take this scenario. Once again your service receives the same call. You respond in the same amount of time; however, on board you have a new AEMT. Upon arrival at the house the patient is semi-conscious and breathing. You perform your assessment, board the patient, and begin transportation to the hospital. During transport the patient loses consciousness and stops breathing. Your new AEMT attempts to insert an endotracheal tube to intubate the patient. However, upon arrival at the hospital, the hospital staff informs you that your brand new AEMT improperly intubated the patient and that the tube is found located in his esophagus. The patient dies several days later due to severe extensive cerebral anoxia caused by the incorrect intubation. The patient leaves behind a wife and four children.

Two questions arise. First, is this "gross" negligence, and

second, can the AEMT be held legally responsible for the patient's death, as well as the ambulance service? In one such case the court held that there existed questions of fact for a jury as to whether the volunteer emergency medical providers' conduct in the intubating of the patient amounted to "gross negligence" as against both the individual providers and the municipal fire department. In that case the department submitted deposition that they followed the proper protocol. In answer to that the decedent's family submitted affidavits from doctors that the service committed acts of malpractice when they failed to properly intubate the patient and departed from good and acceptable practice of what was commonplace in the medical technique. There the court found that a jury needs to determine whether the members and department committed acts of gross negligence.

However, the Law Changes Dramatically for a Paid Service

Take for instance this scenario. A patient becomes ill at work and the emergency service for your local **paid** municipality is dispatched. EMS workers arrive at the scene and begin to treat the patient. He is transported to a local area hospital where he receives medical treatment and subsequently dies later that day. The patient's family commences the action against the municipality alleging that the EMS service failed to timely respond to the scene and that upon their arrival the EMS workers rendered improper medical treatment. In such a case the courts have held that a municipality would be immune to negligence claims arising out of the performance of the governmental function unless the injured person established a "special relationship" with the municipality, which would create a special duty of protection to that patient. In order to establish a special relationship between the patient and the municipality the patient must show 1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured, 2) knowledge on the part of the municipality's agents that inaction could lead to harm, and 3) some form of direct contact between the municipality's agents and the injured party, and 4) the parties' justifiable reliance on a municipality's affirmative undertaking. The mere delay in the response without more would not create liability on behalf of the ambulance service.

When is a "Special Relationship" Created?

A 911 call was made by a private emergency calling service on behalf of a patient. A call was made at approximately 5:39 p.m. when the patient was having difficulty breathing. The medical alert company called the 911 emergency tele-

phone number operated by the municipality. Within five minutes an ambulance was in route. At approximately 5:56 a uniformed police officer arrives at the home. The officer used his radio to make urgent requests for medical personnel and repeatedly assured the patient not to worry because "help was on the way." At around 6:00 the original ambulance dispatched to the plaintiff's home was having difficulty finding the location, became disabled, and was taken out of service. A second ambulance was dispatched, although a "highly" extended response time was expected. At about 6:26 firefighters trained as first responders arrived at the scene. Approximately three minutes later the first paramedics arrived. The patient was pronounced dead at the scene at 7:02 p.m., over an hour after the initial call. The court found that there existed a question of fact for a jury as to whether or not the alleged conduct of the police officer who first responded to the 911 call satisfied the direct contact and reliance requirements of a "special relationship" between the municipality and the patient when the responding officer assured the patient that help was on the way and not to worry.

Recently, the Court of Appeals, the highest court in the state of New York, addressed the issue of "special relationship." In that case the court wrote, "Protecting health and safety is one of municipal government's most important duties. Since municipalities are run by human beings, they sometimes fail in that duty, with harmful, even catastrophic consequences. When that happens, as a general rule, the municipality is not required to pay damages to the person injured. The rationale for this rule is that the costs to municipalities of allowing recovery would be excessive; the threat of liability might deter or paralyze useful activity; invest in net result of allowing recovery would be to make municipal government less, not more, effective in protecting their citizens."

Based upon recent interpretation by the courts it appears that a paid municipal ambulance service can be held responsible when a "special relationship" exists. A volunteer ambulance service may maintain immunity under Public Health Law §3013 if they are free of gross negligence. Absent those circumstances §3013 can provide immunity to the member, service, or municipality. In essence it appears that the legislators created the statute to allow volunteer ambulance services and fire districts to be free from liability in performing their acts.

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