

FIRE (AND POLICE) DEPARTMENTS LIABLE FOR NEGLIGENT RESPONSE

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Under the Tennessee Governmental 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 (T.C.A.)* 29-20-205). However, the act does not define that term. The Tennessee Supreme Court has grappled with both a definition and application of the term in *Gordon, et al. vs. 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 manner in which they deliver all public safety services.

Several plaintiffs sued the City of Henderson on the grounds that negligence of the Henderson Fire Department was responsible for the deaths of four people. 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 15 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;” and
4. The firemen placed their equipment in operation incorrectly.

The plaintiffs never had 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 Governmental Tort Liability Act.

The Court of Appeals was at least partially wrong, declared the Tennessee Supreme Court. The Court noted that while the Tennessee Governmental 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 anyone 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 of whether the City of Tuscumbia was liable for a house destroyed by a fire. The plaintiff in that case alleged that the loss was caused by a delay in the response of the fire department arising from the failure of the 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 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 decisions 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 textbook outcome.¹

Second, and perhaps most important, the Court’s reliance upon the “special relationship” doctrine used by the Alabama Supreme Court 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 and fire departments can, by the conduct of their 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 public safety personnel that rises to the level of a promise to

¹ Since this bulletin was first published in 1991, the Tennessee Supreme Court has adopted the planning-operational test to determine whether an act is discretionary (*Bowers vs. City of Chattanooga*, 826 S.W. 2d 427 (Tenn. 1992)). Under this test, acts that rise to the level of planning or policy making are considered discretionary and are clothed with immunity. Operational acts, on the other hand, can engender liability. In determining whether to impose liability for a particular act, courts will look, not necessarily to the particular actor, but to the decision-making process and the propriety of judicial review of the resulting decision. The acts that gave rise to liability in the *Henderson* case would probably have been denominated operational under this test. Therefore, the result would probably have been the same.

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.²

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 fire fighters and police officers whose duty it is to respond to calls for help or protection must respond skillfully and proficiently. If they do not, the municipality that employs them might be held liable under the Tennessee Governmental Tort Liability Act for injuries arising from their negligent response.

For Further Information

For further information on the Tennessee Governmental Tort Liability Act, please contact Sid Hemsley, Senior Legal Consultant in Knoxville, at (865 974-0411) or your MTAS Legal Consultant. You also may visit our Web site at www.mtas.utk.edu.

² Since this bulletin was first published, the Tennessee Supreme Court has listed the situations that give rise to a special duty or relationship and, thus, to liability:

1. Officials, by their actions, affirmatively undertake to protect the plaintiff, and the plaintiff relies upon the undertaking; or
2. A statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or
3. The plaintiff alleges a cause of action involving intent, malice, or reckless misconduct (*Ezell vs. Cockrell*, 902 S.W. 2d 394 (Tenn. 1995)).

Under this definition of special duty or relationship, the only portion that some of the acts in the *Henderson* case might fall under is the reckless misconduct provision of the third item.

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