

Liability Issues in Emergencies

Fact Sheet

Overview

Concerns about liability—a finding of legal responsibility for an act or failure to act—regularly arise during emergency response situations. Individual government employees, volunteers, and healthcare professionals, as well as entities such as businesses and nonprofits, worry about potential liability for their actions during an emergency. Existing and new federal and state protections against liability have been created to address the concerns of volunteers and others involved in emergency responses. (See ASTHO [Immunity Issues in Emergencies](#) and [Workers' Compensation Issues in Emergencies](#) fact sheets.)

Direct and Vicarious Liability

Direct liability means that a person or entity is legally responsible for their actions or omissions. Vicarious liability (also known as *respondere superior*) is a type of secondary liability in which a person or entity is held legally responsible for the actions or omissions of another person with whom they have a particular legal relationship. This is seen in the context of an employer being held responsible for its employee, or for a corporation, nonprofit, or other entity for the actions of its agent like an officer or director. Some entities may try to limit their potential vicarious liability by designating persons as independent contractors rather than as employees or agents.

Potential Theories of Tort Liability

Civil liability grounded in tort is the most likely theory in which liability issues arise in an emergency response. A tort is an action in which an actor (a person or entity) either intentionally or unintentionally causes harm to another person or property. A tort claim allows an aggrieved person to sue the actor in civil court for the harm. This is contrasted with criminal charges in which the government prosecutes an actor, or with contractual claims in which the parties to a contract sue over the contract. If a person or entity is found liable for causing the harm, the aggrieved party can seek monetary compensation and, in some instances, an injunction against further action by the offending actor.

Intentional and Unintentional Torts

Unintentional torts occur when an actor harms another person or property through their actions but did not intend the harm. Negligence is the most common type of unintentional tort (see below). Intentional torts occur when an actor intends to harm or touches a person/property with the intent to harm. In the healthcare context, conducting a medical procedure on a patient without first obtaining informed consent could be construed, among other things, as the intentional tort of battery. Other intentional torts include assault, conversion (i.e., theft), infliction of emotional distress, fraud, misrepresentation, false imprisonment, and trespass. An actor/defendant has a defense to an intentional tort if a plaintiff gives either express or implied consent to the defendant's actions, or if committing the tort was a "public necessity" taken to avoid a greater harm to persons or the community. When a government takes or uses property, even if for public necessity, issues can arise as to whether the act is covered by sovereign immunity or subject to paying compensation to the owner.

Negligence

The tort of negligence involves unintentional wrongful conduct that harms another. It is the most likely theory to be used for harms stemming from emergency responses. Negligence occurs when a person or entity (the actor/defendant) fails to use ordinary care in their actions, or by their failure to take action. Ordinary care generally means the amount of care that a reasonable person would take under similar circumstances. The standard of care applied to a physician or other person with specialized skills may be different than an ordinary care standard.

The specific elements of a negligence claim are: (1) the defendant owes the plaintiff a duty of care (including a duty of ordinary care); (2) the defendant breached that duty by failing to meet the applicable standard of care; (3) the defendant's actions resulted in harm to the plaintiff; and (4) the defendant's breach of duty was the cause of the plaintiff's injury. Outside the context of a governmentally declared emergency, most states allow juries to consider whether a defendant was acting under emergency circumstances in determining if a defendant's actions were reasonable. Determining the appropriate standard of care to apply during widespread or prolonged events like a pandemic has been the subject of much discussion. A number of specific negligence theories may apply in the emergency response context:

- **Medical Malpractice**—Healthcare providers may be open to malpractice claims for breach of duty to a patient.
- **Scope of Practice**—A licensed healthcare provider such as a nurse may be subject to negligence claims for exceeding scope of practice by making decisions or undertaking tasks beyond what the law permits for his or her profession.
- **Failure to Plan or Prepare**—There are a number of publications and resources available to help healthcare facilities plan and exercise how they will respond to an emergency. A facility that fails to plan for emergencies, keep plans current, or

conduct training and exercises may open itself to claims for failure to plan or prepare.

- **Breach of Privacy & Confidentiality**—Individuals and entities can be subject to tort liability for failing to take adequate precautions to protect patients' privacy and confidentiality during emergencies. This is in addition to violations of federal statutes such as the Health Insurance Portability and Accountability Act (HIPAA) and Family Educational Rights and Privacy Act (FERPA), as well as state privacy and confidentiality laws.
- **Premises Liability**—A person or entity in possession of a premises or land is responsible for injuries to persons present there. Premises liability can arise when facilities are used for preparedness and response activities. This can include the use of hospitals, clinics, and other facilities (schools, convention centers, malls) for alternate care sites. Businesses and other private property owners who allow use of their property as points of distribution (POD) for medicine and supplies also voice concerns about premises liability issues.
- **Gross Negligence**—This is conduct or failure to act which is so reckless that it demonstrates disregard for whether an injury or harm will occur. Acts of gross negligence (also noted as willful or wanton conduct) are not covered under statutes that provide immunity or other liability protections to emergency response participants.

Defenses to Negligence Claims - There are several potential defenses to negligence claims:

- **Contributory and Comparative Negligence**—Contributory negligence arises if a plaintiff's actions contributed to the harm. It acts as a complete defense to negligence such that a defendant will not be found liable for his or her actions because the plaintiff's actions added to the harm. Comparative negligence is used by most states to ease the harshness of contributory negligence by reducing the plaintiff's award to the extent his actions caused the harm.
- **Assumption of Risk**—Assumption of risk was traditionally seen as a complete bar to recovery if a plaintiff understood the risk and voluntarily assumed it either expressly or impliedly. In some states, implied assumption of risk has been incorporated into the concept of comparative negligence, so it is no longer a complete bar to recovery.
- **Immunity**—Immunity protects defendants from potential tort liabilities. The immunity defense is the most significant defense to negligence claims arising in the context of an emergency response scenario. (See [Immunity](#) fact sheet.)

Statutory and Regulatory Violations

In addition to the right of parties to bring contractual and tort-based claims, state and federal laws may also specifically allow individual persons and entities to sue others based on violations of statutes or regulations (known as a private cause of action). To the extent that federal and state governments have waived sovereign immunity, governments and officials in their individual capacities may be subject to private lawsuits for statutory or regulatory violations. There are many potential areas in which state and federal statutory and regulatory requirements could be intentionally or inadvertently violated during an emergency response scenario. Some federal statutes that could form the basis for a claim include HIPAA, the Americans with Disabilities Act (ADA), the Emergency Medical Treatment and Labor Act (EMTALA), and 42 U.S. Code Section 1983 civil rights violations. Potential sources for state-based claims include violations of state civil rights and antidiscrimination laws and violations of state professional licensing requirements. Governors have the authority to temporarily waive or suspend regulatory and, potentially, some statutory requirements during a declared state emergency. Similarly, the HHS secretary is authorized under [Social Security Act \(SSA\) Section 1135](#) to waive certain requirements during public health emergencies. States can evaluate which requirements to retain and which to temporarily suspend to ease compliance and facilitate response and recovery efforts.

Constitutional Violations

The U.S. Constitution, the Bill of Rights, and state constitutions identify fundamental rights that, if violated, can give rise to claims. Parties could assert constitutional claims in addition to tort claims against public officials and entities, including violations of freedom of speech and association (1st Amendment), unreasonable searches and seizures (4th Amendment), cruel and unusual punishment (8th Amendment), due process (5th and 14th Amendments), and equal protection (14th Amendment). Parallel violations grounded on state constitutional claims could also be envisioned.

Criminal Liability

As with civil liability, both individuals and organizational entities can be liable for criminal sanctions based on their actions during an emergency response event. Criminal prosecutions of first responders, healthcare providers, and volunteers involved in emergency response activities are most likely to occur where there has been egregious or willful misconduct on the part of the actor. Ultimately, however, the decision to seek prosecution in any given situation is a matter of prosecutorial discretion and the decision of a grand jury to indict.

Sources

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