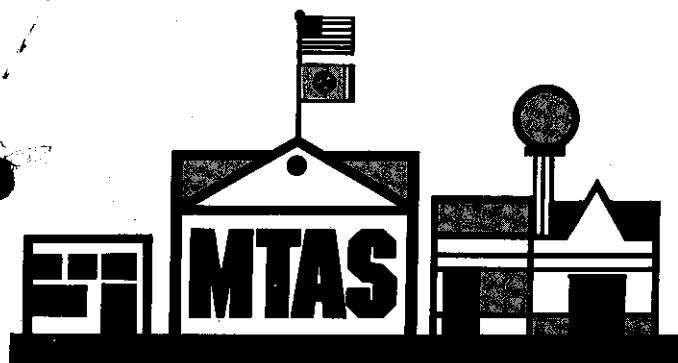




# TECHNICAL BULLETIN



MUNICIPAL TECHNICAL ADVISORY SERVICE  
THE UNIVERSITY OF TENNESSEE  
IN COOPERATION WITH THE TENNESSEE MUNICIPAL LEAGUE

Bulletin No. 23

January 10, 1990

## FIRE (AND POLICE) DEPARTMENT LIABLE FOR NEGLIGENT RESPONSE

by Sidney D. Hemsley

Under the Tennessee Tort Liability Act municipalities are liable for the negligence of their employees, with some exceptions. One of those exceptions is "discretionary functions" (*Tennessee Code Annotated (TCA) 29-20-205*). However, the act does not define that term. The Tennessee Supreme Court recently grappled with both a definition and application of the term in *Gordon, et al. v. City of Henderson*, 766 S.W.2d 784 (1988). Although that case involved the delivery of municipal fire services, it contains some language that should cause Tennessee municipalities to look closely at the way they deliver all public safety services.

Several plaintiffs sued the City of Henderson on the grounds that the negligence of the Henderson Fire Department was responsible for the death of four persons. They complained that:

1. The firemen were absent from their duty stations and had to be located by the Henderson Police Department;
2. The response time of the firemen was fifteen minutes when it should have been five minutes;
3. Some of the responding firemen had the smell of liquor on their breaths and were "unable to respond as trained and professional firemen;"
4. The firemen incorrectly placed their equipment in operation.

The plaintiffs never got an opportunity to prove their case. The Court dismissed their complaint for failure to state a claim upon which relief could be granted. The Court of Appeals upheld the dismissal, reasoning that the four acts of which the plaintiffs complained were "discretionary functions" for which the City of Henderson was not liable under the Tennessee Tort Liability Act.

The Court of Appeals was at least partially wrong, declared the Tennessee Supreme Court. The Court noted that while the Tennessee Tort Liability Act does not define the term "discretionary function," it had previously defined the term under the common law as:

Where the duty is absolute, certain, and imperative, and is simply ministerial, the officer is liable in damages to any one specially injured, either by his omitting to perform the task or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, and to be exerted or withheld according to his own judgment, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a willful exercise of them, where no corruption or malice can be imputed to him, and he keeps within the scope of his authority.

Under that definition, the Court concluded that "while upon a full development of the facts, some of the acts of the firemen complained of could logically be classified as "discretionary functions,"

... we find it difficult to categorize the apparent intoxication of firemen as a 'discretionary function,' nor, without an explanation of defendants, the absence of firemen from their duty station and the resultant delay in response time.

The Court relied in part on an Alabama Supreme Court opinion that a plaintiff was entitled to a trial on the question whether the City of Tuscumbia was liable for a house destroyed by a fire. The plaintiff in that case alleged the fire was caused by a delay in the response of the fire department arising from the failure of the fire department to replace an engine driver who had gone home sick. The deployment of firefighting resources can involve a discretionary function, said the Alabama Supreme Court, but:

We opine that in this case a duty was imposed on the Tuscumbia Fire Department to respond immediately to the call that the [plaintiff's] house was on fire. There was a special duty created to act in a skillful manner to respond to the call. We recognize that firemen may act with extreme skillfulness and yet be unable to get to a fire to prevent a building from burning to the ground. But, here the complaint alleges that the reason the fire department did not immediately respond was that the driver of the truck had gone home sick and had not been replaced. We opine that the fire department acted unskillfully by not having a back-up driver who could have immediately taken the place of the sick driver; ...in other words, the fire department lacked proficiency.

*City of Henderson* appears to have expanded two related avenues of recovery by plaintiffs alleging injury through the negligent acts of public safety (and possibly other) municipal employees.

First, the Court's application of its definition of "discretionary function" narrows, and has the potential to lead to a further judicial narrowing of the range of acts on the part of low-ranking and non-policy making employees that can be classed as "discretionary functions." At first glance it may seem both legally sound and just to declare that the intoxication of firemen or their absence from their duty stations are not "discretionary functions." But that declaration may open a Pandora's Box of complaints concerning the individual and collective mental and physical condition of public safety personnel, and staffing and deployment decisions that affect their response times and the quality of their service. The Court appears to have left some deployment decision within the category of "discretionary functions." But it takes little imagination to see that the Court's language is an invitation to test every deployment decision that does not result in a perfect or text book outcome.

Second, and perhaps most important, the Court's reliance upon the "special relationship" doctrine used by Alabama Supreme Court's probably erodes the doctrine that a fire (or police) department owes no duty to a particular individual. Under the rapidly developing "special duty" or "special relationship" doctrine police or fire department can, by the conduct of its employees, create a duty to aid or protect a particular individual.

The courts are not in agreement on what it takes to create a special duty or relationship. Generally, cases on that subject require conduct on the part of the public safety personnel that arise to the level of a promise to help or protect a particular individual, and reliance by that individual on that promise. Other cases add a requirement that the individual claiming injury through the breach of the promise to help or protect must have suffered the injury while in the physical custody, or control of, public safety personnel. However, this case suggests that a special duty or relationship can be created very easily, possibly by little more than the promise of help or protection created by the existence of a public safety department.

How far these two related avenues of recovery will be expanded remains to be seen. However, wise municipalities will consider that *City of Henderson* puts them on notice that if they maintain and operate municipal fire and police services, the firemen and policemen whose duty it is to respond to calls for help or protection must respond skillfully and proficiently. If they do not, the municipality which employs them might be held liable under the Tennessee Tort Liability Act for injuries arising from their negligent response.

### **For Further Information**

For further information on the Tennessee Tort Liability Act, please contact Sid Hemsley, Senior Legal Consultant in Knoxville at (615) 974-5301, or your MTAS Legal Consultant.

The Municipal Technical Advisory Service (MTAS) is a statewide agency of The University of Tennessee's Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League in providing technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, ordinance codification, and wastewater management.

MTAS TECHNICAL BULLETINS are information briefs that provide a timely review of topics of interest to Tennessee municipal officials. The BULLETINS are free to Tennessee local, state, and federal government officials and are available to others for \$2.00 each. Contact MTAS for a list of recent BULLETINS.

Municipal Technical Advisory Service  
The University of Tennessee  
891 20th Street  
Knoxville, Tennessee 37996-4400  
E14-1050-00-001-90

Non-Profit Org.  
U.S. POSTAGE  
PAID  
Knoxville, Tenn.  
Permit No. 870

MS CAROL  
MTAS LIBRARY C HEWLETT

891 TWENTIETH ST  
KNOXVILLE TN

37996

The University of Tennessee does not discriminate on the basis of race, sex, color, religion, national origin, age, handicap, or veteran status in provision of educational opportunities or employment opportunities and benefits.

The University does not discriminate on the basis of sex or handicap in the education programs and activities which it operates, pursuant to the requirements of Title IX of the Education Amendments of 1972, Pub.L. 92-318; and Section 504 of the Rehabilitation Act of 1973, Pub.L. 93-112; respectively. This policy extends to both employment by and admission to the University.

Inquiries concerning Title IX and Section 504 should be directed to Ms. Mary H. Taylor, Assistant to the Vice President, 109 Student Services Building, Knoxville, Tennessee 37996-0212, (615) 974-6621. Charges of violation of the above policy should also be directed to Ms. Taylor.