HEALTH LAW BULLETIN

No. 86 May 2007

ENVIRONMENTAL HEALTH SPECIALIST LIABILITY: WHAT WILL HAPPEN IF A SPECIALIST IS SUED FOR NEGLIGENCE?

■ Aimee N. Wall

Environmental health specialists often are concerned about the prospect of being sued by a person who is disgruntled about a permit application denial, permit suspension or revocation, or other negative action. Specialists fear that their decisions, particularly those with serious financial implications, will be called into question before a court. These lawsuits do occur, particularly in the area of onsite wastewater permitting, but they are not always successful. This bulletin discusses some of the legal concepts and concerns related to environmental health specialist liability.

Why Would A Specialist Be Sued?

Typically, lawsuits in the environmental health context allege negligence. In such cases, the person bringing the lawsuit asserts that someone, such as the environmental health specialist or the specialist's supervisor, failed to exercise reasonable care in the course of carrying out his or her work. For example, in one case a property owner brought suit for negligent misrepresentation against the county, the health department and the specialist. The owner argued that the specialist initially represented that the owner's property would be suitable for supporting an onsite wastewater system but later rejected the permit application.[1] In another case, a property owner whose onsite permit applications were denied alleged negligence by the specialists involved in the denial, as well as negligent hiring and supervision of the specialists by the county.[2]

The author is a School of Government faculty member who works in the areas of public health and animal control law.

[1] Tabor v. Orange, 156 N.C.App. 88, 89-90, 575 S.E.2d 540, 541-42 (2003).

[2] Carter v. Stanly, 123 N.C.App. 235, 236-37, 472 S.E.2d 378, 380 (1996).

UNC SCHOOL OF GOVERNMENT

The University *of* North Carolina *at* Chapel Hill
Institute of Government
Master of Public Administration Program

In order to be successful, a civil action alleging negligence must demonstrate all of the following:

- The defendant owed the plaintiff a duty of care,
- The defendant failed to exercise reasonable care, and
- The plaintiff suffered harm because of defendant's failure to exercise reasonable care.[3]

The first two criteria are often in controversy.

Claims based on theories other than negligence also are possible. A plaintiff could bring a civil suit alleging an intentional tort by an environmental health specialist. Intentional torts include, for example, assault, battery, intentional infliction of emotional distress and trespass.[4] For example, a specialist and a restaurant owner could get into a dispute during the course of an inspection. If the specialist pushes the owner, the owner might sue the specialist for battery.[5]

A specialist could also be held criminally liable. For example, in March 2007, a specialist was arrested and criminally charged with accepting bribes in connection with his duties related to onsite wastewater permitting.[6]

While these latter two types of cases (intentional torts and criminal charges) are extraordinarily rare, they are certainly feasible. The discussion that follows will focus primarily on cases alleging negligence because they are much more common.

Who Would Be Sued?

In cases alleging negligence, plaintiffs will sue any person or entity that they believe owed them a duty of care and breached that duty. A plaintiff may choose to sue a single person (Steve Sanitarian), a health department (Durham County Health Department), a governmental entity (Durham County), or a state agency (Department of Environment and Natural Resources).

If an individual person is sued, the lawsuit's caption will state whether the person is being sued in an "individual" or "official" capacity. If a local government employee is being sued in an "individual" capacity, the plaintiff is seeking money damages directly from the defendant and also may be seeking punitive damages. If the suit is brought against a local government employee in his or her "official" capacity, the plaintiff is seeking money damages from the government.[7]

Specialists are not typical local government employees. Although they are employed by a county or district health department or public health authority,[8] they are considered agents of the State. They become agents of the State only after they have been officially "authorized" to perform environmental health activities in particular fields, such as food and lodging or onsite wastewater.[9] Thus, if a person brings a lawsuit against a specialist

---

[3] *See* Hart v. Ivey, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992) ("Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care.").

[4] Dan B. Dobbs, THE LAW OF TORTS §§ 23-67 at 47-144 (2001).

[5] Anita R. Brown-Graham, A PRACTICAL GUIDE TO THE LIABILITY OF NORTH CAROLINA CITIES AND COUNTIES, § 1, 4-7, Institute of Government (1999) ("The terms *assault* and *battery* are frequently used interchangeably and almost always in conjunction with one another…. An assault is a *threat of violence*; a battery, the *carrying of the threat into effect*.").

[6] Nathan Key and Paul Teague, *Septic Permit Issue Yields Two Arrests,* News-Topic (Mar. 16, 2007), *available at* http://www.newstopic.net/articles/2007/03/16/news/47septic.txt (last accessed April 30, 2007). The applicable bribery law provides in part:

> If any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, which lay within the scope of his official authority and was connected with the discharge of his official and legal duties, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be punished as a Class F felon.

North Carolina General Statutes § 14-217(a) [hereinafter G.S.].

[7] *See* Brown-Graham, *supra* note 5, § 4, 3-6.

[8] Some specialists are also employed by the North Carolina Alliance of Public Health Agencies and serve local health departments on a temporary basis. *See* http://www.ncapha.org/ for more information about the Alliance.

[9] *See* 15A NCAC 01O .0100 to .0109 (outlining the authorization requirements for local environmental health specialists)

in his or her "official" capacity, both government entities (local and state) could be intended targets. In general, the law provides that if the specialist is acting as an agent of the state, the liability (i.e., the responsibility for the money damages) rests with the state.[10] In practice, however, the state and the county have shared responsibility for paying settlements and judgments in some recent cases.[11]

Would The Plaintiff Win?

Whether a civil lawsuit alleging negligence by a specialist will succeed depends in large part on the facts of the case. If the court determines that the specialist or other defendant was not negligent, the suit will not succeed.

In addition to relying upon the facts of the case, there are several legal principles that might be called upon to protect a specialist, a county or the state from liability. The following discussion will highlight three of these principles: (1) sovereign and governmental immunity, (2) the public duty doctrine, and (3) public official immunity.

Sovereign and Governmental Immunity

Historically, the government has been protected from liability under the common law by a concept called "sovereign immunity." This immunity protects the state (i.e., the sovereign) and "governmental immunity," a more limited type of immunity, extends to protect local governments.[12] "Both sovereign and governmental immunity rest on public policy considerations, which suggest the State should not be forced to answer a lawsuit under the very claims that it created. Accordingly, a court will not enforce these claims without the consent of the State."[13] These immunities are available only when a government entity (i.e., the state, county) is sued, not the individual specialist.

Governmental immunity applies only to functions that are considered "governmental," which are those that are discretionary, political, legislative, or public in nature and performed for the public good on behalf of the State, rather than the local government itself. Examples of governmental functions include fire protection[14] as well as onsite wastewater permitting.[15] The immunity does not extend to "proprietary" functions, which are functions that are commercial or chiefly for the private advantage of the community. Examples of proprietary activities are airports and public utilities.[16]

While this immunity may seem to be an easy way for a government to avoid liability, the immunity is waived if the government consents to be sued or purchases liability insurance. Why would a government sacrifice immunity by consenting to suit or purchasing insurance? The primary reason to purchase insurance is that the scope of sovereign and governmental immunity is limited. Specifically, the immunities do not extend to protect a government entity from liability related to:

- Proprietary functions, and it is often difficult to determine which activities will be considered proprietary rather than governmental,

[10] G.S. 143-300.8; 143-300.6. The primary statute governing defense of sanitarians and payment of judgments provides:

> Any local health department sanitarian enforcing rules of the Commission for Health Services or of the Environmental Management Commission under the supervision of the Department of Environment and Natural Resources pursuant to G.S. 130A-4(b) shall be defended by the Attorney General, subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of [the STCA] in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Health Services or of the Environmental Management Commission. The Department of Environment and Natural Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf, subject to the provisions of G.S. 143-300.6.

G.S. 143-300.8.

[11] Personal conversation with Andy Adams, Section Chief, On-site Water Protection Section, Division of Environmental Health, Department of Environment and Natural Resources (May 2006); For further discussion, see section entitled "Who Pays for Settlements and Judgments," *infra* page 7.

[12] Brown-Graham, *supra* note 5, §3, 7-8.

[13] Anita R. Brown-Graham, *Local Governments and the Public Duty Doctrine After* Wood v. Guilford County, 81 N.C. L. Rev. 2291, 2312 (2003).

[14] *See* Taylor v. Ashburn, 112 N.C.App. 604, 607-08, 436 S.E.2d 276, 279 (1993).

[15] Tabor v. Orange County, 156 N.C.App. 88, 575 S.E.2d 540 (2003).

[16] Brown-Graham, *supra* note 5, §3, 15-16.

- Certain types of claims, such as claims alleging violations of federal law, the North Carolina Constitution and breach of contract claims, and
- Suits in which officials and employees are named in their individual capacities.[17]

In addition, "the public increasingly demands greater accountability from its governments [and] the purchase of insurance is usually the only way for a citizen to be compensated for injuries caused by the local government while it was engaged in a governmental activity."[18]

At the local level, counties are authorized to waive governmental immunity through the purchase of liability insurance[19] and many have done so. At the state level, sovereign immunity has been waived in two ways. First, by enacting the State Tort Claims Act (STCA), the state has consented to be sued in some situations.[20] Immunity is waived only to the extent that the claim is allowed under the STCA.[21] The state has also waived its sovereign immunity to the extent it has purchased liability insurance.[22]

When enforcing state statutes and rules as an agent of the state, an action of a local environmental health specialist will likely be covered by both the STCA and the state's insurance.[23] If, however, the specialist acted outside the scope of his or her agency, the STCA and the state's insurance coverage will not apply. In other words, the specialist's actions *will not* be considered state actions (thus triggering the STCA and the insurance policy) if the specialist was, for example, enforcing a local board of health rule (such as a local well rule), a local ordinance (such as a vector control ordinance) or other local policy.[24]

In summary, if a governmental entity such as a county or the state is sued (rather than an individual person), sovereign or governmental immunity will shield it from liability unless the entity has purchased insurance or is governed by the STCA.

Public Duty Doctrine

The public duty doctrine is a principle that protects governments and their agents from liability even if the government has waived its sovereign or governmental immunity. The doctrine may apply if the government owes a duty to the general public rather than to an individual, particularly if it is a statutory duty.[25]

In lawsuits against local governments, the courts have interpreted the doctrine very narrowly. It applies only in limited situations involving police protection.[26] For state government, however, courts have applied a more expansive interpretation of the doctrine.[27] For example, the North Carolina Supreme

---

[17] Brown-Graham, *supra* note 5, §3, 23-24.

[18] *Id.*

[19] G.S. 153A-435(a).

[20] GS Chapter 143, Article 31 (Tort Claims Against State Departments and Agencies).

[21] Recovery under STCA is capped at $500,000. G.S. 143-299.2. In recent years, legislation has been introduced that would increase the cap to $1 million. *See, e.g.*, An Act To Increase the State Tort Claim Limit, S 586, 2007-08 Sess.

[22] G.S. 58-32-15 (authorizing the Public Officers and Employees Liability Insurance Commission to purchase insurance in some situations).

[23] Sess. L. 2001-505.

[24] Similarly, the state will not provide legal representation for a specialist who is acting outside the scope of his or her agency. *See* Cates v. N.C. Dept. of Justice, 346 N.C. 781 (1997) (holding that a specialist who conducted a preliminary soil evaluation was not entitled to representation by the Attorney General because the evaluations were not provided for in the rules of the Commission for Health Services).

[25] *See* Myers v. McGrady, 360 N.C. 460, 465-66, 628 S.E.2d 761, 766 (2006) (holding that the public duty doctrine barred a claim against the Division of Forest Resources by a motorist alleging that the forest ranger negligently failed to extinguish a fire and warn motorists; court explained that the duty owed was to the public, not to individuals); *see also* Brown-Graham, *supra* note 14, at 2292 ("Commonly referred to as 'the duty to all, duty to none' rule, this judicially crafted doctrine declares that a local government is under no duty to protect any specific individual from the wrongful acts of a third person absent a 'special duty' of protection or a 'special relationship' between the claimant and local government.").

[26] Wood v. Guilford County, 355 N.C. 161, 167, 558 S.E.2d 490, 495 (2002).

[27] In May 2007, legisation was pending in the General Assembly that would narrow the scope of the public duty doctrine as it applies to state government activities. The legislation proposes to allow the public duty doctrine to be used as a defense in certain situations involving law enforcement. H.B. 1113, 2007-08 Sess. ("An Act to limit the use of the public duty doctrine as an affirmative defense for civil actions under the state tort claims act to those claims in which the injuries of the claimant are the result of the alleged negligent failure of law enforcement to protect claimants from the misconduct of others.")

Court extended the public duty doctrine to the Department of Labor in a case alleging that the agency failed to make safety inspections as directed by state law.[28]

According to the courts, there are two exceptions to the public duty doctrine. The exceptions arise when a government owes a duty to an individual rather than the general public. First, a government could owe a duty to an individual if there is a *special relationship* between the injured party and the government.[29] Second, a government could owe a duty to an individual if it has created a *special duty* to an individual by promising protection.[30]

In 2007, the N.C. Court of Appeals held for the first time that the doctrine applied to the onsite wastewater permitting activities of the Department of Environment and Natural Resources.[31] The court concluded, however, that even though the public duty docrine applied, the *special duty* exception also applied. The court explained:

- There was a promise of protection when DENR issued the permit through its agent, the health department (suitable soil was a condition precedent for purchasing the lot).
- DENR failed to keep its promise when it revoked the permit.
- The homeowner relied on the promise and suffered damages.

Because the exception applied, the court concluded that the agency could still be held liable for negligent acts of its agents.

It is not clear whether the future applicability of the special duty exception will be limited by the facts in this particular case. The property owner in this case had indicated that he would not purchase the lot unless the soil was suitable for an onsite wastewater system. After the specialist issued a permit, the owner purchased the lot. Based on these initial events, the court inferred a "promise" from the specialist to the property owner[32] and "reliance" by the property owner on that promise.[33] It is possible, therefore, that the reach of this decision will limited to those situations in which the purchase of property is contingent upon the outcome of the permit application.

One of the three judges wrote a dissent. He agreed that the public duty doctrine applied in this situation but disagreed with the majority's conclusion that the special duty exception applied. The decision has been appealed to the North Carolina Supreme Court so it is possible that the state of the law on this issue will change in the coming months.

In summary, if the state or an agent of the state is sued for negligence related to onsite wastewater permitting, there is a chance that the public duty doctrine could shield the state from liability in some circumstances.

Public Official Immunity

Some lawsuits name individuals, including specialists, environmental health supervisors, health directors and even county commissioners and board of health members, as defendants. If a person is sued in his or her individual capacity, the person might be able to avoid liability by claiming public official immunity. The law, however, imposes significant limitations on this immunity.

The immunity is only available to people considered "public officials," as that term has been defined by North Carolina's courts. A public official

---

If this bill becomes law, the public duty doctrine will no longer be available as a defense for environmental health specialists.

[28] Stone v. N.C. Dept. of Labor, 347 N.C. 473, 495 S.E.2d 711 (1998); *see also* Hunt v. N.C. Dept. of Labor, 348 N.C. 192, 202, 499 S.E.2d 747, 753 (1998) (holding that the public duty doctrine barred a claim against the government agency responsible for regulating amusement parks).

[29] An example might be a relationship between a law enforcement agency and an informant. *See* Braswell v. Braswell, 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991).

[30] In order for the special duty exception to apply, two other conditions must be satisfied. First, the government must fail to keep its promise. Second, the individual must have relied on the promise and suffered some harm as a result. Stone, at 482, 495 S.E.2d at 717 (citing Braswell, 330 N.C. at 371, 410 S.E.2d at 902). The court in *Braswell* explained: "To make out such a prima facie case, plaintiff must show that an actual promise was made by the police to create a special duty, that this promise was reasonably relied upon by plaintiff, and that this reliance was causally related to the injury ultimately suffered by plaintiff." 330 N.C. at 371, 410 S.E.2d at 902.

[31] Watts v. N.C. Dept. of Env't and Nat. Resources, 641 S.E.2d 811 (2007).

[32] *Id.* at 817 ("NCDENR, through its agent the Health Department, made a promise to plaintiff by issuing the improvement permit warranting that the plaintiff could construct a three-bedroom home on the property as described in the site plan.").

[33] *Id.* at 817 ("Plaintiff relied on the permit in negotiating the purchase of the property.").

is a person who meets one or more of the following criteria:

- Holds a position created by legislation,
- Normally takes an oath of office,
- Performs legally imposed duties, and
- Exercises a certain amount of discretion.

In the context of environmental health, the courts have found that health directors are considered public officials,[34] but environmental health supervisors and specialists are not.[35]

Another inherent limitation is that the immunity extends only to "discretionary" duties, which are generally described as acts requiring "personal deliberation, decision, and judgment."[36] It does not apply to "ministerial" duties, which are "absolute, certain, and imperative, and involve merely the execution of a specific duty arising from fixed and designated facts."[37]

In summary, public official immunity provides limited protection to board of health members and health directors if they are sued in their individual capacities for negligence related to discretionary duties. Based on recent court decisions, public official immunity does not afford protection to environmental health specialists or their supervisors.

Would A Lawyer Be Provided?

Several different lawyers may become involved in defending a civil lawsuit. The State will typically provide representation in any claim against the state or against an agent of the state, particularly those filed under the STCA.[38] The state may provide representation in one of four ways: (1) through the Attorney General's office, (2) by hiring outside counsel, (3) by purchasing insurance that requires the insurer to provide defense counsel, or (4) through an attorney employed by DENR.[39] The State will not provide representation if it concludes that:

- The act or omission was not within the scope and course of the specialist's employment (and role as an agent of the state),
- The specialist acted or failed to act because of fraud, corruption or malice on his part,
- There is a conflict of interest between the state and the specialist; or
- Defense of the action would not be in the best interests of the state.[40]

The county attorney may also become involved in such cases and could take the lead in handling cases that fall outside the scope of the STCA (such as those alleging negligence related to enforcement of local rules or implementation of local programs).[41] Finally, an attorney selected by an insurance company (either through a policy purchased by the state or the county) may become involved in representing a person or a governmental entity in an environmental health case.

If the specialist acts outside the scope of his or her employment (e.g., accepting a bribe), it is unlikely that the county or the state would provide an attorney to assist in any defense related to such acts. The specialist would need to hire and pay for an attorney independently.

Who Pays for Judgments and Settlements?

After a case has been settled or a judgment has been entered by a court, the primary concern is often "who pays?" The answer will vary depending on the type of case filed, the defendants named and the relationship between the co-defendants.

---

[34] *See* EEE-ZZZ Lay Drain Co. V. N.C. Dept. of Human Resources, 108 N.C. App. 24 (1992), *overruled on other grounds by* Meyer v. Walls, 347 N.C. 97 (1997).

[35] *See* Block v. County of Person 141 N.C. App. 273 (2000) (holding that supervisors and specialists are public employees rather than public officials).

[36] *See* Brown-Graham, *supra* note 5, §4, 7-9.

[37] *Id.* In addition, the immunity does not apply if the official acts with malic, for corrupt reasons, or outside the scope of his or her official duties. *Id.*

[38] G.S. 143-300.8. The Attorney General's office will not represent the specialist if the state determines that:

(1) The act or omission was not within the scope and course of the specialist's employment (and role as an agent of the state),

(2) The specialist acted or failed to act because of fraud, corruption or malice on his part,

(3) There is a conflict of interest between the state and the specialist; or

(4) Defense of the action would not be in the best interests of the state.

G.S. 143-300.4(a).

[39] G.S. 143-300.5.

[40] G.S. 143-300.4.

[41] Counties are authorized but not required to provide for the defense of any civil or criminal action brought against current or former officers and employees for acts or omissions committed in the scope and course of their employment. G.S. 153A-97 (incorporating by reference G.S. 160A-167).

When the state is named as the defendant (e.g., DENR or a specialist acting as as an agent of DENR) in a case filed under the STCA, the state is responsible for paying a settlement or judgment.[42] In recent years, however, the state has called upon the counties involved in environmental health cases to pay a portion of the settlement or judgment.[43] In some situations, the state's liability insurance may also be implicated.

When the county is named as the defendant and the case is not under the umbrella of the STCA (such as when a case involves the enforcement of a local rule or ordinance), the county or, if the county is insured, the insurer, will likely pay the claim. The same will hold true if the health director, environmental health supervisor or specialist is named as the defendant in his or her official capacity as a county employee and the case involves actions taken within the scope of the defendant's official duties.

If a specialist is sued in his or her individual capacity for an act or omission within the scope of his or her state agency, the state will still likely be involved in the litigation and may pay all or part of a settlement or judgment.[44] The county may also still be involved.

If, on the other hand, a specialist is sued in his or her individual capacity for actions taken beyond the scope of his or her agency or in violation of law or state and county policies, the state and county will likely not become involved in representation or payment of a settlement or judgment. An individual could consider purchasing a private insurance policy that includes professional liability coverage, but such coverage is not required by law.

Conclusion

Environmental health specialists do get sued occasionally for negligence. The case may be settled before going to court. If it does go to trial and the court finds that the specialist was negligent, the person suffering harm may be awarded money damages. Whether the state, the county or the specialist will be required to to pay for those damages depends upon the facts of the case, but it could ultimately be any combination of the three.

---

[42] *See* G.S. 143-300.6 (requiring DENR to pay the first $150,000 of any settlement or judgment; the balance [if any] is paid through other state dollars.)

[43] State law does not require the counties involved to pay a portion of the settlement or judgment. The responsibility technically rests entirely with the state when the settlement or judgment involves actions of a specialist acting as an agent of the state. G.S. 143-300.8.

[44] *See* G.S. 143-300.8 (authorizing the state to defend a sanitarian sued in his or her individual capacity).

The School of Government of The University of North Carolina at Chapel Hill has printed a total of 891 copies of this public document at a cost of $372.43 or $0.42 each. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.