

## **IADC Professional Liability Roundtable**

### **“Strategies for the Defense of Medical Transportation and Pre-Hospital Care”**

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#### **Introduction**

Pre-hospital care is provided by emergency medical services (EMS) responders, who are typically the initial health care providers at the scene of an accident, medical emergency or disaster. EMS personnel often are first to the scene and can immediately evaluate the situation and any need for resources, including medical resources. These licensed/ certified personnel (emergency medical dispatchers, emergency medical responders, emergency medical technicians, and paramedics) may be the first to apply crisis standards of care (CSC).

Pre-hospital care is an essential part of the emergency health care system. It is frequently initiated by a 911 call to a dispatch center. Trained personnel receive a call and dispatch appropriate air and ground ambulances and other EMS responders to triage, treat and transport the patient(s) to the appropriate health care facility where definitive care is ultimately provided. There are obviously many challenges in providing pre-hospital care for seriously ill or injured patients before they reach the hospital and during emergency transfers to a hospital or between hospitals. These challenges can lead to mistakes in the field and/or bad outcomes (without mistakes) that cause litigation to be initiated.

Laws that govern the practice of emergency medical services (EMS) are highly dependent upon the state and county. There are a few federal regulations, but primarily, the states regulate liability of EMS.

#### **State law liability of EMS providers**

In general, in most states, the liability for EMS providers will be based upon general negligence principles and governed by state law applicable to health care liability. Thus, liability will be based upon a duty of care, the legally imposed obligation to

avoid causing reasonably foreseeable harm to a person who would be foreseeably harmed by the acts or omissions of the EMS personnel.

Secondly, liability is typically assessed when the health care provider falls below the required standard of care. The standard is typically what is applicable to a same or similar care provider under same or similar circumstances.

Lastly, to establish liability, the patient must suffer some injury, damage or loss and it must be established that more probably than not, but for the failure to comply with the required standard of care, the patient would not have suffered injury, damage or loss. *See, e.g.*, Tenn. Code Ann. § 29-26-115; Ala. Code 1975 § 6-5-548; Tex. Civ. Prac. & Rem. Code § 74.153; Ga. Code Ann. § 51-1-29.5.

### **Types of lawsuits against pre-hospital providers**

Patients and their families have sued EMTs and paramedics for virtually every EMS activity from negligent ambulance operation to the improper performance of medical procedures. Settlements and verdicts can be in the millions of dollars.

Common EMS liability and malpractice issues include the following:

- Delayed response by first responders or ambulances
- Failure to bring adequate medical equipment
- Lack of functional medical equipment such as defibrillators or ambu bags
- Improper use of medical equipment
- Failure to sufficiently train EMS personnel
- Failure to sufficiently staff
- Failure to follow standard protocols such as BLS, ATLS or ACLS
- Failure to provide a critical care transport when indicated and/or ordered
- Misdiagnoses
- Failure to administer proper medications or administering wrong dosages or over medicating
- Airway management (intubation issues)
- Improper handling of patients with suspected trauma to back or neck
- Traumatic brain injuries
- Issues with mental health patients
- Patient elopement

- Dealing with patients who have recently encountered law enforcement
- Failure to transport patients
- Automobile accidents
- Air crashes
- Dropping patients from stretcher, etc. (worsening of condition)
- Sexual assault

## **EMS litigation strategies and risk management**

### **Proactive – prevention of lawsuits**

A robust risk management and training program is key to avoiding litigation. Training should include review of guidelines and protocols as well as documentation requirements. Most importantly, if you have an ability to address the actual care providers with examples of mistakes in the field and documentation errors that affected liability when there was likely none, the opportunity should be taken.

In addition, for each case that is filed against a provider, encourage safety, quality assurance, risk management, inside and outside counsel to do a post-mortem and discuss how the event and/or lawsuit could be prevented in the future.

Preparing incident reports or variance reports is an important part of a robust quality assurance and risk management program and can assist with avoiding future incidents and claims. However, it is important that the incident reports follow state and local guidelines that will protect the quality assurance privilege so that the incident reports can be prepared in a candid manner.

EMS providers may also consider equipping their vehicles with cameras as a mechanism to ensure video documentation of both EMS personnel and patient conduct for their mutual protection. *See, e.g., Ron Fonger, Mich. County plans to put cameras in all police, paramedic vehicles, EMS 1 by Lexipol (Sept. 16, 2020), <https://www.ems1.com/ems-products/cameras-video/articles/mich-countyplans-to-put-cameras-in-all-police-paramedic-vehicles-bw5rKP9JEQZnVS5S/>; Tim Nowak, 3 ways to enhance EMS situational awareness, EMS1 by Lexipol (Nov. 13, 2019), <https://www.ems1.com/ems-products/vehicle-equipment/articles/3-ways-to->*

enhance-ems-situational-awareness-uWLxHJwaI3qRRMCI/. EMS providers that have installed cameras in their vehicles explain that the measure is expected to simultaneously promote accountability in the event that EMS personnel deviate from their protocols, while also rooting out false accusations by patients. They further note that although the initial installation of cameras in vehicles across their fleet may be expensive, it is ultimately a cost-saving investment because it can mitigate the potential of having to litigate or even settle claims based on false accusations.

### **Reactive – surviving a lawsuit**

First, if a lawsuit is filed against an EMS provider, make sure that you are familiar with any potential state immunity for liability, particularly in the instance of a situation involving a Good Samaritan or COVID-19. Many states have limitations of liability under certain circumstances for persons, including EMS providers, rendering emergency services as a Good Samaritan. *See, e.g.*, Ala. Code 1975 § 6-5-332 (person rendering emergency care in good faith, acting with ordinary prudence, and without compensation is immune from civil liability other than for gross negligence); Ark. Code Ann. § 17-95-101(b) (no liability for person rendering emergency services in a manner calculated in good faith to mitigate or remove an immediate threat to another’s life, health, or safety, other than for gross negligence or willful misconduct); Ga. Code Ann. § 51-1-29(a) (“Any person . . . who . . . renders emergency care at the scene of an accident or emergency . . . shall not be liable for any civil damages[.]”); Tenn. Code Ann. § 63-6-218(b) (“Any person . . . shall not be liable . . . for any civil damages as a result of any act or omission by such person in rendering . . . emergency care . . . except such damages as may result from the gross negligence of the person rendering such emergency care[.]”); Tex. Civ. Prac. & Rem. Code § 74.151(a) (“A person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent[.]”).

Examples of Covid state immunity for liability for EMS providers include the following:

- Georgia SB 359, signed into law by Governor Brian Kemp on August 5, 2020, and effective as of August 6, 2020, immunizes health care providers,

including EMS personnel, against claims for transmission, infection, exposure, or potential exposure of COVID-19 to patients while rendering care, except in cases of gross negligence, recklessness, or willful misconduct. Surprise Billing Consumer Protection Act, Ga. SB 359, §§ 1-6 (2020). The law applies to causes of action accruing before July 14, 2021 and provides a rebuttable presumption that a plaintiff assumed the risk of COVID-19 exposure in cases alleging negligence. *See id.*

- Kentucky SB 150, signed into law by Governor Andy Beshear on March 30, 2020, broadly states that a health care provider, including EMS personnel, who in good faith renders treatment to a COVID-19 patient during Kentucky’s state of emergency “shall have a defense to civil liability for ordinary negligence for any personal injury resulting from said care or treatment[.]” An Act Relating to the State of Emergency in Response to COVID-19 and Declaring an Emergency, Ky. SB 150 § 1 (2020) (emphasis added).
- Louisiana SB 435, signed into law by Governor John Bel Edwards on June 12, 2020, sweepingly provides that no person or entity, including EMS personnel and departments, is liable for a person’s actual or alleged COVID-19 exposure “in the course of or through the performance of provision of the person’s . . . business operations,” unless the person failed to comply with federal, state, and/or local COVID-19 guidelines or acted with gross negligence, recklessness, or willfulness. La. SB 435, at p. 2 (2020).
- Mississippi SB 3049, signed into law by Governor Tate Reeves on July 8, 2020, broadly protects any person, including EMS personnel, acting “in good faith to follow applicable public health guidance” for claims alleging COVID-19 transmission or exposure. Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act, Miss. SB 3049 (2020). The law further immunizes health care providers “from suit for any injury or death directly or indirectly sustained because of the health care professional’s . . . acts or omissions while providing health care services related to a COVID-state of emergency.” *Id.* (emphasis added). The law expressly states that it “shall be liberally construed” and applies to would-be causes of action arising from March 14, 2020 until 1 year after the end of Mississippi’s state of emergency. *Id.*

- Tennessee HB 8001, signed into law by Governor Bill Lee on August 17, 2020, states that a plaintiff “in any action alleging injury arising from COVID-19,” including actions for health care liability, must prove by clear and convincing evidence that the alleged injury “was caused by the defendant’s gross negligence or willful misconduct.” Tennessee COVID-19 Recovery Act, Tenn. HB 8001 § 2 (2020). The putative plaintiff must allege facts in a verified complaint from which a reasonable trier of fact could conclude that the defendant acted with gross negligence or willful misconduct, and must file a certificate of good faith from a qualified health care provider expressing an expert medical opinion that the injury was caused by the defendant’s conduct. *Id.* Thus, while the law does not provide outright immunity to EMS personnel, it severely restricts putative claims arising from COVID-19. The law applies to would-be health care liability claims arising between August 17, 2020 and July 1, 2022. *Id.*

In addition to determining if there is any immunity for liability, early investigation and evaluation of cases is important. We suggest that when an adverse event occurs that the medical record is reviewed and the EMT’s and paramedics are interviewed immediately. The recollection of events within the first 72 hours or so is much greater than waiting to see if a suit is filed. Sequestration of medical equipment that may have failed is important. Downloading of data such as the full report from an EKG monitor can also be key.

Early expert review of cases can assist with identification of cases to settle and cases to potentially fight. Sharing of data with patients that is exculpatory can also assist with settlement negotiations for early resolution.

## **Conclusion**

The defense of medical transportation and pre-hospital care cases requires knowledge of the industry and experience navigating the unique challenges of negligence and medical malpractice cases for pre-hospital care. Cases arise in many different fact patterns than typical hospital medical malpractice cases. Early investigation and evaluation of cases can provide closure and assist with prevention of future events.