

Liability Protections for Municipal Employees and Volunteers

Questions frequently arise concerning liability protection for board of health employees. Since 9/11, the question has also arisen relative to potential liability for volunteers recruited in the event of a public health emergency. This article will attempt to describe five potential sources of protection for public employees and volunteers.

The Massachusetts Tort Claims Act (G.L. Chapter 25B)

Public employers are liable for harm caused by the negligent or wrongful act or failure to act of any public employee who acted within the scope of his or her employment. Liability is capped at \$100,000.00 per incident; and there is no individual liability for such negligence.

Public employers include the Commonwealth of Massachusetts, any city, town or county; any public health district, regional health district or regional health board, local board of health or any commission, committee or council "which exercises direction or control over the public employee.

In order to meet the definition of a public employee, the employee must be subject to the discretion and control of the public employer; and the act or failure to act must have been within the scope of the employee's employment. One need not be paid in order to meet the definition of public employee. A public employee may be elected or appointed, full or part time, temporary or permanent, and compensated or uncompensated. (G.L. ch. 25B, §1).

In determining whether an employee is subject to the direction and control of a public employer, one must look at key factual issues. Paid employees doing regular job duties are generally considered to be operating under the direction and control of their public employer. Doctors at Boston City Hospital were held to be public employees because their duties demonstrated that they were "servants" of the hospital, even though they were also subject to the supervision of an attending physician who was not a public employer. (*Williams v. Bresnahan, App. Ct. 1989*). However, in a

different case, the Court held that there was a dispute as to whether a Boston City Hospital resident who was on rotation at a private hospital worked for the city of Boston or the private hospital. (*Kelley v. Rossi, SJC 1985*).

Mutual aid agreements should be careful to specify the direction and control to be exercised. The written agreement will be evidence that will help the Court determine which municipality exercised direction and control, and whether the employee was operating under that direction and control. For example, the agreement should contain language that says that an employee from Town A that is sent to help Town B "remains under the direction and control of Town A while in Town B."

Independent contractors, consultants and volunteers can be considered public employees if they are operating "under the direction and control" of public employers as well. An Attorney General opinion from 1983 found that student volunteers in the Governor's office were public employees because the Governor's office directed "what shall be done and how it shall be done."

In determining whether a public employee is operating within the scope of his or her employment a Court will consider whether the conduct in question was that which the employee was hired to do. Whether the conduct occurred during authorized time and space; and whether it was motivated by a purpose to serve the employer.

Normally, conduct occurring during travel to and from home is not considered conduct occurring within the scope of employment. The mere fact that one is "on call" does not place one "within the scope of employment." However, if an employee is on call and is traveling to the incident for which he or she was called, the travel time will commonly be considered to be within the scope of employment.

A public employee who is negligent while operating within the scope of his or her employment will not be personally liable for his or her actions or omissions. In addition, he

or she will be entitled to a legal defense from a city or town attorney or the Attorney General if the employee is a state employee.

The Massachusetts Tort Claims Act protects municipal employers and employees from claims that are based on the "performance or failure to perform a discretionary function . . . whether or not the discretion involved is abused." (G.L. ch. 258, §10). The government actor must have been acting within the scope of his or her employment. The purpose of this exemption from liability is to avoid allowing civil claims to be "used as a monkey wrench" in the machinery of government decision making." *Cady v. Plymouth-Carver Regional School District* (1983).

In determining whether an act is discretionary for the purpose of the statute, the Court will determine whether the government actor has any discretion at all, and whether it is the type of discretion that is protected, to wit, a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning.

A city's exercise of its discretion in deciding not to incur the cost of erecting a fence on stairs near a children's playground, or to remove snow from the stairs, was based on a determination of allocation of limited resources, which was an integral part of its governmental policy making or planning function. Therefore, the tort action for the wrongful death of child when the child sledded down the snowy stairs into traffic and was killed was barred, even if the city's decision was ill advised or unreasonable. *Barnett v. City of Lynn* (2001).

In contrast, a claim that the public employee's negligent supervision of a truck driver's operation of a salt truck "does not appear to have a 'close nexus to policy making or planning.'" (*Ku v. Town of Framingham* (2004).

Chapter 258, Section 10(f) also protects government actors from ". . . failing to inspect, or inadequately or negligently inspecting real or personal property to determine whether the property complies with or violates any law, regulation, ordinance or code, or contains a hazard to health or safety. . . ." This statute is

cited frequently by municipal attorneys. In fact, at a recent Board of Selectmen's meeting where members of a Board of Health and its health agent were questioned for closing a restaurant for violations of the state sanitary code, a selectman, reading from a letter from town counsel stated that "a town does not incur liability when it fails to inspect or enforce the sanitary code."

While this is the case, MAHB would argue that the opposite is also true. Cities and towns incur no liability from inspecting and enforcing laws as well, even if the inspections are "inadequate" or "negligently conducted." This statute should not be utilized to thwart Board of Health authority and obligation to protect public health. Rather it should be utilized to offer Boards of Health protection from liability in conducting inspections and enforcing state and local laws.

Finally, G.L. ch. 258, §13, in the extremely unlikely event of a successful claim, allows cities and towns to indemnify municipal officer, elected or appointed from any personal financial loss and expense, including legal fees, in an amount not to exceed \$1 million.

Contractual Provisions

In addition to the Massachusetts Tort Claims Act, contracts themselves can provide protection from liability. Liability provisions can be written into contracts. For example, contracts between a Visiting Nurses Association or a home health agency and a city or town board of health can provide liability provisions. The language might read as follows: "The Agency and the Town shall each maintain professional malpractice and general liability insurance for itself and its employees." The contract might specify that the Agency is NOT an agent of the Town. The contract might also specify that the Town agrees to indemnify the Agency against claims caused by the negligence of the Town; and the Agency agrees to indemnify the Town for claims caused by the negligence of its employees.

Immunity of Physician or Nurse

G.L. ch. 112, §12C provides that "no physician or nurse administering immunization or other protective programs under public health

programs shall be liable in a civil suit for damages as a result of any act or omission on his part in carrying out his duties." This covers both paid and unpaid doctors and nurses. It is not limited to emergency situations; however it would apply to emergency dispensing sites.

Good Samaritan Laws

G.L. ch. 112, §12B protects doctors, nurses and physician assistants who give **emergency care or treatment** from liability for negligence. The care must be given in good faith and as a volunteer, without a fee. It protects from liability for damages as a result of negligent acts or omissions and from liability for hospital expenses for negligently ordering or negligently causing hospitalization. §12BB of this same statute extends essentially the protection to respiratory therapists; and §12V extends it to individuals trained in CPR, AEDs or basic cardiac life support.

§12F protects doctors, dentists, and hospitals from liability for failure to obtain consent from a parent of a child, or spouse of a patient when delay would endanger the life, limb, or mental well-being of the patient. This protection covers emergency room treatment, as well as blood transfusions.

§12V ½ protects individuals trained in CPR and AED from liability for negligence in connection with rendering emergency CPR or AED through a public access defibrillation program, whether or not the individual is paid. Finally, G.L. ch. 111C, §21 protects certified, accredited or approved EMS personnel who "in the performance of their duties" render first aid, CPR, transportation of other EMS services.

Federal Volunteer Protection Act

The federal law provides immunity from liability for negligence for volunteers serving nonprofit agencies or governmental agencies under the following circumstances: the volunteer must have been acting within the scope of his or her responsibilities in the organization; the volunteer must have been properly licensed; the harm was not caused by willful, criminal or reckless misconduct or

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gross negligence; and the harm must not have been caused by the volunteer operating a motor vehicle, vessel or aircraft.

Conclusion

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State and federal "Good Samaritan" laws provide additional protection for government actors, including physicians, nurses and others in the medical field. Fear of liability need not prevent good public health practices in Massachusetts.

This article is based on information presented by Priscilla Fox, MDPH and Cheryl Sbarra, MAIJB in a recent training on Liability Protections. It is provided for educational purposes only and is not to be construed as legal advice.