

RISKY BUSINESS

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Counselor's Comments

By Surdyk Dowd & Turner

Ohio House Considers Bills to Limit Political Subdivision Immunity for Emergency Responses

Currently, when their first responders are on emergency calls, political subdivisions are immune from personal injury and property damage claims arising from negligent vehicle operation. The Ohio House is considering two bills that would strip this immunity protection, except in limited circumstances, exposing Members to possible negligence liability. One bill's exception would eliminate only a discrete class of first-party negligence claims but significantly increase the risk of other negligence actions. The other bill's exceptions are often impractical and could increase the potential harm to law enforcement officers and others.

House Bills 267 and 419 would amend portions of the Ohio Political Subdivision Tort Immunity Act (Act), R.C. § 2744.01, *et seq.*, to remove immunity provided political subdivisions for negligent motor vehicle accidents involving police, fire, and emergency medical service personnel while responding to emergencies. The proposed legislation represents a significant departure from the legislature's "rather open-ended definition of 'emergency call'" applicable to police, *Moore v. Columbus*, 98

Ohio App.3d 701, 706, 649 N.E.2d 850 (10th Dist.1994), as well as the current protections for other emergency responses. Furthermore, if approved, the bills would expand a political subdivision's potential liabilities; thus, undermining the state's "valid interest in preserving the financial soundness of its political subdivisions." *Menefee v. Queen City Metro*, 49 Ohio St. 3d 27, 29, 550 N.E.2d 181 (1990).

Current Law

As structured, the Act removes a political subdivision's blanket immunity, R.C. § 2744.02(A), "for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority," R.C. § 2744.02(B)(1). The Act, however, provides the following defenses; *i.e.*, restores immunity, for the following:

- When "[a] member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or

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or wanton misconduct," R.C. § 2744.02(B) (a):

- When "[a] member of a municipal corporation fire department of any other fire-fighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct" R.C. § 2744.02(B)(1)(b); and,

- When "[a] member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treat-

Counselor's Comments (cont.)

ment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506, or a driver's license issued pursuant to Chapter 4507 of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 411.03 of the Revised Code [to proceed cautiously past a red or stop signal]," R.C. § 2744.02(B)(1)(c).

Essentially, the Act currently restores immunity to the political subdivision if the vehicle was on an emergency call, "a call to duty * * * that demand [s] an immediate response," R.C. § 2744.01(A), including responding to an emergency such as a fire or medical emergency, see *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 13, if the vehicle's operation does not constitute willful or wanton misconduct.

The Proposed Laws

House Bill 267 would eliminate immunity for political subdivisions for emergency responses and would require the subdivision to answer in negligence for accidents involving police, fire and EMS vehicles. The lone exception in the proposed amended Act reads: A political subdivision is not liable in damages for injury, death, or loss to person or property caused by an employee's negligent operation of a motor vehicle **if the plaintiff, at the time of the alleged negligence, was attempting to flee from a law enforcement officer so as to avoid apprehension for a criminal offense.**

(Proposed R.C. § 2744.02(B)(1)) (emphasis added). It is important to note that the proposed amendment would not bar negligence actions filed by third-party plaintiffs injured during a pursuit and it eliminates immunity for fire and EMS emergency calls. The bill does provide that compensatory damages may be reduced

by the plaintiff's or other parties' contributory negligence. (Proposed R.C. § 2744.05(C)(2)).

House Bill 419 retains immunity for first responders' operation of a motor vehicle only if "**the vehicle's lights and sirens [are] simultaneously activated * * ***" (Proposed R.C. § 2744.02(B)(1)(a, b, c)) (emphasis added). This restriction is problematic because it ignores some realities of police work. Although the Revised Code requires emergency or public safety vehicles to activate lights and sirens before exceeding the speed limit, R.C. § 4511.24, courts have recognized that law enforcement officers have the discretion not to do so (or to turn lights and sirens off) when circumstances warrant: *Elsass v. Crockett*, 9th Dist. Summit No. 22282, 2005-Ohio-2142 (proceeding to scene "where someone had been stabbed and the suspect was still in the area"); see *Colbert*, 2003-Ohio-3319 (investigating suspected drug deal). Under House Bill 419, even if an officer did not exceed the speed limit, the political subdivision would lose immunity if the officer determined using lights and sirens was inadvisable under the circumstances. This outcome would not merely increase the subdivision's exposure; it could escalate the potential harm to the officer and others if lights and sirens forewarned a suspect to the officer's presence.

The Status

House Bill 267 was introduced in mid-June 2017. The legislation was assigned to the House Civil Justice Committee (Committee) for consideration. The Committee held two hearings on the bill: on September 13, 2017 and September 20, 2017. Only proponents of the legislation have appeared.

On September 20, the Committee

heard from three witnesses: 1) the individual injured in the Cincinnati accident; 2) a reporter for Channel 12 in Cincinnati who did a series of reports based on the Cincinnati accident and an injury accident in Dayton; and 3) John Van Doorn, a representative of the Ohio Association for Justice, a plaintiffs' bar organization. (Link: <http://www.ohiohouse.gov/committee/civil-justice> (Sept. 20, 2017 hearing)). Included in Mr. Van Doorn's written comments was the following: By rolling back the immunity for emergency vehicles, HB 267 does not make a municipality automatically liable for damages. A person making a claim against a municipality must still prove that an officer, firefighter, or EMT was negligent in the operation of a vehicle and that the operator caused the vehicular collision.

Mr. Van Doorn did not mention the lesser burden required for a plaintiff to prove negligence rather than willful or wanton misconduct, see *Rinehart v. Fed. Natl. Mtge. Assn.*, 91 Ohio App.3d 222, 632 N.E.2d 539 (2nd Dist.1993), or the increased litigation costs that will be required of municipalities forced to defend against negligence claims. The Committee has not yet scheduled additional hearings or a vote on the bill.

House Bill 419 was introduced in late-November 2017 and assigned to the Committee. The Committee held its first hearing on the measure on December 6, 2017 and received testimony from the bill's sponsor, Rep. Michael E. Henne (R-Columbus). His written statement included the following comments: Every police department manual I have found provides for the use of lights and sirens in responding to an emergency. There is some logic to providing

Counselor's Comments (cont.)

some immunity when the police, fire or EMS are providing emergency services, but it also makes sense to alert the public if they are operating in this heightened state. HB 419 does not prohibit emergency responders from operating without lights and sirens. Instead, the municipal corporation will not be able to claim sovereign immunity if they do.

(Link: <http://www.ohiohouse.gov/committee/civil-justice> (Dec. 6, 2017 hearing)). A second hearing was set for January 31, 2018, with proponents of the bill scheduled to testify.

The Consequences

It is clear that enactment of H.B. 267 and/or H.B. 419 would significantly increase the risk of liability to Members. The Legislative Service Commission's (LSC) fiscal analysis of H.B. 267 stated, in relevant part: Liability claims against political subdivisions for the negligent operation of emergency motor vehicles could be significant, particularly so if a claim involves injury or death. As a result, political subdivisions would likely incur significant new costs to pay claims when found to be liable in these cases. However, the bill also specifies that compensatory damages recoverable against a political subdivision for an employee's negligent operation of a motor vehicle must be reduced by the percentage of contributory fault attributable to the plaintiff or other parties. * * * Although this may reduce costs for liability claims, it is difficult to determine how significantly they might be reduced, as liability claims vary greatly depending on the nature of death, injury, or loss.

(H.B. 267 Fiscal Note & Local Impact Statement at 1-2). The LSC

summarized the number of emergency vehicle-related accidents between 2012 and 2016, inclusive. Those accidents number 14,835, including those resulting in death, injury and property loss.

Based on the same data, the LSC's fiscal analysis of H.B. 419 reached a similar conclusion: [P]olitical subdivisions would be exposed to liability for death, injury, or loss resulting from negligent operation of emergency motor vehicles when those vehicles are operated without the lights and sirens simultaneously activated. * * * If found to be liable, political subdivisions would likely incur significant new costs either (1) to pay claims, for entities that self-insure against liability, or (2) in the form of increased insurance premiums for entities that are members of joint insurance pools or otherwise purchase liability insurance.

(H.B. 419 Fiscal Note & Local Impact Statement at 1). The LSC does not specify the number of mishaps that were the employee's fault; nevertheless, it is virtually guaranteed that removal of political subdivision immunity as envisioned by these bills will significantly increase both the number of cases and the potential exposure.

Conclusion

The elimination of immunity for law enforcement, fire, and EMS emergency calls unquestionably will yield negative consequences. When political subdivisions are subjected to a mere negligence standard for these mishaps, except in the most limited circumstances, the liability exposure and cost of defense will indisputably increase. Stripping immunity may slow response times

and increase risk to responders and others. Currently, emergency responders "are afforded discretion to determine how to respond to emergency calls." *Hoffman v. Gallia Cty. Sheriff's Office*, 4th Dist. Gallia No. 17CA2, 2017-Ohio-9192, ¶ 81; see R.C. § 4511.24 (speed limits "do not apply to emergency vehicles or public safety vehicles when they are responding to emergency calls * * *") In the Cincinnati accident previously referenced, according to the reporter's presentation to the Committee, while on patrol, the police officer received an emergency call for a robbery. As he increased speed to respond, the officer lost control on wet pavement and struck the parked car. Would the officer have increased his response speed if he knew he would be held to the same liability standard as a civilian? In *Elsass*, would the responding officer or others have been harmed if the officer's lights or siren had alerted the suspect? These are just a few of the salient issues for the Committee's and, perhaps ultimately, the General Assembly's consideration.

We will continue to monitor the progress of the proposed legislation and report on the final outcome.

Loss Control Lowdown...

“Recognize & Respond: Police Interactions with Individuals with Autism Spectrum Disorder”

Starr Markworth



MVRMA recently sponsored a training program that was developed by Isaac Wiles and its training partners which serves as a solution to the complex issues posed by police interactions with individuals with ASD. Attorney Carolyn Gutowski and Retired Westerville Assistant Chief of Police Jon Scowden both presented this topic very effectively with great knowledge and personal experience.

This training program is very important for the recognition of individuals with ASD, but also, it neutralizes 42 U.S.C. 1983 claims—and the associated attorney fee awards—by providing police agencies the tools they need to proactively implement tactics and procedures to avoid volatile interactions to begin with.

According to Autism Speaks website, on a daily basis police officers encounter a multitude of individuals in emergency situations. Just as each emergency differs from the next, so does the individual involved, especially in regards to individuals with autism spectrum disorders. Police are trained to respond to a crisis situation with a certain protocol, but this protocol may not always be the best way to interact with individuals with autism. Because police are usually the first to respond to an emergency, it is critical that these officers have a working knowledge of autism, and the wide variety of behaviors individuals with autism can exhibit in emergency situations.

Teaching first responders the signs of autism is an important first step toward preventing unfortunate situations.

General training guidelines*:

- Law enforcement agencies should proactively train their sworn workforce, especially trainers, patrol supervisors, and school resource officers, to recognize the behavioral symptoms and characteristics of a child or adult who has autism, and learn basic response techniques.
- A training program should be designed to allow officers to better protect and serve the public and make the best use of your valuable time, and avoid mistakes that can lead to lawsuits and negative media scrutiny, loss of confidence from the community, morale problems, and lifelong trauma for all involved.
- A good autism recognition and response workshop is designed to inform law enforcement professionals about the risks associated with autism, and offers suggestions and options about how to address those risks.

**Dennis Debbaudt, [Autism Risk & Safety Management](#)*

The feedback from this training program has been overwhelmingly positive, in fact MVRMA is currently planning at least three more sessions to be held in the North Dayton, South Dayton and Cincinnati region in the upcoming months.

If your agency is interested in hosting one of these sessions, please contact Starr Markworth, smarkworth@mvrma.com.



Broker's Beat

Emergency Readiness

Most Public Entities are well prepared in this this area, but there is always room for improvement. Lately, we have seen client group meetings start with a short preparedness talk. Instead of where the bathrooms are located, and when breaks will occur, they talk about 1) exits, 2) lighting and 3) where to gather post event.

A number of natural catastrophes have shown that we might not be as prepared for the challenges faced as we might think. Don't think "That could never happen here", because it can. Be sure that your crisis management plans take into account the truly unexpected for your area.

Emergency response begins with planning ahead of time. Following are best practices for "what needs to happen in the first 72 hours" offered by the Alliant claims group.

1. First, contact the members of the team that you will need for the situation:
 - Staff and Supporting Agencies
 - Restoration contractor
 - Broker
 - Adjuster
2. Preserve/protect property from further damage to the extent possible.
3. Protect property and people from potential liability situations.
4. Consider obtaining an Emergency Proclamation so you can secure the contracts needed to start repairs quickly.
5. There are variations between jurisdictions as to what constitutes an emergency. You will need to know your locality's definition to trigger services.
6. On-site meetings with key players.
7. Agree to an action plan.
8. Set up a regular meeting schedule; plan for an on-site, via conference call or both.

Broker's Beat

(Cont.)

9. No surprises. Adjusters hate surprises.
10. Dealing with mold in the first 72 hours.
11. Valuable papers-need to stabilize conditions.
12. Insurance adjustment team - who will it be comprised of:
 - Adjuster
 - Forensic Accountant
 - Engineers
 - Construction cost estimators
 - Other specialized trades
13. Insured's team:
 - Selected restoration contractor/agreed rates
 - Forensic Accountant
 - Construction Cost Estimator, if needed
 - Structural Engineer
 - Industrial Hygienist
14. Temporary housing decisions and approvals

The Claims File...

Craig Blair

Looking back on 2017 from a claims perspective, it was a typically busy year. The MVRMA program provides coverage of our members', auto, property, and general liability claims. There were 352 claims last year which is consistent with the recent trend. It will take some time before the 2017 loss year can be closed out as we must wait for the expiration of Ohio's two-year statute of limitations to file claims. Then we must resolve all claims and pending lawsuits.

General liability accounted for about 40% of the 352 claims and about 20% of the amount paid. This is the line of coverage with the most claims and lawsuits. As a result, the amount paid on 2017 General liability claims may increase significantly over the years until the cases are resolved. To date, commercial property claims account for 28% of total 2017 claims and 38% of the payments. Auto claims account for 32% of total 2017 claims and 42% of the payments; however, payments under this line of coverage will increase as we settle the pending injury claims.

Another service MVRMA provides to its members is assistance with subrogation claims. Such claims involve seeking reimbursement from 3rd parties that damage city property or vehicles. Reporting of subrogation files to MVRMA is optional, but most members prefer we handle these claims so they can concentrate on their core job responsibilities. In 2017, 97 subrogation matters were handled by MVRMA for our members and \$54,039 was collected, but these figures are subject to change once all claims are closed.

Due to the members' exceptional loss control practices, claims losses have trended at relatively low levels. Because of this, the pool had another good year financially in 2017. MVRMA is funded entirely by our members and they benefit from the pool's good financial results. When MVRMA closes out a loss year, the remaining funds are returned to the members. In 2017, the pool returned over \$1.5 million to the membership which again demonstrat-

FYI...Is This Covered?

By Tom Judy

“Is this covered?” Not surprisingly, this is a question we hear often. We find the answer to that question in the MVRMA Liability Coverage Document. The MVRMA Board of Trustees approved the 2018 MVRMA Liability Coverage Document at its December 2017 meeting. This document is, effectively, the pool’s own liability insurance policy.

Understanding how to read an insurance policy is a skill every risk manager should acquire. That said, reading an insurance policy is not for the faint of heart. The good news, however, is that virtually every liability insurance policy is constructed in the same manner. Once you understand this general format, you will find your ability to read and understand your insurance policies will be greatly enhanced.

Liability policies contain the following elements, which you can remember using the acronym “DICED:”

Declarations: This is usually the first few pages of the policy and provide an overview of who is insured, the name of the insurance company, the types of coverages, the dollar limits of the coverage, deductibles, and a list of the various forms and endorsements that comprise the policy.

Insuring Agreement: This is a very broad description of what is covered under the policy.

Conditions: The Conditions section is usually near the end of the policy and describes the rights and obligations of the various parties including when claims must be reported, duties of the insureds to limit losses, how disputes will be settled and notice provisions.

Exclusions: The Exclusions section whittles down the broad coverage provided in the Insuring Agreement. It is very important to understand the exclusions in your policy. Exclusions generally fall into the following categories:

- **Morale / Morale Hazards:** Losses that are not accidental, including those intentionally caused by the insured, or losses caused by carelessness or neglect, often in anticipation that insurance will cover them.

- Catastrophic Exposures: Losses arising out of such things as nuclear hazards, riots or war.
- Losses Covered Elsewhere: Claims covered by other policies such as Workers Compensation, pollution, aircraft or crime events.
- Business Risks: Losses due to the failure to perform business obligations or due to economic conditions. These exclusions include breach of contract, failure to collect/improper collection of revenue, or poor workmanship.
- Other Exclusions: An insurer may simply choose to not to provide a particular type of coverage.

Definitions: This section assigns a precise meaning to various words and phrases used in the policy. Such defined terms are usually identified throughout the policy by bold print, italics or quotation marks. A term or word in an insurance policy may have a different meaning than in the “real world” so the readers of a policy are advised to consider the policy’s definition of a term rather than assume they understand its meaning.

The second part of the policy consists of the endorsements. These are often added to the base policy to customize the policy for the benefit of the insurer and/or the insured. The reader of a policy is encouraged to acquire copies of all applicable endorsements because these can drastically alter the coverage provided.

When you are presented with a potential claim, here is a suggested method to determine if it is a coverage loss:

1. Is the person or entity covered? The policy will contain a section titled “who is insured” (or “covered persons or entities” in the MVRMA coverage document.) Read this section of the policy to determine if the person or entity has the right to recover under the policy. Often, persons are identified by their relationship to the named insured such as officers, employees, volunteers or permissive users of automobiles.
2. Is the loss covered? Examine the broad Insuring Agreement and then search the Exclusions to see if there are any applicable provisions that remove coverage.
3. Read and understand the meaning of any defined terms in the applicable sections of the policy.
4. Review the Declarations to determine the limits of coverage and deductibles applicable to the loss.

Hopefully, this short overview will be useful to you the next time you bravely attempt to read an insurance policy.

Calendar of Events



-Upcoming Training Events

Police Interactions with Individuals with Autism Spectrum Disorder

Centerville: February 28 Troy: March 15 Blue Ash: April 17

Spring Driver Training

New Student:	April 4-6	April 26-27	May 17-18		
Recertification:	April 11	April 12	April 19	May 9	May 10

Forklift Training March 13 April 10

CPR/AED & First Aid March 20

Alcohol Awareness Training for Supervisors April 24

- Upcoming Board Events

Committee Meetings

Risk Management - March 1st 10:00 AM

Finance - March 1st 1:30 PM

Board Meeting

March 19th 9:30 AM

From The Board Room

Actions taken at the December 18th 2017 Board meeting included:

- ⇒ Approval of the 2018 Liability Coverage Document
- ⇒ Approval of the 2018 Liability Renewal with GEM and Genesis
- ⇒ Approval of the 2018 Crime Renewal
- ⇒ Approval of the Amended Late Payment Policy, Disposal of Surplus Property Policy, Travel and Business Expense Policy, Bond Coverage Policy, P&C Policy and the new Credit Card Policy
- ⇒ Approval of the 2018 Budget
- ⇒ Election of Board Officers