Sources of emergency management law: An overview

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ABSTRACT

This article is the first in a series dealing with legal issues in emergency management. It provides an overview of the sources of emergency management law, and, more specifically, addresses the topic of negligence. The upcoming issue of the Journal of Emergency Management will tackle the legal issues associated with immunities.

INTRODUCTION

Local authorities face many decisions in connection with emergency management activities. Unfortunately, the essential nature of emergencies is that something is going wrong or is about to go wrong. Whether the event springs from an occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause,¹ the choices that must be made by local officials frequently are not easy. Often, all the options are unpleasant. Sometimes, different plaintiffs will see the same action as wrong for the opposite reasons.

For example, a flood threatens a city and limited resources mean that one of two residential areas may be preserved through sandbagging and building dikes. One region has many low-income residents and low property values. The other area is a wealthy enclave with extremely high property values. Assuming all residents can be safely evacuated, the choice that must be made is still not a happy one. Whether the selection is to preserve the higher property values or the greater number of residences, many citizens will be dissatisfied that their neighborhood was not saved. In this case, as with many emergency management decisions, either group may have the basis for a lawsuit. The legal challenge for leaders of local government, as for emergency management as a whole, lies in taking proactive steps to avoid bad choices. Of course, not every bad choice can be prevented. Still, with close involvement of legal counsel in all phases of emergency management, the situation may be vastly improved. This approach is known as “litigation mitigation.”²

Litigation mitigation has three goals: 1) reduced exposure to legal claims, 2) improved life safety, and 3) enhanced property protection.

Lawyers are trained to look at the first of these three factors as their main concern. A leader of local government must regard all three as fundamentally important. Reduction of legal exposure naturally results in higher life safety and property protection.

Unfortunately, the array of laws that regulate the conduct of local government may be bewildering. Emergency managers sometimes disregard legal issues and vociferously declare that they are “too busy saving lives and protecting property to bother with all that legal nonsense.” Such a line of attack is specious, given the “all hazards” nature of emergency management. Unfortunately, educational materials are generally deficient when it comes to treatment of legal issues.³ Liability issues have, in fact, been called the “great unplanned for hazard faced by emergency management.”²
SOURCES OF EMERGENCY MANAGEMENT LAW

Emergency management law in the United States is rooted in all three levels of government—federal, state, and local. While all three types of legal responsibility may result in liability, the most likely source is state law, specifically the tort concept known as negligence. Immunities allow protection for emergency managers under certain circumstances. The National Fire Protection Association and post-9/11 federal law have created new standards that apply to all emergency managers. The availability of federal funds for emergency management results in setting criteria for state and local emergency management performance.

Many other laws affect emergency management's daily activities. Some of these laws spring from duties peculiar to the discipline, such as obligations to plan, train, and exercise. Emergency managers who are government employees have obligations that arise from their service, such as complying with government ethics rules and special requirements for procurement. Other important legal considerations arise from general managerial responsibilities and affect managers in both the private and public sectors. These include issues such as personnel law and contract law.

Negligence

Negligence is a common law doctrine that has evolved over the years. Its basic principle is this: every person has a general obligation to act in a reasonable manner at all times, considering the circumstances. When one acts (or fails to act) unreasonably and that act (or failure to act) is the legal cause of an injury to a person or property, liability ensues.

The elements of negligence are: breach of duty—the unreasonable action or failure to act; legal causation—frequently referred to as “proximate cause,” which means that the harm happened as a reasonably close result of the act or failure to act; and personal injury or property damage brought about by the failure to act. The result is liability.

In the emergency management context, negligence usually arises from the failure to perform (or unreasonably bad performance of) specific governmental duties. The unit of government may incur liability from failure to properly train or supervise emergency management workers. Other frequent sources of liability include failure to perform the duties that are generally accepted as being part of emergency management’s responsibilities.

Types of activity that may give rise to negligence liability vary. They include failure to adhere to a plan, executive level decision making—poor choices, poor planning, bad emergency response—or an incident commander’s lack of wisdom. (For a detailed discussion of liabilities for failure to plan properly, see Lerner K.)

Another frequent cause of liability is the failure to comply with a legal duty, such as OSHA law. Also, a violation of law may be used as proof in a civil suit requesting damages for personal injury or wrongful death. When the elements of the violation are the same as the elements required for civil liability, and the burden of proof is the same for both, the only issue in a civil trial may be the measure of damages. For example, in Meridian Ins. Co v. Zepeda, "a criminal conviction may be admitted in evidence in a civil action and may be conclusive proof in a civil trial of the factual issues determined by the criminal judgment."

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REFERENCES

1. Indiana Code 10-14-3-1(a), definition of a disaster. 2004.