



2011

LIABILTY ISSUES IN EMERGENCY MANAGEMENT FOR NORTH CAROLINA EMERGENCY MANAGERS



NC Division of
Emergency
Management

UNC School of
Government

Acknowledgements

This guide was developed collaboratively by the North Carolina Division of Emergency Management, the North Carolina Emergency Management Association, and the UNC-Chapel Hill School of Government. The authors wish to thank Ms. Kandace Davis, UNC School of Law JD 2012, and Mr. Jake Pflapsen, UNC School of Government MPA 2012, for their assistance in research, editing, and authorship of various sections of this guide. The authors also wish to thank the following for their thoughtful contributions:

Sharon Scudder
NC Association of County Commissioners

Bill Gentry
UNC-CH Gillings School of Global Public Health

Sandy Sanderson
Dare County Emergency Management

Mike Patterson
The Salvation Army – North & South Carolina

Authors:
Derrick Remer
North Carolina Division of Emergency Management

Norma Houston
UNC School of Government

Purpose of this Guide

This guide accompanies the North Carolina Emergency Management Certification Program Course *Liability Issues in Emergency Management* (G-305.11). The certification program is authorized pursuant to Article 5 of Chapter 166A of the North Carolina General Statutes. North Carolina emergency managers participate in the certification program on a voluntary basis. This guide is not intended to serve as a definitive authority on liability issues and should not be relied on exclusively for legal advice. *Emergency managers should always consult with their jurisdiction's legal counsel for legal advice on specific issues.*

Table of Contents

| | |
|--|-----------|
| Section I. Introduction | 1 |
| Section II. General Overview | 3 |
| Key Concepts..... | 3 |
| What is Liability? | 3 |
| How Does Someone Become Liable? | 4 |
| Section III. Sources of Legal Rights: Constitutions & Statues | 7 |
| Key Concepts..... | 7 |
| Constitutional Rights | 7 |
| Freedom of Speech and Political Affiliation | 8 |
| Due Process..... | 8 |
| Freedom from Unreasonable Searches and Seizures | 9 |
| Cruel and Unusual Punishment..... | 9 |
| Statutes..... | 9 |
| Federal Statutes..... | 9 |
| State Statutes..... | 10 |
| Section IV. Sources of Legal Rights: Common Law Liability | 11 |
| Key Concepts..... | 11 |
| Intentional Torts..... | 12 |
| Battery | 12 |
| Assault..... | 13 |
| False Imprisonment..... | 13 |
| Negligence | 14 |
| Strict Liability | 15 |
| Negligence – Governmental Duty Issues | 15 |
| Public Duty Doctrine | 15 |
| Negligent Entrustment..... | 16 |
| Negligent Employment and Retention | 17 |
| Section V. Defenses Against Liability | 18 |
| Key Concepts..... | 18 |
| General Tort Defenses – Intentional Torts | 18 |
| Consent..... | 19 |
| Self-defense and Defense of Others | 19 |
| Statutes of Limitations..... | 19 |
| General Tort Defenses – Negligence | 20 |
| Contributory Negligence..... | 20 |
| Assumption of the risk..... | 20 |
| Statutes of limitations | 21 |
| Governmental Liability Defenses | 21 |
| Defenses Against Official Capacity Actions..... | 21 |

| | |
|--|-----------|
| Defenses Against Individual Capacity Actions | 25 |
| Section VI. Special Liability Protections in North Carolina: Statutory Immunity for Emergency Management..... | 29 |
| Key Concepts..... | 29 |
| NC Statutory Immunity for Emergency Management..... | 30 |
| What Is Covered? | 30 |
| What Is NOT Covered? | 32 |
| What Does The Immunity Statute Protect From? | 33 |
| Who Is Covered (General Coverage)? | 34 |
| Who Is Covered (“Emergency Management Worker”)? | 35 |
| When are “Emergency Management Workers” Covered? | 37 |
| Special Conditions for Firms and Corporations..... | 38 |
| Waiver of Licensure Requirements | 40 |
| Continued Entitlement to Certain Benefits | 41 |
| Immunity for Private Property Used During Disasters | 41 |
| Liability of Persons Who Ignore Disaster Warnings..... | 42 |
| Section VII. Volunteers..... | 44 |
| Key Concepts..... | 44 |
| Federal Law – Volunteer Protection Act (VPA) | 45 |
| State Law – Qualified Liability Immunity for Volunteers | 46 |
| Other Related Immunity Statutes | 48 |
| Good Samaritan Law | 48 |
| First Aid and Emergency Medical Treatment..... | 48 |
| Managing Volunteers | 49 |
| Know “Who” | 50 |
| Know “How” | 52 |
| Section VIII. Legal “Mitigation”: Protecting Against Liability | 54 |
| Insurance..... | 54 |
| Documentation..... | 55 |
| Training Standards | 55 |
| Valid Contracts | 56 |
| Legal Mitigation Checklist..... | 58 |
| Section IX. Conclusion | 59 |
| Appendix A: Selected NC Statutes..... | 60 |
| “What Do You Think” Citations | 64 |

Section I. Introduction

Hurricanes, flooding, tornadoes, and mudslides are some of the many hazards an emergency manager in the State of North Carolina may face on a yearly basis. In fact, the State of North Carolina has so many emergencies that our emergency managers have become quite proficient at preparing for, responding to, and recovering from these disasters. Our state has Urban Search and Rescue Teams, Public Assistance Teams, National Guard Force Packages, and multiple other resources that can be made available to local emergency managers in a matter of hours. This system works well in helping the citizens of the state.

With all the planning and preparing for disasters of consequence, many emergency managers do not have the time to think about the legal consequences of their actions, especially in the immediate aftermath of a disaster event. The law can be quite complex, and with the constant updates to legislation, changes in policies and procedures, and the ever expanding definition of who a “first responder” is, it is apparent why many emergency managers have asked for guidance on potential legal risks and liabilities.

Because the area of liability law is not only complex, but also often very fact-specific, this guide cannot address every possible question or scenario of potential liability that may arise. Instead, this guide gives an overview of the liability and immunity laws that apply to emergency management in North Carolina, and provides guidance on where answers to specific questions can be found.

It is important that local emergency managers and first responders seek the advice of their legal counsel on potential liability issues. While this guide provides a broad overview of the general areas of liability law, the answers to specific questions oftentimes turn on the facts of a particular situation or scenario. Local emergency

managers and first responders should not rely solely on the information contained in this guide for definitive legal guidance, but instead should consult with their own legal counsel to ensure they are in full compliance with the law and can take appropriate steps to mitigate against potential liability for themselves and their unit of government.

Section II. General Overview

Key Concepts

- ✓ Liability is the legal obligation to compensate a person who has been injured or suffered harm as a result of another person's wrongful actions or failure to act when legally required to do so.
- ✓ Public officials can face liability under federal and state constitutions, federal and state statutes, and "common law" (law created by judicial opinions).
- ✓ The plaintiff is the person who makes a claim that his rights have been violated and that he has suffered harm as a result.
- ✓ The person or group of people against whom the plaintiff makes his claims is the defendant(s).
- ✓ Law suits can be brought against public officials in their governmental (official) capacity, individual (personal) capacity, or both.
- ✓ The plaintiff can recover three types of damages: nominal, compensatory, and punitive.

Like the emergency management field, the legal field has its own terminology that can be difficult to understand. This section provides a general overview of what liability¹ is and the process through which someone can become liable.

What is Liability?

Simply put, liability is the legal obligation to compensate a person who has been injured or suffered harm as a result of another person's wrongful actions or failure to act when legally required to do so. If the wrongdoer is found to have violated the victim's legal rights and the victim suffered injury or harm as a result, the wrongdoer is "liable" to the victim and must compensate him for his injuries and losses unless the wrongdoer has a valid legal defense for his actions or is immune (shielded) from liability.

¹ For purposes of this guide, the term "liability" refers to civil liability.

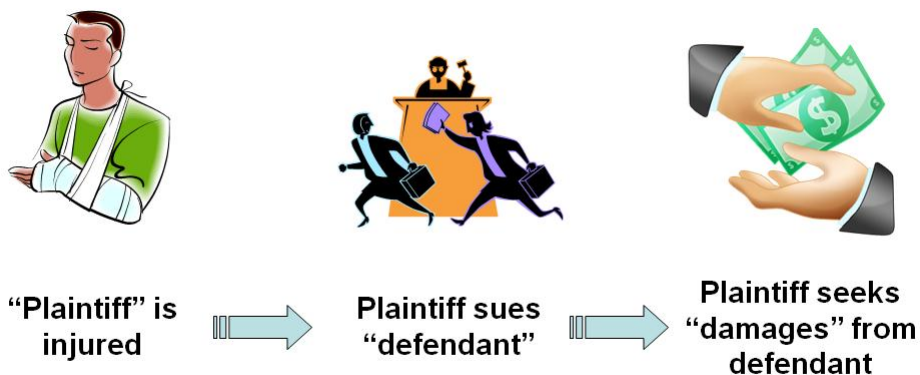
There are three main areas of the law under which a public official or employee can face liability:

- (1) federal and state constitutions
- (2) federal and state statutes (laws enacted by legislative bodies such as the U.S. Congress and the N.C. General Assembly)
- (3) the common law (commonly referred to as “tort law”)

Some situations can involve violations of both state and federal laws. While a victim can only recover (get compensated) once for the injury he has suffered, he can potentially recover under federal *and* state laws if the wrongdoer’s actions violate both. Constitutional and statute sources of liability are discussed in Section III of this guide; common law (torts) liability is discussed in Section IV.

How Does Someone Become Liable?

Whether someone is liable to another person is usually determined through **civil (non-criminal) litigation** (lawsuits or related demands for compensation such as administrative proceedings). In civil litigation, the injured person (**plaintiff**) files a law suit against the wrongdoer (**defendant**) in state or federal court seeking compensation for the injury, harm, or loss suffered (**damages**) as a result of the wrongdoer’s actions or omissions (**failure to act**).



The **plaintiff** is the person who makes a claim that his rights have been violated and that he has suffered harm as a result. A plaintiff can be an individual, a group or individuals (class actions), or entities such as corporations, businesses, or other organizations. A plaintiff can bring a claim against a single individual, any number of individuals, or entire organizations and entities. The people or groups defending themselves against the plaintiff's claims are called **defendants**.

Law suits can be brought against public official defendants in **their governmental (official) capacity, individual capacity, or both**. A plaintiff can sue a government unit itself or officers and employees in their official capacity. A suit against officers and employees in their official capacity is, in essence, a suit against the unit of government itself because a unit of government acts through its officers and employees. A suit can also be brought against individual officers and employees in their individual capacities, meaning that the plaintiff seeks to recover damages (compensation) from them personally. Cities and counties in North Carolina are authorized, although not required, to

What Do You Think?

Following the cataclysmic terrorist attacks of September 11, 2001, between 40,000 and 90,000 professional rescuers and volunteers responded to an unprecedented rescue and recovery effort at the World Trade Center site. In the immediate aftermath, many of the responders, save for those employed by public agencies and professional volunteer organizations, were ordinary citizens. Men and women from around the New York City region, and around the country, rushed to what became known as Ground Zero. Local recovery workers, primarily unionized tradesmen, gradually replaced the first responders.

Some of these workers have since died, and many have contracted serious illnesses from their time on "the pile." 600 firefighters have been forced into retirement, and a quarter of FDNY and EMS personnel have since developed lung conditions. The collapse of the Twin Towers released a cloud of fine particulate matter, cement dust, glass fibers, asbestos, lead, hydrochloric acid, PCBs, and other toxins. Underground fires at the site were not extinguished until December 2001. Officials certified that air quality in lower Manhattan was safe soon after, and pictures from the site show inconsistent respirator usage among recovery workers. The World Trade Center Medical Monitoring and Treatment Program was established the following year, and has produced significant research documenting both the high occurrence of both psychological and respiratory issues. (Colangelo, Auliff, & Siemaszko, 2006)

Who is liable for the care of these disaster workers?

provide for defense of current and former officers and employees.² North Carolina law also authorizes (but does not require) local governments to pay judgments on behalf of their employee defendants³.

When filing a suit, a plaintiff can ask for recovery of three types of damages. **Nominal damages** are awarded when there is a technical violation of the plaintiff's legal rights that does not include actual damages. **Compensatory damages** are compensation for actual losses suffered by the plaintiff and are awarded to restore the plaintiff to his pre-harm condition. Compensatory damages include compensation for direct personal injury (such as medical expenses), direct damages to or loss of property, and economic losses (such as lost wages or pain and suffering). **Punitive damages** act as punishment of the defendant and to deter the defendant and others from committing similar wrongful acts in the future. Punitive damages are difficult to win against the government and are more likely to be recovered against officers or employees in their individual capacities. In North Carolina, punitive damages are capped at \$250,000 or three times the amount of actual damages, whichever is greater, and requires a finding of fraud, malice, or willful and wanton conduct.⁴

In addition to claims for recovery of damages, a plaintiff can also ask for a **declaratory judgment** under which the court orders that the defendant either take certain actions or refrain from taking certain actions to protect the plaintiff's legal rights. A declaratory judgment may at times prevent future litigation by clearly defining each party's responsibilities.

² G.S. 160A-167; G.S. 153A-97.

³ *Id.*

⁴ G.S. 1D-15; G.S. 1D-25.

Section III. Sources of Legal Rights: Constitutions & Statues

Key Concepts

- ✓ Constitutional rights are rights that are guaranteed under the U.S Constitution. or a state constitution.
- ✓ Statutory rights are rights created by laws enacted by Congress or a state legislature (such as the North Carolina General Assembly).

In order to avoid violating an individual's legal rights (which may result in liability), it is important to first understand where these legal rights come from. This section provides a brief overview of sources of legal rights under constitutions and statutes. Section IV of this guide describes common law (torts) legal rights.

Constitutional Rights

A constitution is the basic charter of our federal and state governments. Constitutions set limits on governmental power and guarantee certain individual rights that many not be infringed upon. Violations of an individual's constitutional rights may result in liability.

A plaintiff can allege violations of both federal and state constitutional rights. Section 1983 of the Civil Rights Act of 1871⁵ authorizes a person to sue state and local governments and their officials and employees for certain violations of that person's federal constitutional rights. Under this law, a person may recover damages against the state or a local government or its governing board members, officials, and employees.

⁵ 42 U.S.C. § 1983 (1988).

Some common constitutional claims that are relevant in the context of emergency management include the rights of free speech, due process, and freedom from unreasonable searches and seizures. Each of these constitution rights is discussed below.

Freedom of Speech and Political Affiliation

The First Amendment to the U.S. Constitution protects an individual's freedom of speech. The word "speech" generally includes the right to say what you want when you want, subject to certain limitations. It also includes "unspoken" speech, such as art, music, internet communications, and clothing. Freedom of speech is one of the most fundamental rights under our federal Constitution, but it still has some important restrictions, including libel, slander, obscenity, and criminal conduct such as bribery, perjury, or incitement to riot.

Due Process

The Fourteenth Amendment to the U.S. Constitution guarantees the right of due process. Due process is the set of procedures that the government must follow before depriving someone of their life, liberty, or property. What constitutes "life, liberty or property" is fairly broad. For example, generally speaking, the government cannot take private property without just compensation. A condemnation action by a city or county requires a number of procedural protections for the property owner that must be satisfied before the government can take the person's property. Normally, except in the case of emergencies, procedural due process generally requires an opportunity for a hearing to be held before the government can take away a constitutionally protected interest.⁶

⁶ Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 7-5 (Chapel Hill: Institute of Government: The University of North Carolina at Chapel Hill, 1999).

Freedom from Unreasonable Searches and Seizures

The Fourth Amendment to the U.S. Constitution grants the right of freedom from unreasonable searches and seizures. Search and seizure is the process by which a law enforcement officer or any other authority figure who suspects that a crime has been committed conducts a search of a person's property and confiscates any relevant evidence pertaining to the crime that might have been committed. An example of a due process violation is a police officer arresting an individual without probable cause. Since an arrest is considered to be one type of seizure, the person arrested could claim that his Fourth Amendment rights were violated. Similarly, if an officer conducts a search of a person's property without a warrant absent legally recognized justifications, the officer may have violated that person's Fourth Amendment rights.

Cruel and Unusual Punishment

The Eighth Amendment prohibits the government from imposing excessive bail, excessive fines, and cruel and unusual punishment. How prisoners are treated in isolation and jails is a common basis for Eighth Amendment claims.

Statutes

A statute is a formal enactment of the legislative branch of government. Federal statutes are acts of Congress, and North Carolina state statutes are acts of the North Carolina General Assembly - both can give rise to liability. Most commonly, a statute will prohibit a specific action, impose a specific duty or obligation, or declare public policy that, if violated, may result in liability.

Federal Statutes

Section 1983 of the Civil Rights Act of 1871, which was discussed above, also authorizes a party to sue state and local governments and their officials and employees for violations of rights created by other statutes in addition to those rights established by constitutions. For example, the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. Plaintiffs in one case, who

included disabled Tennesseans, successfully sued over their lack of access to the upper levels of state courthouses arguing that the state was denying them access to public services because of their disabilities in violation of the ADA.⁷

State Statutes

Statutes enacted by the North Carolina General Assembly can create liability if the statute imposes a specific duty or obligation on a unit of government or specific governmental officers or employees. For example, North Carolina's open meetings and public records laws require much of the business of state and local government to be conducted openly and available to the public. Under the state's open meetings laws, public bodies, such as Boards of County Commissioners and City Councils, must conduct the public's business in open session unless they are specifically authorized to go into closed session.⁸ Under the state's public records laws, most government documents must be made available to the public.⁹ Failing to comply with these legal mandates can result in liability for the government.

⁷ *Tennessee v. Lane*, 541 U.S. 509 (2004).

⁸ G.S. Chapter 143, Article 33C.

⁹ G.S. Chapter 132.

Section IV. Sources of Legal Rights: Common Law Liability

Key Concepts

- ✓ A tort is a civil (not criminal) wrong for which a plaintiff files a lawsuit seeking compensation for injuries or damages suffered as a result of another person's wrongful acts or omissions (failure to act).
- ✓ An intentional tort is a wrongful act that was committed intentionally or willfully and results in injury or harm to the victim.
- ✓ Negligence is the failure to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions and that results in injury or harm to the victim.
- ✓ Strict liability is imposed even when there is no intentional tort or act of negligence; merely performing the act that results in injury or harm to the victim will result in liability.
- ✓ The public duty doctrine is a legal theory under which the government holds a general duty to the public at large, not to individual citizens; while applicable in local government law enforcement cases, it is not clear whether the courts would apply this doctrine in emergency management situations.
- ✓ Liability can arise in situations involving negligent hiring, negligent retention, and negligent entrustment.

Common law is the law that comes from judicial decisions – “case law” and “precedent.” Tort law is the main common law area of concern of emergency managers. A **tort** is a civil (not criminal) wrong which is recognized as grounds for a lawsuit seeking compensation for injury or damages resulting from another person's wrongful acts or omissions (failure to act).¹⁰ There are three basic types of common law torts: intentional torts, negligence, and strict liability.

¹⁰ Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 1-3.

Intentional Torts

An intentional tort is a wrongful act that is committed intentionally and results in injury or harm to the victim. The wrongdoer can be held liable even if he did not intend to cause injury or harm, and even if he honestly believed that his actions would not result in harm. All that is required for intentional tort liability is that the person intended to commit the act – lack of intent to do harm or ignorance of the law are not defenses. In addition, the legal doctrine of “transferred intent” may apply. Under this doctrine, the wrongdoer’s intent to commit an act against one person is transferred to any other person who is harmed by the wrongdoer’s action regardless of the wrongdoer’s intent. For example, if Bob intended to hit John but accidentally struck Doug instead, Bob could be liable to Doug for his injuries even though Bob never intended to hit Doug.

There are three main kinds of intentional torts that may be particularly relevant to emergency managers and other government officials: battery, assault and false imprisonment.

Battery

Battery is intentionally inflicting harmful or offensive contact against another person. If a security guard, for example, intentionally slams an individual up against a wall without just cause, he may be held liable for battery. Whether the guard intended to cause harm to the individual is irrelevant.

Battery clearly includes inflicting harm that actually results in some type of bodily pain or injury. Battery also includes contact that is merely “offensive,” even if it doesn’t result in physical injury. Contact may be offensive when it is damaging to a “reasonable sense of dignity.” In determining what constitutes offensive contact, the standard isn’t whether the person who was harmed was offended, but rather whether an “ordinary person not unduly sensitive as to his dignity” would have

been offended.¹¹ If, for example, George gently pushes past Bob in a crowd, it is unlikely that George would be found to have committed battery. Even if Bob claimed to be offended by the contact, an ordinary person most likely would not have been offended, so George would not be liable for battery. Battery can also include contact made with an object that a person is holding (such as an umbrella or purse), the person's clothing, or anything else that is so closely identified with the person's body that contact with it would be as offensive as contact with the person's actual body.

Assault

Assault is intentionally causing apprehension of harmful or offensive contact – in other words, a fear of violence. Even if the threatened contact never occurs (if it did, that contact would be a battery), an assault may still be committed. Some type of overt act (such as shaking a fist angrily) is usually required to constitute an assault – words alone generally are not sufficient. Words can also negate a claim of an assault. For example, John looks angrily at Bill and says, “If I weren't such a nice guy, I'd hit you.” In this case, John would not likely be found liable for assault because his words made it clear that he wasn't actually going to cause harm to Bill even if his actions suggested it. Furthermore, threats of future harm cannot constitute assault; the fear of harm must be imminent.

False Imprisonment

False imprisonment is the illegal restraint of a person against that person's will. If the restraint is legal, it is not false imprisonment. Restraints necessary to protect public health, safety, and welfare are generally considered legal. False imprisonment can be either physical restraint or verbal restraint, and must involve confinement within a fixed boundary (not just a limitation on freedom of movement or restriction from entering a certain area). Let's say for example that a portion of a public road has been reserved for paying spectators of a boat race. Paul wants to

¹¹ Restatement (Second) of Torts § 19C (1965).

enter the restricted area, but is prevented from doing so by a police officer. Although Paul was confined in the sense that he was not permitted to go in the spectating area, since he is still free to travel along the other direction of the road, he has not been subjected to false imprisonment. In addition, false imprisonment will not likely apply if there is a reasonable means of escape that the individual is aware of.

Negligence

Unlike intentional torts, the tort of negligence is the failure to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions.¹² The reasonableness of the defendant's conduct is viewed under an objective standard: would a "reasonably prudent person" in that position have done as the defendant did?

There are four essential elements in a cause of action for negligence: duty, breach, causation, and actual damage. For the defendant to be liable, the plaintiff must prove all four elements:

- (1) **Duty** refers to a legal duty that requires the defendant to conduct himself according to certain standards to avoid unreasonable risks to others. Everyone owes a duty of reasonable care to others, but a heightened or more specific duty can be created by common law, statute, or, in some instances, by the status of the victim.
- (2) **Breach** is the failure of the defendant to conform his conduct (either by acts or omissions) to the standards of a particular duty. Breach can generally be thought of as the conduct that constitutes the "carelessness" resulting in injury to another person.
- (3) **Causation** is the factual or legal connection between the breach of a duty and injury to the plaintiff. The plaintiff must show that there is a sufficiently close causal relationship between the defendant's act of negligence and the harm that the plaintiff suffered.

¹² *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992).

- (4) **Damages** are the actual harm or loss suffered by the plaintiff. The plaintiff must have suffered **actual damages** – if the defendant commits an act of negligence that results in no injury, there will be no liability.

Strict Liability

There are some situations where liability is imposed even where there is no intentional act or act of negligence. This is referred to as strict liability. Under strict liability, the law imposes liability merely by performing a certain act, regardless of the intent of the person committing the act or the standard of care being exercised. An example of strict liability in North Carolina civil law would be injury or damage resulting from the use of explosives for blasting, which is deemed an “ultrahazardous activity” for which strict liability is imposed.

Negligence – Governmental Duty Issues

Remember, duty is the first of the four essential elements in proving negligence. Duty can arise from a number different sources, including common law and statutes, accepted standards of conduct of a particular profession or occupation requiring specialized skills and training, or a special relationship between parties, such as a jailor and an inmate. Some particular issues involving duty are important for government officials and employees to be aware of.

Public Duty Doctrine

Although government officials seek to serve all citizens, there are some situations in which units of government have no general duty to protect individual citizens from harm caused by third parties because the duty is owed to the public at large, not to a particular citizen. This is called the public duty doctrine. To overcome the public duty doctrine (defenses against liability are discussed in Section V), a plaintiff must prove either that the government, by its actions, had created a “special duty” toward him or that the government had a “special relationship” with him. The North Carolina Supreme Court has generally limited the application of the public duty doctrine for *local* governments to situations involving law enforcement departments

when exercising their general duty to protect the public.¹³ However, North Carolina courts have applied the public duty doctrine to relieve state forest rangers from liability for allegedly allowing a forest fire to smolder, which reduced highway visibility and resulted in a fatal multi-car accident.¹⁴ It is somewhat unclear whether the public duty doctrine would be as successful as a defense against a claim of negligence in the context of emergency management outside of these activities, or whether the court would further extend the doctrine to local government activities beyond law enforcement.

Negligent Entrustment

Liability for negligent entrustment may occur where an injury results from an individual (or other entity) entrusting property (such as a motor vehicle or piece of equipment) to a person (entrustee) who the individual knew or should have known was likely to use the property in a manner that involved an unreasonable risk of harm to others. Oftentimes, negligent entrustment occurs where the trustee had a reputation or record that showed his propensity to be dangerous when possessing the property. If the claim is brought against an employer, the employer will be held liable if the trustee's record was known to the employer or

What Do You Think?

In April 1992, a contractor for the US Postal Service under the influence of alcohol and drugs ran a stoplight in a bulk mail carrier, colliding with a vehicle driven by the Hines family. The wife and daughter were killed, and two other family members sustained severe injuries. The US Postal Service commonly hires contractors for the delivery of mail, and requires all transport drivers be screened. Despite a history of alcohol-related reckless driving, the driver was given a temporary permit and never underwent a background check. The Postal Service is responsible for the acts of its subcontractors, and the courts ultimately held that the driver, William Smith, had been negligently entrusted with the vehicle. (Hines v. United States)

What procedures does your organization have in place to ensure that all employees maintain acceptable standards?

¹³ *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000); see also *Scott v. City of Charlotte*, 691 S.E.2d 747(2010).

¹⁴ *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006).

would have been easily discoverable by that employer had a diligent search been conducted. For example, if a bus company hires a driver who has a record of reckless driving, which the company could have learned of through a search of publicly available records, the company will be liable for the negligent entrustment of the bus to that driver if the driver causes an accident.

Negligent Employment and Retention

An employer can be liable for unreasonably exposing individuals to a risk of injury or harm by hiring or retaining an unfit employee. There are four basic claims in negligent employment: negligent hiring, negligent retention, negligent supervision and negligent training. Similar to negligent entrustment, negligent hiring may be found where the employee had a reputation or record that showed his propensity to misuse the kind of authority given by the employer. In such a case, the plaintiff must also prove that this record would have been easily discoverable if the employer had exercised his due diligence. Negligent retention occurs when the employer or supervisor fails to remove an employee from a position of authority or responsibility after it becomes apparent that the employee is in fact misusing that authority or responsibility in a way that poses a danger to others. Negligent supervision and negligent training are closely related, as these occur where an employer fails to reasonably monitor or control the actions of an employee, or fails to ensure proper training of the employee. In all of these situations, the plaintiff must have suffered harm or injury by the unfit employee for the employer to be held liable.

Section V. Defenses Against Liability

Key Concepts

- ✓ There are three general defenses against intentional torts: consent, self-defense and defense of others, and statutes of limitations.
- ✓ There are three general defenses against negligence: contributory negligence, assumption of risk, and statutes of limitations.
- ✓ There are four main categories of defenses against official capacity law suits: not an employee, not within the scope of employment, sovereign or governmental immunity, and agent of the state (if the suit is against local government).
- ✓ There are two main categories of defenses against individual capacity law suits: absolute immunity and qualified immunity.

Just because someone has filed a law suit against you doesn't automatically mean you are liable. You might have defenses that you would argue (or that your attorney would argue on your behalf) do not make you liable for the plaintiff's injuries. This section discusses the main defenses against liability and the main theories of non-liability available for governmental entities, public officials, and public employees that are applicable in the context of emergency management.

As discussed in Section IV, there are two main categories of torts: intentional torts and negligence. The defenses discussed below would be put forward by an individual who has been alleged to have committed either an intentional tort or negligence. Also discussed in this section are special liability defenses available for government officials and employees.

General Tort Defenses - Intentional Torts

There are three general defenses against intentional torts: (1) consent; (2) self-defense or defense of others; and (3) statutes of limitations.

Consent

Consent is a complete defense against almost every intentional tort where it can be proved that the injured person gave competent and effective consent to the acts that caused him injury or harm. If the injured person consented to the act that resulted in harm to him, the person who committed the act generally will be relieved of liability. The consent defense is not absolute, however. If the injured person was not capable of giving competent and effective consent (such as being mentally incompetent or intoxicated), or the injured person didn't understand the nature, extent, and probable consequences of the act he consented to, or the injured person was coerced or threatened into giving consent, then this defense is not available. In addition, under North Carolina law, effective consent cannot be given to illegal acts or unlawful conduct.¹⁵

Self-defense and Defense of Others

This defense can relieve a defendant of liability for an intentional tort liability where the person committing the harmful act believed there was a threat of bodily harm, offensive contact, or confinement of himself or others. The defendant must show that it was reasonable for him to believe the threat of harm existed. This defense is not available where the person committing the intentional tort instigated the altercation, the threat of harm is no longer imminent, or if the force used was beyond that which was necessary to protect against the harm.¹⁶

Statutes of Limitations

Statutes of limitations are specific deadlines by which a lawsuit must be filed. If the injured person does not file his law suit within the applicable time frame, the plaintiff's action will be barred. The statutes of limitation for most intentional torts are either one, two, or three years from the date of the occurrence of the action that

¹⁵ Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 1-22 (Chapel Hill: Institute of Government: The University of North Carolina at Chapel Hill, 1999).

¹⁶ *Id.*, 1-23.

caused the harm.¹⁷

General Tort Defenses – Negligence

There are three general defenses against negligence: (1) contributory negligence; (2) assumption of risk; and (3) statutes of limitations.

Contributory Negligence

Contributory negligence is the legal theory in North Carolina that precludes an injured person from recovering from the individual who caused the injury if the injured person committed any acts or omissions that contributed to the cause of his injury. Unlike most states, where the victim’s “contribution” to his own injury simply reduces the amount of damages he can recover by the proportion of his own “contribution” to his injuries, in North Carolina, contributory negligence is a complete defense to negligence and acts as a complete bar to recovery by the plaintiff.

Assumption of the risk

Assumption of the risk acts as a defense to negligence where the victim knew of the risk and knowingly placed himself in a

What Do You Think?

The domestic disturbance call was escalating. Officer Tracey Fox had already radioed for backup to the location, the site of a previous domestic incident involving weapons. She radioed again, urgently, her stress clearly audible. Officer Joseph Kelly was already responding, having activated his blue lights and sirens. As Officer Kelly sped towards the scene, he went briefly airborne across railroad tracks, and saw a woman crossing the street. Travelling at approximately 60 mph, Officer Kelly swerved to the right to avoid the woman, who turned and ran back towards the curb, into the path of the oncoming police cruiser. The impact threw Ms. Jones 76 feet, causing severe injuries.

The victim sued the City of Durham for gross negligence in the September 2000 incident, and her case eventually reached the North Carolina Supreme Court. The court sided with the City, resulting in several strongly worded dissenting opinions. As LexisNexis noted in commentary regarding a similar case, *Charles Holloway v. N.C. Department of Crime Control and Public Safety*, “North Carolina’s standard of gross negligence, with regard to police pursuits, is very high and is rarely met.” (*Jones v. City of Durham*)

Has your local counsel recently reviewed your agency’s policies and procedures relating to vehicle operations?

¹⁷ G.S. 1-52 (3-year statute of limitations for liability created by state or federal law, assault, battery, false imprisonment); G.S. 1-53 (2-year statute of limitation for causes relating to wrongful death); G.S. 1-54 (1-year statute of limitation for libel and slander).

position to be injured. This defense is also available where there is a contractual relationship between the injured person and the individual committing the acts or omissions resulting in harm. An example of this kind of contractual relationship would be signing a release when going sky-diving or bungee-jumping.

Statutes of limitations

Statutes of limitations apply to negligence claims just as they do to claims of intentional torts. The statute of limitations for negligence claims in North Carolina is three years after “the harm becomes apparent or ought reasonably to have become apparent to the claimant [the plaintiff], whichever event first occurs.”¹⁸

Governmental Liability Defenses

The government and its officials and employees enjoy special liability defenses that are available to them under certain circumstances. In North Carolina, state law confers specific immunity from liability in the context of emergency management – North Carolina’s emergency management liability immunity statutes are discussed in Section VI. Broader liability defenses available to governmental units and their officials and employees are discussed below.

Defenses Against Official Capacity Actions

As discussed in Section II, law suits brought against public officials and employees in their official capacity are, in essence, law suits brought against the unit of government itself on whose behalf the official or employee took the action that gave rise to the law suit. Local governments can be required to pay damages for the injuries caused by the wrongful acts or omissions of its officials and employees under the legal doctrine of *respondeat superior* (which literally means “let the master answer”).¹⁹

¹⁸ G.S. 1-52(16).

¹⁹ Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 3-3. See also North Carolina Law of Torts § 19.40, p.13. There are some arguments that the doctrine of *respondeat superior* does not apply to governmental entities; emergency managers are encouraged to discuss specific situations with their local attorney.

For the unit of government to be liable, the plaintiff must prove that:

1. The person committing the wrongful acts or omissions was an employee or elected official of that unit of government at the time the incident occurred;
2. The acts or omissions were expressly authorized; and
3. The acts or omissions were within the scope of employment of the employee or the official duties of the elected official, *or* the unit of government authorized or approved the acts or omissions after the incident occurred.

The government will not be liable if the plaintiff cannot prove each of these elements.

Defenses to official capacity law suits generally fall into four main categories:

- the person who committed the acts or omissions was **not an employee** of the unit of government;
- the acts or omissions were **not within the scope** of the employee's employment (job duties);
- the unit of government is shielded from liability by **sovereign or governmental immunity** even if the person who committed the wrongful acts or omissions was an employee or official of the unit of government and was acting within the scope of his employment; or
- in the case of local governments, the employee or official was acting as an **agent of the state** rather than the local government.²⁰

Generally, if the person is **not an employee, official, or agent (such as a volunteer)** of the unit of government, that governmental unit will not be liable for that person's negligent acts or omissions. This is particularly the case with **independent contractors**. While there is no clear definition of an independent contractor under common law, in the context of government-contractor relationships, most independent contractors include individuals, companies and firms that engage in an

²⁰ It is unlikely that a local government emergency management coordinator or other county employee would be considered an agent of the state given the clear authority vested in counties and municipalities for emergency management functions. However, this is a question that has yet to be addressed by North Carolina's courts.

independent business or occupation, are doing a specified piece of work at a fixed price or a lump sum, are not in the regular employ of the unit of government, and are not provided employment benefits from the unit of government (such as retirement and health insurance).²¹ In most situations, the government will not be liable for the acts or omissions of independent contractors working for it. To ensure the government's protection from liability for the acts or omissions of its independent contractors, the unit of government will often include in its contract or agreement with the independent contractor provisions under which the independent contractor indemnifies and holds harmless the government from the acts or omissions of the contractor's workers, officers, and agents.

There are some instances, however, where the unit of government may still be liable for the acts or omissions of its independent contractors. A unit of government may be liable if the activity being performed is "inherently dangerous,"²² if the duty is "nondelegable," or if the unit of government was negligent in its hiring or retention of the contractor. If this situation occurs, having strong indemnification and hold harmless provisions in the government's contract with the independent contractor may still protect the unit of government from liability costs in that it can recover those costs from the contractor.

The *scope of employment* defense applies in situations where a government employee's wrongful acts or omissions do not further a legitimate government interest or are not related to the performance of the employee's job duties (either in writing or in practice). If the person's conduct is consistent with his job duties or furthers the government's interest, that conduct will fall within the scope of the person's employment. However, if the acts or omissions were done purely for personal reasons or are not related to the person's job duties, the government could be relieved of liability and the employee might be held liable in his individual capacity. Most intentional torts tend to fall outside the scope of employment unless

²¹ Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 3-6.

²² North Carolina Law of Torts § 19.40, p. 13.

the wrongful act is proven to further the government's business.

What constitutes the employee's job duties? Certainly those duties that are listed in the employee's job description or required by statute or other laws would be included. However, duties that are not formally contained in a job description may still be included if the duties are part of the customary way in which the employee performs his job. In addition, an employee's actions can be within the scope of his employment if the unit of government expressly authorized the specific conduct, or approved of the conduct after the fact either explicitly or implicitly (for example, a supervisor being aware of an employee's wrongful conduct and not taking any action to correct it, or allowing a certain practice among employees such as using government vehicles for personal errands).

Even if the person committing the wrongful act is an employee of the unit of government and the wrongful act was within the scope of his employment, the government may still be shielded from liability under either *sovereign immunity* (for the state) or *governmental immunity* (for local governments).

Sovereign immunity (which literally means "the king can do no wrong") broadly protects the State of North Carolina and its officials and employees from liability except to the extent that the state has waived its sovereign immunity. North Carolina has partially waived its sovereign immunity for negligence tort claims (but not intentional torts) under the State Tort Claims Act, which allows an individual harmed by the negligence of a state employee or official acting within the scope of a state agency or office to recover compensatory damages up to \$1,000,000.²³ However, the North Carolina Court of Appeals has held that the state has maintained its sovereign immunity with respect to emergency management operations under the state's Emergency Management Act (see Section VI for more information on immunity for emergency management functions and personnel under Chapter

²³ Article 31, Chapter 143; G.S. 143-299.2.

166A).²⁴

Governmental immunity has been granted by the General Assembly to units of local government in this state. Similar to, but not quite as broad as sovereign immunity, governmental immunity shields local governments from liability for negligence in performing governmental activities unless the local government has waived its immunity by purchasing or obtaining liability insurance. If the local government has purchased liability insurance, it will be liable for damages only up to the amount of its insurance coverage.²⁵ However, the limit would apply only for those governmental functions for which it would have otherwise had governmental immunity. While governmental immunity shields local governments from tort liability in connection with performing governmental activities, it does not provide immunity for “proprietary” activities or functions. Governmental actions generally are those that promote the public health, safety, and welfare (such as law enforcement and jails), as opposed to proprietary actions that in some way directly benefits the local government itself (such as operating a water distribution system for profit). While the distinction between “governmental” and “proprietary” functions can be complex and not always clear,²⁶ it is likely that most emergency management functions would be considered “governmental” and thus come under the shield of governmental immunity. Because governmental immunity shields only the local government itself from liability, it is only available as a defense in official capacity lawsuits and is not available as a defense for a person who has been sued in his individual capacity.

Defenses Against Individual Capacity Actions

Unlike official capacity actions, individual capacity law suits are brought against the

²⁴ *Gregory v. Penland*, 179 N.C. App. 505, 634 S.E.2d 625 (2006). It is unclear whether this decision applies in the context of governmental immunity for local governments.

²⁵ G.S. 153A-435 (counties) and G.S. 160A-485 (cities). Similarly, if the local government’s insurance policy has a deductible or does not cover claims below a certain amount, the local government retains governmental immunity for damages that fall within those amounts.

²⁶ See, Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties*, 3-8 through 3-18.

individual government employee or official personally, not against the government itself. If an employee or official is found liable in his individual capacity, he will be personally liable for damages. The employee or official is not, however, defenseless against individual capacity law suits. In addition to the general tort defenses discussed above, there are some limited immunities available for public officials in certain situations depending on the nature of the actions they have taken. These immunities fall into two main categories: absolute immunity and qualified immunity.

Absolute immunity is just that – absolute. When it applies, it applies completely, even if the conduct of the public official is corrupt, malicious, or intended to do injury, so long as the conduct is not illegal.²⁷ Absolute immunity only applies, however, in two limited contexts. The first is legislative functions, where local officials are acting in a legislative capacity (performing quasi-legislative functions such as adopting a zoning ordinance). The second is when local officials are performing judicial functions, such as judges and prosecutors, or local quasi-judicial boards such as the planning board or the board of adjustment. Outside of these limited contexts, absolute immunity is not available as a defense to individual capacity law suits.

Qualified immunity (“public official immunity”) is also available for public officials in individual capacity law suits. While not absolute, it does provide some immunity from negligence for public officials when they are exercising discretion in performing their public duties so long as they did not act with malice, for corrupt reasons, or outside the scope of their official duties. This defense is only available for public officers, not public employees. Public officers are primarily those who hold a position created by statute (other factors the courts have recognized include whether the person took an oath office, performed legally imposed duties, and exercised a certain amount of discretion). The courts have recognized a number of

²⁷ *Jacobs v. Sherard*, 36 N.C. App. 60, 243 S.E.2d 184, *rev. den’d*, 295 N.C. 466, 246 S.E.2d 12 (1978).

local officials as being public officers, including county directors of social services, county health directors, and chief building inspectors.²⁸ Although the question of whether a county or municipal emergency management coordinator is a public officer has never been decided by our state's courts, it is likely that local government emergency management coordinators would be considered public officers because they serve in a position created by statute, take an oath of office, and exercise some discretion in the performance of their duties.²⁹

Unlike public officers, public employees are not entitled to public official immunity. Public employees are those who act mostly at the direction of others and whose job duties are more administrative or ministerial than discretionary. Personnel such as police department radio operators, social workers, teachers and public works maintenance employees have been recognized by our state's courts as public employees, not public officers.³⁰ Because public official immunity is not available for most local government employees, the primary defenses available to them if they are sued in their individual capacity are the general tort defenses discussed at the beginning of this section.

However, keep in mind the difference between "official capacity" and "individual capacity." If the employee is acting with the scope of his employment (his actions are part of his job duties), or if the employee's actions were specifically authorized by his employer or approved by his employer after the fact (either explicitly or implicitly), he is not likely to be found liable in his individual capacity. Employees, as well as public officials, are most at risk of personal liability if they act outside the scope of their employment, including engaging in acts or omissions that constitute malice, willful or wanton conduct, or gross negligence.

²⁸ Anita R. Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 12-13, Article 12 in David Lawrence (ed.) *County and Municipal Government in North Carolina* (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 2007).

²⁹ G.S. 166A-7; G.S. 166A-13.

³⁰ Brown-Graham, "Civil Liability of the Local Government and Its Officials and Employees," 13-14.

Fortunately, the General Assembly has granted emergency management personnel qualified immunity under the Emergency Management Act.³¹ North Carolina's emergency management immunity statute is fully discussed in Section VI. Statutory qualified immunity is also available for other first responders such as police officers³² and firefighters.³³

³¹ G.S. 166A-14.

³² G.S. 122C-301.

³³ G.S. 58-82-5.

Section VI. Special Liability Protections in North Carolina: Statutory Immunity for Emergency Management

Key Concepts

- ✓ North Carolina statutes grant broad immunity from liability for emergency management workers when performing emergency management functions.
- ✓ Emergency management functions include the “never-ending cycle” of emergency management (planning, response, recovery, and mitigation).
- ✓ Emergency management workers include paid employees and volunteers who are working under the direction and control of a unit of government.
- ✓ North Carolina’s emergency management immunity statute does not protect against willful misconduct, gross negligence, or bad faith.
- ✓ Persons who ignore disaster warnings can be liable for the costs of recovery efforts undertaken on their behalf.

Recognizing the critical importance that emergency management plays in protecting the public health, safety, and welfare, and the need to protect emergency management workers from undue liability concerns, the North Carolina General Assembly enacted statutes granting special qualified immunity for emergency management personnel and volunteers. This section provides a general overview of North Carolina’s statutory immunity provisions: when they do – and do not – apply, and who they do – and do not – protect.

NC Statutory Immunity for Emergency Management

Broad immunity is granted for emergency management functions under North Carolina law.³⁴

Generally speaking, the North Carolina Emergency Management Act exempts from liability the state, any political subdivision of the state, and any emergency management worker who is, in good faith, performing emergency management functions.

However, this grant of immunity is not absolute. Harm that results from willful conduct, gross negligence, or bad faith is not covered under this immunity protect. To avoid the misperception that anyone or any kind of conduct is protected under this immunity provision, emergency management

coordinators should become familiar with the law's general provisions and consult with their local attorneys regarding specific questions and potential scenarios.

What Is Covered?

What kinds of activities (acts or omissions) are covered? The emergency management immunity statute generally extends immunity protection to “all functions and all other activities relating to emergency management.”³⁵ This includes functions carried out under the North Carolina Emergency Management Act (Chapter 166A) as well as any other provisions of the North Carolina General Statutes, such as Article 36A of Chapter 14 (which grants some of the direct authority for counties and municipalities in times of disaster).

The definition of “emergency management” under North Carolina law is

What Do You Think?

You impose emergency protective measures prior to the issuance of a State of Emergency Declaration. Are you still covered under the North Carolina emergency management statutory immunity?

YES!

Protection under this statute applies to all emergency management functions and is not dependent on a state of emergency declaration being in effect.

³⁴ G.S. 166A-14.

³⁵ G.S. 166A-14(a).

Those measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effect of any type disaster, which includes the never-ending preparedness cycle of planning, prevention, mitigation, warning, movement, shelter, emergency assistance, and recovery.³⁶

This definition broadly covers emergency management functions from planning to mitigation to response to recovery. By declaring emergency management functions as “governmental functions,” and by referencing functions carried out under both the state’s Emergency Management Act (Chapter 166A) and “elsewhere in the General Statutes,” the emergency management immunity statute generally extends liability protection in two important ways:

- First, immunity is granted for the full, “never-ending cycle” of emergency management, including planning and mitigation activities; and
- Second, immunity is granted for *any* emergency management functions and activities authorized by *any* provision of the North Carolina General Statutes, including both Chapter 166A and Article 36A of Chapter 14.

Under this broad immunity protection, all normal operations and functions of emergency management are covered, ranging from developing and adopting emergency

³⁶ G.S. 166A-4(4).

What Do You Think?

Lincoln, Nebraska is no stranger to severe weather. Hot, humid summers and bitter winters characterize life in this Great Plains city. Following a major snowstorm in March of 1998, city employees were busy clearing the streets with snow removal equipment. High winds and a dry snow combined to create localized whiteouts, as drifts developed throughout the city. While clearing one of the streets, a veteran city employee and snow blower operator collided with an oncoming vehicle head on, severely injuring the elderly couple who were driving. With visibility at zero, neither party had seen each other. The snow blower was operating against the flow of traffic, as permitted by city policy. The victims sued the city, which sought liability protection under the Nebraska Emergency Management Act. The city had conducted operations under a “snow emergency,” which allowed for, among other things, the removal of vehicles from main roads. Like North Carolina’s Emergency Management Act, Nebraska’s offers qualified immunity under its emergency management statutes. The courts found that the primary purposes of a snow emergency was to notify citizens about snow removal activities and did not constitute an emergency so as to protect the city from liability. (Stinson v. City of Lincoln)

What liability protections does North Carolina law provide in emergency situations? In non-emergency situations?

management and hazard mitigation plans to conducting training exercises to activating emergency management operations prior to a disaster event to post-event response and recovery operations. These immunity protections apply regardless of whether a state of emergency declaration is in effect, and thus are applicable not only when emergency management functions are carried out pursuant to a state of emergency declaration, but also when emergency management functions are carried out in the normal course of business.³⁷

What Is NOT Covered?

Despite the broad coverage of the state's emergency management immunity statute, it is not all-encompassing – it is “qualified” immunity, meaning that there are some instances when the immunity protection will not apply.

First, since the immunity protection extends to those functions that fall within the definition of “emergency management,” activities that are not considered “emergency management functions” are not likely covered.

What Do You Think?

It was only 9am on November 12, 2005 and the driver was already swerving across the road. Charlotte Mecklenburg Police Officer Todd Davis responded to the call from dispatch, thinking it was a bit early for yet another drunk driver. Upon making the traffic stop, Officer Davis spoke with the driver, David Scott, who had not been drinking. He had recently suffered a stroke though, and was on medication. Several other officers arrived, and they placed a call to the drivers' wife. Mrs. Scott agreed that he should not be allowed to continue to drive in his current condition, as he could barely stand without wobbling. She agreed to drive immediately from Cary to pick up her husband. One of the officers had asked Mr. Scott if he needed an ambulance. The officers left the scene, having safely parked Mr. Scott's vehicle in a store parking lot and arranging for his wife to come down. Several hours later, Mr. Scott was found dead in the car of a massive brain hemorrhage. His widow brought a claim of gross negligence against the City of Charlotte, but the city prevailed. The courts determined that the officers acted in good faith by removing Mr. Scott from the road, offering medical care, and engineering what they believed was an adequate solution. (Scott v. City of Charlotte)

What constitutes gross negligence?

³⁷ Immunity protection for firms, partnerships, associations or corporations is more limited; see “Special Conditions for Firms and Corporations” in this section for a more detailed discussion of these limitations.

Second, immunity protection is not granted in cases of willful misconduct, gross negligence, or bad faith.³⁸ In situations where injury or damage results from an act or omission that constitutes willful misconduct, gross negligence, or bad faith, the immunity statute is not likely to apply and the individual who engaged in such behavior may be liable for the injury or damage caused. For example, if a county employee is drunk while operating a county vehicle removing debris after a storm and runs over a property owner's mailbox and fence, that employee's conduct would likely constitute gross negligence and thus would not be protected by the immunity statute.

Finally, immunity protection under this statute is not available to anyone who is not considered to be an "emergency management worker." The definition of emergency management worker is discussed in more detail later in this section, but it is important to note here that the actions of individuals who are not "emergency management workers" as defined by the immunity statute will not be covered under the statute's protections.³⁹

What Does The Immunity Statute Protect From?

The state's emergency management immunity statute protects those who are covered by it from liability for the death of or injury to persons or for damage to

What Do You Think?

As an emergency management coordinator, you review the emergency plans of health care facilities in your jurisdiction. Are you protected from liability if the facility does not implement its plan correctly and patients are injured?

YES!

Because reviewing health care facility emergency plans is an emergency management planning function, this activity is covered under the NC emergency management immunity statute. You are not likely to be found liable for errors on the part of the health care facility unless you yourself did not exercise due care or follow appropriate procedures when you reviewed the plan.

³⁸ G.S. 166A-14(a).

³⁹ *Ray v. Lewis Hauling & Excavating, Inc.*, 145 N.C. App. 94, 549 S.E.2d 237 (2001).

property as a result of their actions or failure to act (omissions).

Who Is Covered (General Coverage)?

The state's emergency management immunity statute covers the following individuals and organizations:⁴⁰

- The State of North Carolina (i.e., state government)
- Political subdivisions of the state (i.e., cities, counties, and other units of local government)
- Emergency management workers (except in cases of willful conduct, gross negligence, or bad faith)
- Firms, partnerships, associations, or corporations (except in cases of willful conduct, gross negligence, or bad faith)

The coverage of this immunity statute is broad – applying not only to government agencies and entities themselves, but also to individual emergency management workers and private organizations such as firms, partnerships, associations, and corporations that are working under the order or control of or at the request of a government agency. This broad coverage is helpful in shielding the unit of government itself as well as those public and private individuals and organizations that may be acting on the government's behalf when performing emergency management functions.

⁴⁰ G.S. 166A-14(a).

Who Is Covered (“Emergency Management Worker”)?

The state’s immunity statute covers “emergency management workers.”

Who is an “emergency management worker?”

An “emergency management worker” is any full or part-time paid, volunteer or auxiliary employee of:⁴¹

- The State of North Carolina;
- The District of Columbia and other states, territories, or possessions of the federal government or any neighboring country;
- Any political subdivision of the federal government, this state, other states, or neighboring countries;
- Any agency or organization performing emergency management services at any place in this state; or
- Any health care worker performing health care services as a member of a hospital-based or county-based State Medical Assistance Team designated by the North Carolina Office of Emergency Medical Services and any person performing emergency health care services pursuant to state law (G.S. 90-12.2).

This definition covers state employees as well as employees of units of local

⁴¹ G.S. 166A-14(d).

What Do You Think?

While making a left turn in Raleigh on September 15, 1996, Allen Petty’s Mack truck struck Vivian Hall’s car, injuring Ms. Hall. A Florida corporation, Lewis Hauling, owned the dump truck, which was in turn under contract with Siboney Corporation of West Palm Beach, Florida to provide trucks and employee operators to assist in clean-up efforts in the aftermath of Hurricane Fran. The storm had passed through Raleigh September 4th and 5th, and the governor had declared a State of Emergency. During the resulting court case, Lewis Hauling claimed that Petty was performing debris removal services in support of the Army Corps’ emergency management efforts in Raleigh. This assertion supported the claim that Petty was an emergency management worker and entitled to immunity. The hauling company was unable to produce evidence that Siboney Corporation did in fact possess a contract with the Army Corps for debris removal, or that the driver was under direct control of a representative from that agency, as claimed by Lewis Hauling. There was also no evidence that the Army Corps was actually in Raleigh to assist with recovery operations. Moreover, the North Carolina state Emergency Operations Plan designated the Department of Transportation as the lead debris removal agency, and did not mention private subcontractors. Ultimately, the courts could not find clear evidence of a contractual relationship between Lewis Hauling and emergency management work, and the company was held liable for Ms. Hall’s injuries. (Ray v. Lewis Hauling & Excavating, Inc.)

Discuss the importance of clear operations plans with all contractors and subcontractors.

government. It also covers any other government employees when they are performing emergency management services anywhere in the state “subject to the order or control of or pursuant to a request of State government or any political subdivision” of the state. This includes emergency management workers performing emergency management services outside of their jurisdiction when acting under interlocal agreements, compacts, EMAC, or mutual aid agreements.⁴² Under most inter-governmental cooperative agreements for emergency management services, employees who are working under the order or control of or at the request of the unit of government that requested assistance are considered agents of the requesting unit of government, not their home unit of government.

While the immunity statute does not specifically reference volunteer organizations, it does include “volunteer employees” of “any organization performing emergency management services at any place in this State.” This language appears to cover volunteers so long as those volunteers are

performing emergency management services “under the order or control” of state or local officials or “at the request of” state or local government officials.⁴³

⁴² G.S. 166A-14(e); G.S. 166A-46.

⁴³ *Ward v. Long Beach Volunteer Rescue Squad*, 151 N.C. App. 717, 568 S.E.2d 626 (2002) (volunteer member of beach rescue squad was an “emergency management worker” when participating in beach patrols with local beach rescue squad in the aftermath of Hurricane Floyd, and thus was entitled to

What Do You Think?

You’ve been asked to have county workers clean up debris in the yards of private homeowners following a major storm. Is this activity protected under the emergency management immunity statute?

PROBABLY NOT!

Since governmental units do not have the legal authority to perform work on private property (unless there is an immediate threat to public health, safety, or welfare), this activity is not likely to be covered under the statutory immunity protection. Similarly, other activities that fall outside the scope of governmental authority are not likely to be protected under the statutory immunity. It would be best to have such activities performed by volunteer organizations that are trained in disaster services and that carry liability insurance for their volunteer workers.

Finally, this definition also covers individuals who are employees of (or volunteers with) private organizations such as firms, partnerships, associations, and corporations. This generally would include private contractors such as debris management firms so long as the contractor’s employees are performing emergency management services under the order or control of or at the request of state or local government officials; however, the immunity protection for private firms and corporations is more limited as is discussed later in this section.⁴⁴

When are “Emergency Management Workers” Covered?

The immunity statute applies to emergency management workers who are “subject to the order or control” of the state or a political subdivision of the state, or who are providing emergency management services “pursuant to a request of State government or any political subdivision.”⁴⁵ This means that the protections of the immunity statute extend to individuals and organizations operating under the control of or at the request of state or local government officials. Individuals who engage in emergency management activities, but who are doing so outside the order or control of or not at the request of state or local government, would not likely be considered “emergency management workers” and thus would not be protected under the emergency management immunity statute.⁴⁶

The immunity statute applies when the emergency management worker is complying with or reasonably attempting to comply with:

Workers’ Compensation for injuries sustained during beach patrol activities). See Section VI for a more detailed discussion of volunteers.

⁴⁴ Immunity protection for firms, partnerships, associations or corporations is more limited; see “Special Conditions for Firms and Corporations” in this section for a more detailed discussion of these limitations.

⁴⁵ G.S. 166A-14(d).

⁴⁶ *Ray v. Lewis Hauling*, 145 N.C. App. at 101 (In holding that a debris hauling company and its employee had not sufficiently proved their relationship with the State, a local government, or the federal government for debris removal activities in the aftermath of Hurricane Fran, the court noted that “[a]n emergency management worker, as defined in the statute, *must* be ‘subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof.’” *Emphasis added.*)

- Any provisions of the state’s Emergency Management Act (Chapter 166A);
- Any provisions of local ordinances relating to emergency management measures; or
- Any order, rule, or regulation issued under Chapter 166A or a local ordinance.

Since all emergency management functions are covered under the immunity statute, so long as an emergency management worker is complying with or making a reasonable attempt to comply with an order, rule, or directive that is considered to be an “emergency management function,” and is doing so under the control of or at the request of state or local government, the actions of that emergency management worker will most likely be covered by the state’s emergency management immunity statute unless the individual engages in conduct that constitutes willful misconduct, gross negligence, or bad faith.⁴⁷

*Special Conditions for Firms and Corporations*⁴⁸

While the state’s immunity statute generally covers non-governmental organizations such as firms, partnerships, associations, and corporations, the immunity protection for these organizations and their employees or volunteers is not as broad as that granted for governmental entities and their employees.

The immunity statute covers non-governmental organizations and their employees and volunteers only when they are acting without compensation (or only receiving reimbursement for actual expenses) AND they are EITHER

- Providing their services during a declared state of emergency issued by the Governor or a city or county and are operating under the direction and

⁴⁷ See, *Ward v. Long Beach*, 151 N.C. App. at 722 (In holding that a volunteer member of a rescue squad was entitled to Workers’ Compensation for injuries sustained during a beach patrol in the aftermath of Hurricane Floyd, the court noted that emergency management services included “the never-ending preparedness cycle of prevention,” that the circumstances following Hurricane Floyd necessitated “a continuous need for relief efforts,” and that it was “irrelevant whether plaintiff [the injured volunteer] was responding to a call for help at the time of her injuries because the need for help existed on a continuous basis.”

⁴⁸ G.S. 166A-14(a1).

control of either the state or a local government, OR

- Engaged in emergency management planning, preparation, training, or exercises conducted with the Division of Emergency Management, the Division of Public Health, or a city or county governing board.

Unless the conditions above are met, the firm or corporation will not be covered under the state's emergency management immunity statute.

In addition, immunity under this statute is not granted if the actions or omissions of the firm or corporation, or any of its employees or agents, either caused part or all of the disaster or necessitated the need for emergency management measures.⁴⁹ For example, if a railroad company's negligence caused the derailment of a toxic waste transport train resulting in a major hazardous chemical spill, any response and recovery actions taken by the railroad company and its employees would not be covered under the state's immunity statute as it was the company's negligence that caused the disaster to begin with.

Finally, immunity for firms and corporations granted under this statute is deemed waived if the firm has liability insurance.

⁴⁹ G.S. 166A-14(a1)(2).

What Do You Think?

Sue Pugh knew what to do. When wildfires threatened San Diego in October 2007, triggering an evacuation of over 500,000 residents (the largest fire evacuation in history), Pugh arrived early at Qualcomm Stadium, the main evacuation site. She introduced herself as a registered nurse at the volunteer check-in, and quickly got to work. Over the next three days, she worked under the city's medical director, Dr. Jim Dunford, himself a decorated professor of emergency medicine at UCSD. She supervised the care of 600 people, including many members of vulnerable populations. At the time, Dunford called her "a key linchpin in the operation" and "a wonderful example of humanity."

Pugh had initially claimed to be a volunteer firefighter, forced off the front lines due to smoke inhalation. It turned out that her claims turned out to be almost entirely fabricated. While she had briefly served as a volunteer firefighter for a small backcountry district almost five years prior, she was not currently affiliated with any fire department, nor did the California Board of Registered Nursing hold any record of a nursing license in their database, going back eight years. (Braun, One 'Star' Makes A Big Difference Amid Crisis, 2007) (Braun, A Leader at Qualcomm Aid Center Led Us On, 2007)

What questions does this story raise, especially with volunteers in leadership positions?

Immunity is deemed waived up to level of the firm or corporation's insurance indemnification. Liability that exceeds the level of insurance coverage then potentially may be covered under the state's emergency management immunity statute provided that all the necessary requirements for immunity are met.⁵⁰

*Waiver of Licensure Requirements*⁵¹

The state's immunity statute also helps emergency management workers perform emergency management functions without undue fear of liability by waiving licensure requirements for any professional, mechanical or other skill being performed by an emergency management worker during a declared state of emergency. This provision applies only when a state of emergency declaration is in effect, and applies only to authorized emergency management workers who are performing emergency management functions. This provision would not apply if the emergency management worker was engaging in these activities when a state of emergency was not in effect or even during a declared state of emergency if the activities were not related to emergency management functions. Even with this liability protection, emergency management workers should exercise care and caution when performing activities and functions that are highly technical or skilled and would otherwise require licensure, especially if the activity or function is beyond the skills and capabilities of the emergency management worker. While the licensure requirement may be waived if the requirements of the emergency management immunity statute have been met, the general duty to exercise reasonable care would still apply, and the employee or volunteer may not be covered under the statutory immunity provision if engaging in the activity or function would constitute gross negligence, bad faith, or willful misconduct (for example, attempting to fly a helicopter without having any pilot training).

⁵⁰ G.S. 166A-14(a1)(3).

⁵¹ G.S. 166A-14(c).

Continued Entitlement to Certain Benefits⁵²

While the government enjoys broad liability protection under the state's emergency management immunity statute, the law makes clear that individuals and employees are still entitled to any benefits they would normally be entitled to under the state Emergency Management Act (Chapter 166A) or other applicable provisions of law, including compensation, leave, and workers' compensation benefits.

Immunity for Private Property Used During Disasters⁵³

Sometimes private property (including both real property and personal property) is used in disaster response and recovery operations. Owners of private property are immune from liability for injury to or death of persons and damage to other property when their private property is used to render aid to persons in any way for emergency management purposes, including sheltering, protecting, or safeguarding. This immunity is granted regardless of whether the use of the property is done with the owner's consent or knowledge (in other words, knowingly or unknowingly, with or without consent, voluntarily or involuntarily). Immunity is also granted regardless of whether the owner of property is compensated for use of property. Finally, this immunity is not contingent on there being a state of emergency declaration in effect, although most instances where private property is used for emergency management purposes are likely to occur during a declared state of emergency. Examples would include using a privately-owned facility as an emergency evacuation shelter or a temporary first aid center.

The immunity granted under this statute is in some ways broader than the emergency management immunity statute discussed above, and it is also narrower in some ways. Its coverage is broader in that it does not require the owner of the property to be an "emergency management worker" in order to enjoy immunity protection. In fact, the protection under this statute is available even when the property is used without the owner's knowledge or consent (in which case, the

⁵² G.S. 166A-14(b).

⁵³ G.S. 166A-15.

owner would not be making the property available “pursuant to the request of” a government agency). However, the types of activities for which immunity is granted under this statute are more narrow than the general emergency management immunity statute. The use of the property must be for the purpose of “sheltering, protecting, safeguarding or aiding in any way persons,” which is narrower than the “emergency management functions” more broadly covered under the general immunity statute. It is unclear whether using private property for common emergency management-related activities such as a debris removal site or a general staging area for vehicles and equipment would be covered under this immunity statute as it is unclear whether such activities would be considered “sheltering, protecting, safeguarding or aiding in any way persons.”⁵⁴ Emergency managers should consult with their jurisdiction’s legal counsel if they are unsure whether a particular activity to be conducted on private property is covered under this immunity statute.

Liability of Persons Who Ignore Disaster Warnings⁵⁵

So far, this section has discussed state statutes conferring immunity from liability for emergency management functions and in disaster situations. A related provision in the North Carolina statutes addresses the liability of persons who willfully ignore warnings issued in a disaster situation. Under certain circumstances, these persons can be civilly liable for the cost of the rescue effort undertaken to save them.

A person can be held civilly liable for costs incurred by any governmental or non-profit agency undertaking an operation to rescue that person if a federal, state, or local emergency management or law enforcement agency issues a warning regarding personal safety during a disaster, and the person ignores the warning and either engages in unreasonable actions or fails to take reasonable actions. If the person places himself or another person in danger under these conditions and a

⁵⁴ *Ray v. Lewis Hauling*, 145 N.C. App. at 102 (The court found “general issues of material fact” as to whether debris removal efforts constituted “sheltering, protecting, safeguarding or aiding in any way persons.”)

⁵⁵ G.S. 166A-15.1.

governmental rescue operation is undertaken on the endangered person's behalf, that person can be civilly liable for the costs of the rescue operation. For example, if a county issues a mandatory evacuation order in response to an oncoming hurricane and an individual chooses to ignore the order and instead drives around during the storm, if the individual becomes stranded during the storm and the government undertakes efforts to rescue the individual, that individual may be civilly liable for the costs of the rescue operation.

Section VII. Volunteers

Key Concepts

- ✓ Volunteers have qualified immunity under both federal and state law.
- ✓ Immunity for volunteers does not protect against gross negligence, intentional actions, or acts beyond the scope of the volunteer's duties.
- ✓ It is important to manage volunteers appropriately to avoid liability for their actions if they are working under the direction or control of a governmental unit.

Volunteers are an essential component of any emergency management operation. When well-managed, volunteers can be an invaluable asset to a community's ability to respond to and recover from disasters. However, if not managed and supervised properly, volunteers can pose potential liability risks to local and state emergency management officials as well as to the volunteers themselves and the non-profit organizations or government-sponsored volunteer programs with which they are affiliated ("affiliated volunteers"). Even more problematic are volunteers who are not affiliated with an organized non-profit agency or government-sponsored volunteer program ("unaffiliated volunteers") who simply show up at the scene of a disaster offering their assistance.

Because volunteers are, by their very nature, not employees of the unit of government they are assisting, the defense of governmental immunity will not be available to them. And, at first glance, one might assume that the unit of government the volunteer is assisting can potentially avoid liability for the volunteer's negligence since the volunteer is not that government's employee. However, the unit of government may still be exposed to liability if it negligently supervises the volunteer, directs the volunteer to engage in a nondelegable or inherently dangerous activity, or the volunteer is sufficiently under the control of the unit of government to be considered its agent (*respondeat superior*).

As a general rule, it is best to engage volunteers who are affiliated with a recognized volunteer or non-profit organization that specializes in specific disaster response activities. Volunteers affiliated with these organizations are normally trained and supervised, and are often covered under the liability insurance policy of their organization. Volunteers may also be properly trained and supervised through government-sponsored volunteer programs.

Regardless of whether the volunteer is affiliated or unaffiliated, some protections against liability are available for them under both federal and state law.

Federal Law – Volunteer Protection Act (VPA)

The VPA⁵⁶ grants qualified immunity to volunteers who are serving a governmental entity or non-profit organization. Under this law, a volunteer is someone who does not receive compensation (other than reasonable reimbursement for expenses) or anything else of value in excess of \$500 per year. Being a volunteer includes those who are actually providing a service or assistance as well as directors, officers, and trustees of volunteer organizations. The VPA does not apply to all volunteers, but only those serving either a government entity or a non-profit organization (defined as an organization having tax-exempt status under the Internal Revenue Code).

⁵⁶ 42 U.S.C. §§ 14501-14505.

What Do You Think?

Cindy Mahoney, one of many World Trade Center (WTC) site volunteers, spent six months at Ground Zero tending to the spiritual needs of rescue workers. A former paramedic turned nun, the native South Carolinian had recently moved to New York City as part of her spiritual training. During the course of her ministry work at the WTC site, Sister Mahoney developed a deep connection with her adopted hometown, and became known as the “Angel of Ground Zero.” By all accounts vigorous and healthy previously, she returned from the site with significant health issues. Just over five years later, she was dead, gasping for air following the termination of her health insurance. Her dying wish to be autopsied as part of the WTC Medical Monitoring and Treatment Program was honored, and the autopsy showed she died from respiratory ailments common to other WTC responders. (Goldiner, 2006) (From Dust to Dust, 2006)

What responsibility do governments have for unaffiliated volunteers?

The VPA provides immunity from personal liability for volunteers who commit negligent acts or omissions during their volunteer service. The VPA does not, however, protect volunteers from liability for criminal, intentional (willful), or reckless conduct, or from gross negligence. Nor does the VPA protect a volunteer when:

- the activity that caused the harm was beyond the scope of his volunteer duties;
- the volunteer was operating a motor vehicle, vessel, aircraft, or another type of vehicle for which a license and insurance is required;
- the volunteer did not have a state-required license or certificate for the activity being performed; or
- the act or omission occurred while the volunteer was under the influence of drugs or alcohol.

The VPA also specifically excludes from its protection crimes of violence, hate crimes, sexual offenses, and violations of state and federal civil rights laws.

State Law - Qualified Liability Immunity for Volunteers

The Emergency Management Act (Chapter

166A) grants broad qualified immunity to volunteers who are performing emergency management functions. This immunity provision is discussed more fully

What Do You Think?

Christopher Kangas answered the call. The 14-year old “apprentice firefighter” in Brookhaven, Pennsylvania was killed in a traffic accident in 2002 while responding to an emergency call on his bicycle. Though Pennsylvania law prohibits anyone under 16 from entering a burning building, climbing ladders, or operating high pressure hoses other than during training, volunteer junior firefighters are nevertheless “a vital part of the fire department.” Their duties include, among other things, offloading equipment and attaching non-pressurized hoses, administering first aid, assisting in food services, and removing debris. Christopher, eager to reach the fire station, raced through an intersection without stopping at a stop sign, and was struck by a vehicle. He was not wearing a helmet. Following his death, his mother received benefits under the Pennsylvania Emergency Law Enforcement Personnel Death Benefits Act, and his name was placed on the state’s Honor Roll of fallen firefighters. Federal benefits under the Public Safety Officers’ Benefits Act of 1976 were withheld after a lengthy court battle, as the federal courts decided that he was ineligible because he did not technically “fight fires.” (*Amber-Messick v. United States*)

Do you have any specific programs or policies regarding juvenile volunteers?

in Section VI.

North Carolina law also provides **general immunity from civil liability for volunteers** who perform services without compensation (other than reimbursement for actual expenses) for a charitable organization (a non-profit with tax exempt status) or who are engaged in emergency services, including preparing for and responding to natural and man-made disasters such as evacuation, emergency transport and sheltering, and services performed as a function of a Community Emergency Response Team (CERT).⁵⁷ Under the state's general volunteer immunity statute, volunteers are immune from civil liability for acts or omissions that cause injury, death or loss to persons or property when performing their volunteer services if:

- The volunteer was acting in good faith and the services were reasonable under the circumstances
- The acts or omissions are not wanton, intentional or do not constitute gross negligence
- The acts or omissions did not occur while the volunteer was operating a motor vehicle.

If the volunteer or charitable organization has liability insurance, qualified immunity is waived up to the amount of the policy coverage.

Certain categories of volunteers enjoy specific qualified immunity under North

⁵⁷ G.S. 1-539.10; G.S. 1-539.11.

What Do You Think?

Daniel Moynihan, a former volunteer firefighter on Long Island, hurried to Manhattan on the morning of 9/11. After slipping past an FBI agent, the volunteer helped FDNY personnel extinguish fires for 13 hours that day until he was taken to the hospital for smoke inhalation. Although he was then working as a deliveryman, Moynihan had 19 previous years of firefighting experience. Once discharged from the hospital, he returned to "the pile" for weeks of service, working hours on the burning rubble, sleeping at the site, and digging for remains. Soon thereafter, the previously healthy mid-30s Moynihan began suffering serious respiratory ailments, and is now disabled. (Lemire, 2008)

***Who is responsible for his care?
How does this story reflect the
challenges of managing
unaffiliated volunteers?***

Carolina law. Generally, these immunities are available for claims of simple negligence, and are not available when the volunteer’s conduct constitutes gross negligence or intentional or wanton conduct. For example, specific immunity protections are available for volunteer firefighters,⁵⁸ and architects and engineers who provide structural, electrical, mechanical, or other architectural services at the scene of a declared disaster or emergency at the request of state or local government officials.⁵⁹

Other Related Immunity Statutes

*Good Samaritan Law*⁶⁰

Like most states, North Carolina has what is known as a “Good Samaritan law,” which is intended to encourage individuals to render aid to one another under certain circumstances without undue fear of liability. Under North Carolina’s Good Samaritan law, immunity is granted to any person who:

- renders first aid or emergency assistance at the scene of a motor vehicle crash,
- on any street or highway in this state,
- to any person injured as a result of an accident.

Acts or omissions amounting to wanton conduct or intentional wrongdoing are not covered under the state’s Good Samaritan law.

*First Aid and Emergency Medical Treatment*⁶¹

North Carolina law also grants immunity to any person who:

- renders first aid or emergency health care treatment to an unconscious, ill, or injured person,
- when reasonable circumstances require prompt action, and

⁵⁸ G.S. 58-80-45; G.S. 58-82.5.

⁵⁹ G.S. 83A-13.1; G.S. 89C-19.1.

⁶⁰ G.S. 20-166(d).

⁶¹ G.S. 90-21.14

- delay in treatment would seriously worsen the victim's condition or endanger the victim's life.

This immunity is available to anyone, and specifically includes volunteer rescue squad members. It also specifically applies to the use of an automated external defibrillator (AED).⁶²

As with other immunity statutes already discussed, acts or omissions on the part of the person rendering the aid that amount to wanton conduct, gross negligence, or intentional wrongdoing are not covered. Immunity under this statute is also not available to a medical professional when rendering professional services in the normal course of his business or profession.

Managing Volunteers

Historically, volunteers *were* disaster response, and they have remained a critical component of emergency management to the present. Despite advances in both organization and technology, human nature dictates that volunteers will try to lend a hand during times of need. Given this

⁶² G.S. 90-21.14(a)(2); G.S. 21.15.

What Do You Think?

Bored after almost a week of recovery work on Oak Island, North Carolina following Hurricane Floyd in 1999, a National Guardsman and three disaster volunteers decided to take a Humvee on a beach patrol. Reaching the end of the island, the driver turned around, "gunned the engine," and "did a little fish-tail" before straightening back out. The driver then accelerated onto the soft sand towards the back of the beach. Bouncing over the dunes, the "vehicle became airborne," then "landed and... vaulted again." When it landed for the second time, the Humvee flipped over, injuring the three passengers and killing the driver. The surviving passengers estimated the driver was going roughly fifty miles per hour.

One of the injured volunteers was an honorary member of the Oak Island Beach Rescue Squad and was concurrently employed as an EMT for Brunswick County (although she was not on duty at the time of the accident). The courts decided that although she only served as an honorary member of the rescue squad when the accident happened, she was actively patrolling the beaches in furtherance of the squad's mission of minimizing the effects of the disaster. The North Carolina Industrial Commission was ordered by the Court of Appeals to extend benefits to Ms. Ward as an emergency management worker. (Gregory v. Penland) (Ward v. Long Beach Volunteer Rescue Squad)

Does your organization have honorary or adjunct members who sometimes participate in activities? What policies are in place to guide them?

reality, how should your agency manage them?

Know “Who”

The listing below does not represent an exhaustive inventory of volunteer organizations, but instead is a sampling of the types of groups that may assist in disasters. Specific communities may have all, some, or none of these organizations. Each of these groups is comprised of motivated, civic-minded volunteers who want to help. As an emergency manager, it is key to *know who* is active in your community before a disaster strikes. Prior preparation will allow you to establish relationships, ascertain capabilities, and better integrate these volunteers into your Emergency Operations Plan (EOP). Encouraging volunteers to affiliate prior to a disaster is helpful for both logistical and liability reasons.

VOADs Larger organizations that routinely respond to disasters are collectively known as Volunteer Organizations Active in Disasters (VOADs), and include organizations like the American Red Cross and the Salvation Army. National VOAD (NVOAD) is an umbrella organization of the major disaster response organizations in the United States, including most national faith-based organizations. Each state, including North Carolina, has its own independent VOAD chapter, and maintains lists of mission-capable organizations active in the state. For example, the American Red Cross, Triangle Area Chapter, sponsors its own Disaster Action Team (DAT). NVOAD was originally formed to assist in recovery efforts through better coordination to prevent duplication of services.

North Carolina VOAD: www.ncvoad.org

National VOAD: www.nvoad.org

AmeriCorps This national volunteer program provides services to numerous partner organizations across a broad spectrum. Disaster relief is one of their mission areas, and they have provided significant contributions to Hurricane Katrina recovery. Young adults comprise a major portion of their volunteers.

AmeriCorps: www.americorps.gov

CERT Many communities around the country have established Community Emergency Response Teams (CERTs). Typically, these teams consist of volunteers from the community trained in disaster preparedness, fire safety, disaster medical operations, search and rescue, Incident Command System (ICS), disaster psychology, and terrorism. Some CERTs may be “operational” in nature, and able to deploy for certain assignments, while others focus on training citizens to be self-sufficient for several days after a major disaster. CERT teams are commonly overseen by an existing response agency such as a municipal fire department or Civil Air Patrol wing.

CERT: www.citizencorps.gov/cert/ (“Find Nearby CERT’s” tab)

Citizen Corps Citizen Corps was launched by FEMA as a response to the terrorist attacks of 9/11, and included Citizens Corps Councils across the country. These individual groups build on community strengths to implement preparedness programs and carry out a local strategy to involve government, community leaders, and citizens in all-hazards preparedness and resilience.

Citizen Corps: www.citizencorps.gov

Medical Reserve Corps Medical Reserve Corps (MRCs) typically operate at the county level, and provide a network of trained medical personnel who volunteer to assist in a time of disaster.

MRC: www.medicalreservecorps.gov (“Find MRC Units” tab)

Volunteers in Police Service Many police departments have a volunteer function such as an auxiliary or reserve unit. These Volunteers in Police Service (VIPS) have varying degrees of responsibility.

VIPS program: www.policevolunteers.org (“Program Directory” tab)

Community organizations These local entities like religious organizations, civic clubs, and youth clubs may have their own service capabilities. Typically, these groups are too small to be formally affiliated with VOAD, but may nevertheless offer important resources.

Unaffiliated volunteers Ordinary citizens may still show up to help. While these individuals are often seen as burden by some emergency managers, they can also represent a tremendous “surge capacity.” As with any volunteer group, assigning appropriate tasks and ensuring proper oversight remain important. With unaffiliated volunteers, the oversight burden falls squarely on your emergency management agency as there is no outside organization to which they report.

Know “How”

Every North Carolina county and most municipalities have an emergency operations plan. Your EOP should have a section or index directly addressing volunteers. It is important to review this section periodically, as well as sharing it with volunteer organizations active in your community. Give a copy of the section to volunteer program leaders, and attend their meetings on a regular basis.

As with any emergency, the site of the disaster should be secured if at all possible. Volunteers will need a place to which to report. The Volunteer Reception Center (VRC) should be clearly marked, staffed, and supplied. The primary function of this site is to check-in volunteers and assign duties. Check-in is extremely important from a liability standpoint. Many jurisdictions use carbon copy intake forms, so that both the volunteer and the organization get a copy. This is a good time to note and verify (if possible) any credentials that the volunteer may present.

With all volunteers, it is important to remember that they are not paid employees. Take the time to properly recognize and thank volunteers for their contributions. Such recognition goes a long way in making the volunteers feel valued.

The following resources provide additional guidance on managing disaster volunteers:

NC Commission on Volunteerism & Community Service

Disaster Response - Volunteer Coordination

<http://www.volunteernc.org/programs/volunteerCoordination.aspx>

Top 15 Things to Know When Managing Volunteers in Times of Disaster (HandsOn Network, 2010). www.handsonnetwork.org/node/2339

Ready to Respond: Disaster Preparedness and Response for HandsOn Action Centers (HandsOn Network, 2009). www.handsonnetwork.org/node/2757

Community Renewal: Community Preparedness Toolkit (Corporation for National and Community Service, 2010). www.serve.gov/toolkits/disaster/index.asp

Section VIII. Legal “Mitigation”: Protecting Against Liability

Mitigation is preventing something from occurring or lessening the impacts of an event. Emergency managers are familiar with this and practice mitigation strategies on daily basis – writing Emergency Operation Plans, performing exercises or drills, and educating the public are a few examples. The same principles can be applied to the liability issues discussed in this guide. With the proper understanding of what can happen, emergency managers can make informed decisions on how to best mitigate a potential issue before it becomes a problem.

Legal mitigation can follow more general risk management processes:

- (1) Identify the risk;
- (2) Evaluate the impact;
- (3) Select methods for managing the risk.⁶³

The most effective way to mitigate against liability risks is to consult with your local attorney. Help your attorney become familiar with emergency management operations and your jurisdiction’s EOP, and discuss potential areas of liability risk. Together, you can develop strategies for mitigating against those risks. A few simple strategies are offered below.

Insurance

Most jurisdictions have insurance. Discuss with your local attorney your jurisdiction’s insurance coverage and identify where there may be gaps in coverage or limits on liability that impact emergency management operations.

⁶³ Harkins, Scott, Managing Risk in EMS, Journal of Emergency Medical Services, Vol. 30, pg. 45 (2001)

Documentation

One of the most essential aspects of mitigating a legal situation is documentation. If it is not written down, it did not happen. Documentation can go a long way in protecting your employees and unit of government. Keeping good records and even making personal notes during an event can document important facts such as following standard procedures, exercising reasonable care, providing proper notification, or obtaining approval from the appropriate official. These facts can be critical to protecting yourself and your unit of government against liability if your actions become the basis for a law suit and also help refresh your memory of events that may have happened months or even years ago.

If standard forms are used for documentation of events or activities, always completely fill out the form. If parts of the form are obsolete, update the form by deleting the obsolete sections. A half-filled out form suggests that the person completing the form was rushed or careless

Written standard operating procedures are common in emergency management, and a good emergency manager keeps his or her SOP's up-to-date. If portions of a SOP or other internal emergency management policies are obsolete, update the SOP or policy. Demonstrating that an employee followed written policies can be helpful in defending against liability. However, if portions of those written policies or procedures are out-dated or not being followed, that failure can be used against the employee.

Training Standards

Training is a vital part of any organization's daily operations. Continual training keeps employees abreast of current trends and allows them to practice rarely used skills. Training programs should be well documented and account for all activities that are completed. Programs should always remain compliant with established standards created by federal, state, and local governing boards. A training program following these standards will help protect the organization so long as the act in

question followed the established procedures.

For emergency managers, the National Incident Management System (NIMS) and its Incident Command System (ICS) principles are an example of standards that dictate how an incident should be handled. Standards such as these should always be followed as they have been extensively researched and proven as a “best practice.” These are also the standards to which an organization is likely to be held to in a liability case, and following these standards can help you and your jurisdiction successfully defend against a law suit.

To avoid negligent hiring and retention claims, it can also be helpful to have a clear policy for doing simple background checks (such as a driving record check through DMV if the employee will be operating vehicles) and checking references. As with all policies, these kinds of employment policies should be followed every single time, without exception.

Valid Contracts

Contracts, memorandums of agreement, memorandums of understanding, mutual aid agreements, and public service agreements have become common in the field of emergency management. As emergency managers strive to provide the best services and response to their customers, these contracts are written to call for extra help, enlist the services of an expert, or secure standby assistance in case of an emergency. They are an integral part of the job, but can be quite complex. Nobody can be of more assistance with contract writing than local attorneys. They must be consulted when writing contracts as they provide a wealth of knowledge of the inner workings of a particular jurisdiction’s legal requirements.

Contracts should be reviewed by your local attorney to ensure they contain provisions that will help mitigate against liability. Hold harmless and indemnification clauses are standard in most governmental contracts. Contracts

with private entities that include payment for goods or services (such as for debris removal or supply purchases) have certain very specific legal requirements that, if not met, make the contract unenforceable under North Carolina law. Finally, some purchasing activities must follow certain bidding requirements. Emergency managers should consult with their local attorneys before entering into any contracts or agreements.

Legal Mitigation Checklist

Legal mitigation is similar to operational mitigation:

- **Mitigation:** Prevent something from occurring or lessening the impacts of an event
- **Risk Analysis:** Identify what can occur and possible impacts
- **Risk Reduction:** Find ways to reduce risk

Outlined below are some suggested tips for helping mitigate against liability in emergency management functions and operations:

Keep Thorough Documentation:

- ✓ If it is not written down, it did not happen!
- ✓ Document training, standards, daily operations, reports, etc.
- ✓ Make sure all documentation is clear, legible, detailed and complete

Update Legal Agreements:

- ✓ Include indemnification and hold-harmless clauses in all contracts and MOU's
- ✓ Make sure mutual aid agreements are current
- ✓ Keep back-up copies of all legal documents

Exercise Due Care:

- ✓ Exercise due care consistent with standards of the profession and standards set by state and federal government
- ✓ Stay current on training requirements
- ✓ Ensure NIMS compliance for all applicable governmental officials and personnel
- ✓ Exercise due care in using volunteers and hiring employees, contractors and vendors

Involve Your Local Attorney:

- ✓ Consult on specific areas of concern
- ✓ Invite him to participate in table-top exercises and other training programs
- ✓ Review your SOP with him to identify any potential gaps that may open up liability issues

Section IX. Conclusion

Emergency managers face many risks – natural, man-made, and legal. Recognizing risks and mitigating against them is a critical part of an emergency managers' job. While this can be challenging when facing liability risks, emergency managers can turn to their jurisdiction's legal counsel for advice and guidance. A jurisdiction's risk management organization can also be a good resource.

Appendix A: Selected NC Statutes

§ 166A-14. Immunity and exemption.

(a) All functions hereunder and all other activities relating to emergency management as provided for in this Chapter or elsewhere in the General Statutes are hereby declared to be governmental functions. Neither the State nor any political subdivision thereof, nor, except in cases of willful misconduct, gross negligence or bad faith, any emergency management worker, firm, partnership, association, or corporation complying with or reasonably attempting to comply with this Article or any order, rule or regulation promulgated pursuant to the provisions of this Article or pursuant to any ordinance relating to any emergency management measures enacted by any political subdivision of the State, shall be liable for the death of or injury to persons, or for damage to property as a result of any such activity.

(a1) The immunity provided to firms, partnerships, associations, or corporations, under subsection (a) of this section, is subject to all of the following conditions:

- (1) The immunity applies only when the firm, partnership, association, or corporation is acting without compensation or with compensation limited to no more than actual expenses, and one of the following applies:
 - a. Emergency management services are provided at any place in this State during a state of disaster or state of emergency declared by the Governor pursuant to this Article or G.S. 14-288.15, and the services are provided under the direction and control of the Secretary of the Department of Crime Control and Public Safety pursuant to G.S. 166A-5, 166A-6, and 143B-476, or the Governor.
 - b. Emergency management services are provided during a local state of emergency declared pursuant to Article 36A of Chapter 14 of the General Statutes, and the services are provided under the direction and control of the governing body of any municipality under G.S. 14-288.12 and G.S. 166A-8, the governing body of any county under G.S. 14-288.13 and G.S. 166A-8, or the chair of any board of county commissioners under G.S. 14-288.14 and G.S. 166A-8.
 - c. The firm, partnership, association, or corporation is engaged in planning, preparation, training, or exercises with the Division of Emergency Management, the Division of Public Health, or the governing body of each county or municipality under G.S. 166A-7 and G.S. 166A-8 related to the performance of emergency management services or measures.
- (2) The immunity shall not apply to any firm, partnership, association, or corporation, or to any employee or agent thereof, whose act or omission caused in whole or in part the actual or imminent disaster or emergency or whose act or omission necessitated emergency management measures.

(3) To the extent that any firm, partnership, association, or corporation has liability insurance, that firm, partnership, association, or corporation shall be deemed to have waived the immunity to the extent of the indemnification by insurance for its negligence. An insurer shall not under a contract of insurance exclude from liability coverage the acts or omissions of a firm, partnership, association, or corporation for which the firm, partnership, association, or corporation would only be liable to the extent indemnified by insurance as provided by this subdivision.

(b) The rights of any person to receive benefits to which the person would otherwise be entitled under this Article or under the Workers' Compensation Law or under any pension law, and the right of any such person to receive any benefits or compensation under any act of Congress shall not be affected by performance of emergency management functions.

(c) Any requirement for a license to practice any professional, mechanical or other skill shall not apply to any authorized emergency management worker who shall, in the course of performing the worker's duties as such, practice such professional, mechanical or other skill during a state of disaster.

(d) As used in this section, the term "emergency management worker" shall include any full or part-time paid, volunteer or auxiliary employee of this State or other states, territories, possessions or the District of Columbia, of the federal government or any neighboring country or of any political subdivision thereof or of any agency or organization performing emergency management services at any place in this State, subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof. The term "emergency management worker" under this section shall also include any health care worker performing health care services as a member of a hospital-based or county-based State Medical Assistance Team designated by the North Carolina Office of Emergency Medical Services and any person performing emergency health care services under G.S. 90-12.2.

(e) Any emergency management worker, as defined in this section, performing emergency management services at any place in this State pursuant to agreements, compacts or arrangements for mutual aid and assistance to which the State or a political subdivision thereof is a party, shall possess the same powers, duties, immunities and privileges the person would ordinarily possess if performing duties in the State, or political subdivision thereof in which normally employed or rendering services. (1957, c. 950, s. 4; 1975, c. 734, s. 14; 1977, c. 848, s. 2; 1979, c. 714, s. 2; 1979, 2nd Sess., c. 1310, s. 2; 1995, c. 509, ss. 130, 131; 2002-179, s. 20(b); 2006-81, s. 1; 2008-200, s. 1; 2009-146, s. 2.)

§ 166A-15. No private liability.

Any person, firm or corporation owning or controlling real or personal property who, voluntarily or involuntarily, knowingly or unknowingly, with or without compensation, grants a license or privilege or otherwise permits or allows the designation or use of the whole or any part or parts of such real or personal property for the purpose of sheltering, protecting, safeguarding or aiding in any way persons shall, together with his successors in interest, if any, not be civilly liable for the death of or injury to any person or the loss

of or damage to the property of any persons where such death, injury, loss or damage resulted from, through or because of the use of the said real or personal property for any of the above purposes. (1957, c. 950, s. 3; 1977, c. 848, s. 2.)

§ 166A-15.1. Civil liability of persons who willfully ignore a warning in a disaster.

(a) In a disaster as defined by G.S. 166A-4, a person who willfully ignores a warning regarding personal safety issued by a federal, State, or local law enforcement agency, emergency management agency, or other governmental agency responsible for emergency management under this Article is civilly liable for the cost of a rescue effort to any governmental agency or nonprofit agency cooperating with a governmental agency conducting a rescue on the endangered person's behalf if:

- (1) The person ignores the warning, and: (i) engages in an activity or course of action that a reasonable person would not pursue, or (ii) fails to take a course of action that a reasonable person would pursue;
- (2) As a result of ignoring the warning the person places himself or herself or another in danger; and
- (3) A governmental rescue effort is undertaken on the endangered person's behalf. (1997-232, s. 1.)

§ 166A-46. Liability.

Officers or employees of a party state rendering aid in another state pursuant to this Compact shall be considered agents of the requesting state for tort liability and immunity purposes; and no party state or its officers or employees rendering aid in another state pursuant to this Compact shall be liable for any act or omission occurring as a result of a good faith attempt to render aid or as a result of the use of any equipment or supplies used in connection with an attempt to render aid. For the purposes of this Article, "good faith" does not include willful misconduct, gross negligence, or recklessness. (1997-152, s. 1; 2007-484, s. 24.)

§ 1-539.10. Immunity from civil liability for volunteers.

(a) A volunteer who performs services for a charitable organization or a volunteer engaged in providing emergency services is not liable in civil damages for any acts or omissions resulting in any injury, death, or loss to person or property arising from the volunteer services rendered if:

- (1) The volunteer was acting in good faith and the services rendered were reasonable under the circumstances; and
- (2) The acts or omissions do not amount to gross negligence, wanton conduct, or intentional wrongdoing.
- (3) The acts or omissions did not occur while the volunteer was operating or responsible for the operation of a motor vehicle.

(b) To the extent that any charitable organization or volunteer has liability insurance, that charitable organization or volunteer shall be deemed to have waived the qualified immunity herein to the extent of indemnification by insurance for the negligence by any volunteer.

(c) Nothing herein shall be construed to alter the standard of care requirement or liability of persons rendering professional services. (1987, c. 505, s. 1(2); 2005-273, s. 1.)

§ 1-539.11. Definitions.

As used in this Article:

- (1) "Charitable Organization" means an organization that has humane and philanthropic objectives, whose activities benefit humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward and is exempt from taxation under either G.S. 105-130.11(a)(3) or G.S. 105-130.11(a)(5) or Section 501(c)(3) of the Internal Revenue Code of 1954.
- (1a) "Emergency services" means the preparation for and the carrying out of functions to prevent, minimize, and repair injury and damage resulting from natural or man-made disasters and all other activities necessary or incidental to the preparation for and carrying out of these functions. These functions include firefighting services, police services, medical and health services, rescue services, engineering services, land surveying services, warning services and communications, radiological, chemical and other special weapons defense services, evacuation of persons from stricken areas, emergency welfare services, including providing emergency shelter, emergency transportation, and emergency resource management services, existing or properly assigned plant protection services, temporary restoration of public utility services, services performed as a function of a Medical Reserve Corps (MRC) unit or a Community Emergency Response Team (CERT), and other functions related to civilian protection, including the administration of approved State and federal disaster recovery and assistance programs.
- (2) "Volunteer" means an individual, serving as a direct service volunteer performing services for a charitable, nonprofit organization, who does not receive compensation, or anything of value in lieu of compensation, for the services, other than reimbursement for expenses actually incurred or any person providing emergency services without any financial gain. (1987, c. 505, s. 1(2); 2005-273, s. 2.)

“What Do You Think” Citations

Citations

- “From Dust to Dust.” (2006, September 9). *The Stanford (Hong Kong)*.
- Amber-Messick v. United States*, 483 F.3d 1316 (2007).
- Braun, G. (2007, October 31). A Leader at Qualcomm Aid Center Led Us On. *San Diego Union-Tribune*.
- Braun, G. (2007, October 24). "One 'Star' Makes A Big Difference Amid Crisis." *San Diego Union-Tribune*.
- Colangelo, L., Auliff, M., & Siemaszko, C. (2006, July 25). "Fury of Forgotten: Victims in 9-11 Health Crisis Fume Mike 'Dropped Ball.'" *New York Daily News*.
- Goldiner, D. (2006, November 3). Lung Illness Takes An Angel of Ground Zero. *New York Daily News*.
- Gregory v. Penland*, 179 N.C. App. 505, 634 S.E.2d 625 (2006).
- Hines v. United States*, 60 F.3d 1442 (9th Cir. 1995).
- Jones v. City of Durham*, 360 N.S. 81, 622 S.E.2d 596 (2005).
- Lemire, J. (2008, March 16). "Harthat Hero Who Raced To The Pitt on 9/11 Battles Bush for WTC Cash." *New York Daily News*.
- Ray v. Lewis Hauling & Excavating, Inc.*, 145 N.C. App. 94, 549 S.E.2d 237 (2001).
- Scott v. City of Charlotte*, 691 S.E.2d 747, cert. den'd, 364 N.C. 435 (2010).
- Stinson v. City of Lincoln*, 9 Neb. App. 642, 617 N.W.2d 456 (2000).
- Ward v. Long Beach Volunteer Rescue Squad*, 151 N.C. App. 717, 568 S.E.2d 626 (2002).