

# PROTECTING THE PROTECTORS: LIABILITY, INSURANCE, AND LAWS PERTAINING TO VOLUNTEERS INVOLVED IN HOMELAND SECURITY AND EMERGENCY MANAGEMENT\*

Carol A. Rolf, J.D.\*\*

Assistant Professor of Criminal Justice and Legal Studies, Rivier College

## Abstract

*The establishment of the Citizen Corps by the President as another component of the U.S.A. Freedom Corps has emphasized the need for and value of trained volunteers during emergencies and disasters. However, one issue that has not been adequately resolved concerns liability and worker's compensation insurance for these volunteer responders. Governmental entities that deploy these volunteers to emergency and disaster scenes may ultimately be held responsible for acts of these responders under the theory of vicarious liability. Thus, these governmental entities, especially local entities, may need to amend existing insurance policies and pay enhanced insurance premiums to provide coverage for harms caused to and by uninsured volunteer responders, including responders from such established emergency volunteer groups as Citizen Emergency Response Teams (CERTS), Medical Reserve Corps (MRC), Fire Corps (FC), Volunteers in Police Service (VIPS), Neighborhood Watch Programs (NWP), and faith based organizations. Although some state and local governmental entities are relying on statutes such as Good Samaritan laws to provide liability protection, some states have begun to adopt legislation to address the liability and insurance coverage issues that arise when volunteers are deployed to emergency scenes. In addition, the U.S.A. Freedom Corps is partnering with the Public Entity Risk Institute (PERI) to draft model legislation for states to adopt that addresses the liability and insurance issues. Future homeland security monies may also be made available to governmental entities to pay for the enhanced premiums to provide liability and worker's compensation insurance coverage for volunteers. This paper will explore the status of existing liability laws that apply to volunteers and some of the recent state legislative proposals adopted in response to homeland security. Finally, this paper will suggest public policy issues that should be considered by legislative bodies before adopting these new laws.*

## 1. The Issues

Homeland Security Presidential Directive 8 supports involvement by second responders in emergencies in order to “strengthen the preparedness of the United States to prevent and respond to threatened or actual domestic terrorist attacks, major disasters, and other emergencies . . . .”<sup>i</sup> In addition, President Bush made it clear in his 2002 State of the Union Address that all American citizens should become involved in homeland security and emergency management, even if just to volunteer their services to one of the volunteer entities under the U.S.A. Freedom Corps.<sup>ii</sup> However, involving volunteers in emergencies has created problems and issues, some of which include the following:

- Local emergency management agencies and personnel are not willing to involve volunteers for a number of reasons;
- Second responders, such as volunteers and those in the private sector, don't have adequate training, certification, and credentials, and there is no money to provide such efforts; and
- Second responder volunteers may not have insurance coverage, such as worker's compensation and liability insurance, when participating in emergency response and recovery, and the cost to provide such coverage is prohibitive.

This paper will concentrate on the third issue of insurance coverage for second responder volunteers.

## 2. Volunteers

When national emergencies such as 9/11 and Hurricane Katrina occur people become interested in volunteering.<sup>iii</sup> In a Report entitled "Volunteer Growth in America: A Review of Trends Since 1974"<sup>iv</sup> the authors indicated that volunteering by Americans had increased by 32% over a 16 year period starting with 1974. Obviously, events such as 9/11 and the 2005 hurricanes resulted in another increase in volunteerism. However, there has always been a concern that people will not volunteer if they could be found liable for monetary damages due to their acts or omissions. Thus, Congress made many attempts to pass a law to cover this problem. Finally, in 1997, the Federal Volunteer Protection Act (VPA)<sup>v</sup> was adopted. The purpose of the VPA is to protect volunteers who serve nonprofit and governmental entities from liability and monetary damages that result from the careless acts or omissions of the volunteers, which are not intentional or do not involve wanton or grossly reckless conduct. Some acts, such as negligent motor vehicle operation or excluded from the federal immunity protection.

The VPA preempts inconsistent state laws, unless a state law provides greater protections than the VPA or one of several conditions found in the VPA applies, including the ability of a state to opt out of the VPA under certain circumstances. The VPA has not been as successful as hoped, as volunteers and nonprofit organizations may still be sued and will face the expense and time of defending a lawsuit, even though the volunteers may ultimately be successful because of the liability and immunity protections provided by the VPA. Perhaps the most limiting provision of the VPA, however, is that volunteers are not protected if the entity they serve has no insurance and does not indemnify volunteers. Many volunteers represent entities that are unable to provide such insurance or indemnity for purposes of liability protection, so they receive no protection from the VPA. Furthermore, if the nonprofit ends up paying for the acts of its volunteers, it could sue the volunteer to recover the damages.

Some volunteers simply show up at emergency scenes. Most of these volunteers are turned away unless they can show they are with an organized group, have basic certification and disaster training<sup>vi</sup>, and in some cases carry appropriate credentials, as those responding to emergencies and disasters follow prepared plans based on the National Incident Management System (NIMS)<sup>vii</sup> and the Incident Control System (ICS)<sup>viii</sup>, and unless volunteers are built into the plan the first responders are unlikely to deploy them. The days of simply showing up at the scene of a disaster or emergency are probably gone. However, there are now many volunteer organizations and groups that have trained and credentialed members and are part of local emergency response and recovery plans, but these volunteers usually are

not protected by any liability or worker's compensation insurance, as the volunteer organizations do not have sufficient funding to provide such protective coverage.

### **3. U.S.A. Freedom Corps.**

President Bush established the U.S.A. Freedom Corps<sup>ix</sup> in January, 2002 in the aftermath of 9/11 and partly because of the volunteer efforts during the 9/11 disaster. Within the U.S.A. Freedom Corps are several established and well known entities including the Peace Corps and the Corporation for National and Community Service (CNCS), which includes Americorps, Senior Corps, and Learn and Serve America. A new addition to the U.S.A. Freedom Corps family is the Citizen Corps program, whose volunteers could be involved in emergency preparation, response, and recovery efforts at the local or community/regional level, as well as participating in national domestic emergencies. Volunteers may also be asked to help out in non-emergency situations. Some of these groups have been in existence for years; some are new.

#### **3a. Citizen Corps.**

The Citizen Corps program is based on a hierarchical structure. At the top is the Department of Homeland Security (DHS), which in conjunction with the Department of Justice (DOJ) and the Department of Health and Human Services (DHHS) manages the Citizen Corps Program. There is also a National Citizen Corps Council (NCCC)<sup>x</sup> that includes national and state first responders and leaders from volunteer organizations, the private sector, and non-governmental organizations (NGOs). The NCCC is chaired by the Assistant Secretary of the DHS Preparedness Directorate, Office of Grants and Training. The group supports Citizen Corps efforts at the state, regional, and local levels.

President Bush established Citizen Corps to fulfill the following purposes:

Citizen Corps, a vital component of USA Freedom Corps, was created to help coordinate volunteer activities that will make our communities safer, stronger, and better prepared to respond to any emergency situation. It provides opportunities for people to participate in a range of measures to make their families, their homes, and their communities safer from the threats of crime, terrorism, and disasters of all kinds.<sup>xi</sup>

Because the President has recognized the value of community volunteers through establishment of the Citizen Corps program, local governments have begun to deploy more volunteers during emergencies. However, these volunteers are not deployed unless they have received basic training in advance of the emergency, and in some cases have their own basic equipment to bring to the disaster or emergency scene. The training for the volunteer groups usually includes NIMS/ICS and basic first aid, AED, and CPR training. The training may vary, but the idea is that volunteers will be better prepared to assist first responders and those the volunteers partner with during an actual emergency if they receive some basic training in emergency response. The federal government through the Citizen Corps program pays for such training. In addition, these volunteer groups are able to seek funding for equipment.

### **3b. State Citizen Corps Council**

Every state has a State Citizen Corps Council (SCCC). This is generally a group of volunteers consisting of first responders (fire, police, health), legislators and local officials, members of non-governmental groups and the private sector, and members of volunteer groups. The SCCC has several functions, one of which is to make decisions on disbursement of homeland security funds<sup>xii</sup> to volunteer groups to carry out the purposes of the Homeland Security Act of 2002.<sup>xiii</sup> However, before the SCCC provides funds to establish and equip one or more of the various volunteer groups, the local or regional government must indicate a desire to have participation by such groups by sponsoring the groups. The SCCC begins by funding Local Citizen Corps Councils (LCCC), which are the umbrella for the various volunteer groups discussed below.

### **3c. The LCCC**

The LCCC is most often composed of local or regional governmental officials in charge of one or more aspects of emergency management and will usually include representatives from the volunteer groups sponsored by the LCCC. The partnering arrangement between the governmental entity and the volunteer group or groups is usually secured by a Memorandum of Understanding (MOU). There are numerous regional, mostly county-based, and local CCCs throughout the United States. Some of the possible volunteer groups that might be included under a LCCC include those listed below in alphabetical order. These are the organizations whose volunteer members are most likely to lack any type of insurance or liability protection.

#### **3c.1. Community Emergency Response Teams**

Community Emergency Response Teams (CERT)<sup>xiv</sup> have been in existence since 1985 when volunteer groups were used by the Los Angeles Fire Department during early stages of catastrophic disasters including wildfires and earthquakes. CERT training (usually 20 hours) normally includes basic disaster training such as first aid, AED, CPR, and fire safety training, in addition to a focus on NIMS/ICS and Weapons of Mass Destruction (WMDs). CERT teams are deployed to carry out many functions, including distribution of supplies, accounting, and helping in cleanup efforts. CERTS are also involved in non-emergency efforts such as community emergency preparedness education. CERTs are funded and administered by DHS.

#### **3c.2. Fire Corps**

The Fire Corps (FC)<sup>xv</sup> is a new program commenced in 2004. Those who participate in the FC support local and regional fire departments. Many of these groups are involved in providing public education and training on fire prevention and safety, but because the members are likely to receive disaster training they could be deployed during an emergency. Fire Corps is funded by DHS and is managed through a partnership with the National Volunteer Fire Council, the International Association of Fire Chiefs/Volunteer Combination & Officers Section, and the International Association of Fire Fighters.

#### **3c.3. Medical Reserve Corps**

The Medical Reserve Corps (MRC)<sup>xvi</sup> is one of the new groups that came about as a result of 9/11. Members of this group receive specialized training in basic life support. Some members have taken

advanced training. Although many of the MRC volunteers are already skilled and credentialed health care providers, EMTs, and paramedics, other members include non-health care first responders and volunteers. In addition, mental health care providers are becoming involved with MRCs and are receiving specialized training that enables them to help not only emergency victims, but also those who respond to an emergency both during and after the emergency. MRCs also carry out many non-emergency initiatives, such as assisting in the administration of annual flu immunization clinics and during blood drives. The Department of Health and Human Services (DHHS), through the Office of the Surgeon General, administers the MRC program and has provided MRC funding in the past.

### **3c.4. Neighborhood Watch Program**

The Neighborhood Watch Program (NWP)<sup>xvii</sup> has existed since 1988. It started as a volunteer group that helped to reduce and prevent local crime, but now is involved in homeland security efforts most often for purposes of providing emergency preparedness education. However, members of the NWP could be deployed to respond to terrorist attacks and related criminal activity. Members of NWP usually receive disaster preparedness training. NWP is funded by the Department of Justice (DOJ) and is administered by the National Sheriffs' Association.

### **3c.5. Volunteers in Police Service**

The Volunteers in Police Service (VIPs)<sup>xviii</sup> organization was officially created after 9/11. VIPs work with first responders in state and local law enforcement and provide public education concerning law enforcement. During a disaster those in a VIP group may be deployed to help out in behind-the-scenes law enforcement activities. VIPs are funded by the DOJ and are managed by the International Association of Chiefs of Police.

## **4. Other Volunteers**

### **4a. Faith Based Organizations**

Whenever there is a serious emergency -- local, state, or national -- faith-based groups are many times the first volunteers to show up. These groups have proved to be invaluable to the local communities. This was evidenced especially during the 2005 hurricanes. In support of these organizations, President Bush signed an Executive Order in 2006 that directed the DHS Secretary to establish a center for Faith Based and Community Initiatives. The Secretary placed this Center under the DHS Directorate for Preparedness. However, there is also a White House Office of Faith-Based and Community Initiatives. The DHS has established the following responsibilities for the Center:

- Conducting a department-wide audit to identify existing barriers to the participation of faith-based and other community organizations' participation in our programs and activities;
- Proposing ways to remove these barriers and to better integrate the community into preparedness efforts;
- Developing and coordinating Departmental outreach efforts to disseminate information more effectively to faith-based and other community organizations with

respect to programming changes, contracting opportunities, and other agency initiatives.<sup>xix</sup>

Some of the faith based organizations may have their own insurance coverage, but before they are deployed as volunteers, the governmental entity deploying them should ensure that such insurance protection exists and that the volunteers are properly trained.

#### **4b. Private Sector Volunteers**

In the past private companies may have been involved in emergency response planning because of some of the environmental laws and Occupational Safety and Health Administration (OSHA) requirements, but some companies are now looking at homeland security issues and are developing partnerships with local governments to assist in emergencies that may or may not involve such company's personnel and physical plant. Such a partnership with the private sector is encouraged by several of the Homeland Security Presidential Directives, including HSDP-8 and HSPD-5. Moreover, local governments are quite willing to work with private companies, as many private companies have excellent communication systems and equipment that could be used during an emergency. Most of these volunteers will lack training and insurance coverage, unless the private sector employer provides such training and insurance coverage.

#### **4c. Other Volunteer Organizations and NGOs**

Other volunteer organizations and NGOs include many of the organizations most often associated with emergencies and disasters. Most of these organizations are charitable, non-profit entities, such as the American Red Cross, and many of the organization's members have training in emergency preparation, response, and recovery. Moreover, a number of these organizations provide liability and worker's compensation insurance coverage for their members and have their own emergency response equipment. Because some of these organizations have been in existence for years and have good track records, governmental entities are not only willing to deploy their members during an emergency, but the reality is that national, state, and local governments could not adequately respond to and recover from emergencies without their help.

### **5. The Issue of Liability**

Any governmental entity that deploys people to an emergency scene needs to be clear about insurance coverage, as the governmental entity may ultimately be held responsible for acts and omissions of the responders it deploys. Thus, governmental entities, especial local and county governments, may need to update existing insurance policies to cover the plethora of responders – both first and second volunteer responders. Some of the potential damage claims could include lawsuits based on personal injury, wrongful death of victims and responders, and property damage.

#### **5a. Types of Liability**

Liability linked to an emergency could be in several forms. The term "liability" is based on a person's acts or failure to act. A responder might be hurt while helping out during or after the emergency, or a responder may cause an injury to another responder or to a victim through the responder's acts or

omissions. In addition, a responder might damage or destroy personal or real property in responding to an emergency. Usually someone will be asked to pay for these injuries, harms, and damages, and that is why people rely on insurance companies to take over in providing a legal defense when a lawsuit is filed and to pay any monetary damages that are awarded.

## **5b. The Laws Affecting Liability**

Volunteer responders and the governmental entity that deploys them could be held liable for injuries, harm, and damages [hereinafter “damages”] at an emergency or disaster scene based on agency, contract, and tort law, including negligence.<sup>xx</sup> Unless the volunteer responder shows up at an emergency scene without authority, in which case the volunteer responder may have assumed all of the liability, the governmental entity could be responsible for the acts or omissions of all responders based on a legal theory under agency law known as “vicarious liability.” In addition, the government’s responsibility could be based on negligence theories, such as failing to deploy trained and credentialed volunteers. Furthermore, the governmental entity could be held liable if it ignores the fact that some volunteer responders are at the emergency scene without being deployed or without authority.

### **5b.1. Agency Law**

Those who work or do something for someone else could become an agent. The agent is carrying out the instructions of the principal. In the case of an emergency, the first and second responder agents are carrying out the instructions of the principal, ultimately the governmental entity – e.g., a city or town. Everything the agent does can bind the principal. This means that if the agent causes damages the government may be required to pay for the mistakes of the agent responders under the theory of vicarious liability. The government didn’t cause the damages, but because its agent did, then the government should be held liable and will have to pay. The assumption is that the governmental entity has the “deep pockets” or, that is, more money available to pay for monetary relief than the responders who caused the damages.

The best defense the government or principal has is that it did everything it could to prevent the damages, and that the agent responder did not act within the scope of his or her duties. Acting outside the scope of one’s duties is known in many cases as a “frolic and detour.” This defense usually doesn’t work very well, unless the responder committed an intentional act, such as the alleged criminal acts of euthanasia and theft that may have been committed by New Orleans hospital workers and law enforcement officials after Hurricane Katrina. In both cases, if the responders did what was alleged, they acted outside the scope of their duties, as criminal acts are never condoned by principals. Although intentional acts could result in principals avoiding liability, since someone must pay, courts and juries may still find the principal liable for the intentional acts of its agents on the basis that the governmental entity was careless in hiring, supervising, or deploying these people in the first place. Many states have adopted statutory laws that provide immunity or cap the amount of damages for governmental and charitable entities whose employees commit intentional acts.

### **5b.2. Contract Law**

Contract law plays a role in volunteer liability because when governmental and charitable entities are made liable for acts of their agents they will turn to their insurer to provide coverage for damages. Insurance policies are contracts and are enforced in accordance with contract law. Insurance policies

contain many exclusions, such as exclusions for intentional acts of the people covered. So when volunteers are involved in emergencies not only is there an issue concerning coverage, but also there should be concern that the acts or omissions of agents who are covered may be excluded from coverage under some provision of the insurance contract. Moreover, even if there is coverage, when a major disaster or emergency occurs there is no guarantee that the insurance company will provide coverage, as the national disaster or emergency may tap the limits of the insurer, and although the contract would provide coverage, the insurance company may breach the contract and fail to pay. Again, Hurricane Katrina cases provide evidence of potential contract breaches, as some people who had flood insurance are claiming they have not been paid for their damages. The federal government may need to step in to provide coverage in such cases where insurance companies deny coverage or breach their insurance contracts.<sup>xxi</sup>

Another area where contract law becomes important in emergency and disaster management concerns mutual aid agreements and memoranda of understanding, which concern partnering between and among various governmental, nongovernmental, private, and volunteer entities to provide assistance during an emergency or disaster. The NIMS recommends that mutual aid agreements address several issues including worker's compensation, liability, and immunity. Provisions might provide that none of the parties to the mutual aid agreement assumes responsibility for volunteers, in which case all parties to the contract must take care that volunteers are not deployed. Otherwise, there is a breach of the contract and the deploying party could be held responsible. On the other hand, one entity may support the use of volunteers while the other entity does not. In such a case, when the mutual aid agreement is being used, the supportive community may no longer be able to use volunteers without violating the contract. Moreover, most mutual aid agreements provide for some form of indemnification and hold harmless provisions. This essentially guarantees that neither party to the agreement will sue the other party when something goes wrong, and that both parties assume liability for acts of their partner's agents. Finally, some contracts may contain damage limitations or provisions for resolving breach of contract claims such as mandatory arbitration.

Contract defenses and excuses can be employed at three separate times during the life of a contract – at the time the contract was formed; when attempting to enforce the contract; and when there is a claim of breach for non-performance. The first defense is that a contract was never formed because one of the three required elements – offer, acceptance, or consideration – was missing. Contract formation requires intent to enter a contract, a knowing acceptance, and some exchange of benefits and detriments to provide consideration to support the contract. When any of these elements are missing there may not be a contract to enforce.

In addition, courts do not enforce contracts if one of the parties to the contract lacked capacity; genuine assent was lacking; or the contract was formed for an illegal purpose. Finally, a contract may have been properly formed and may be enforceable, but the breaching party is excused from performance for some reason, such as inability to satisfy a contract condition due to an unexpected or impossible situation that has occurred. Much of contract law is based on court made common law. Defenses, exceptions, and excuses are ever changing to meet the needs of modern society. For example, although a terrorist attack such as 9/11 may not have been foreseen, it is unlikely that similar attacks in the future will provide an adequate defense to contract enforcement.

### **5b.3. Tort Law and Negligence**

In tort law, which covers personal injury claims, the plaintiff who is injured and brings the lawsuit will generally claim negligence. However, claims may also be based on intentional acts, such as assault,<sup>xxii</sup> battery,<sup>xxiii</sup> or false imprisonment<sup>xxiv</sup> in which a person intended to commit an act or intended to omit an act. In addition, in some cases there may be a claim for strict liability when the damages are caused by an inherently dangerous act. An example might be a governmental entity that is removing buildings destroyed in a hurricane by using dynamite. Dynamite is inherently dangerous, and if it results in someone's death there may be a claim based on strict liability. Strict liability insurance coverage is usually quite costly and most local governments would be unable to pay for such coverage.

Liability of volunteers in emergency situations will usually be based on negligence because of careless acts or omissions.<sup>xxv</sup> Negligence requires proof of four elements, which may vary slightly based on state law, usually court made common law. The elements include duty, breach of duty, causation, and harm. If any element cannot be proved, or if there is a defense that eliminates an element, then there is no negligence.

Responders owe a duty to use reasonable care in responding to an emergency. Some responders have professional training and enhanced skills and their expected level of care may be higher than persons who do not have similar or professional training. For example, a person with medical training may have an enhanced duty of care if providing medical assistance, while a person without medical training only has to use reasonable care.

The governmental entity that deploys responders owes a duty to use reasonable care in deciding who to deploy and supervising their acts after they are deployed. This is why background checks, training, and credentialing of responders are so important. If a plaintiff can show that the government deployed a volunteer responder who had no training, both the responder and the deploying entity could be found liable and required to pay damages. In addition, even if the responder was trained, but acted in a careless manner or did not use the reasonable care expected of a person with such training, the governmental entity could still be held liable on the basis that it failed to properly supervise the responder.

In a few states there is a much criticized defense known as the "public duty doctrine" that governmental entities have been able to employ successfully to avoid liability caused by careless mistakes of their agents.<sup>xxvi</sup> The doctrine attacks the first element necessary for negligence, which is duty, and provides that in order for there to be a duty, the duty must be owed to a particular person or persons and not the public at large. For example, a governmental entity might avoid liability in a case in which a home burned to the ground because of faulty inspections by a building department employee. Under the public duty doctrine a court could hold that the duty of the building department employee is to protect the public at large and not the specific homeowner. In an emergency situation the defense might be used to claim that responders owe a duty to the public at large and not to individuals who are damaged while being assisted during an emergency.

The second element in a negligence claim is a breach of duty. If there is a duty, then it is usually easy to ascertain whether there has been a breach. For example, if a responder does not use reasonable care or fails to act, this could be considered a breach of duty. In addition, if a governmental entity deploys an unskilled responder to carry out a duty the person is not qualified to perform, this also might be considered a breach of the duty of due care. However, for there to be liability, the breach of duty must cause some type of damage<sup>xxvii</sup>. Some negligence cases fail simply because the plaintiff is unable to convince the judge or jury that the person has suffered an injury. If there are no damages, then there is no reason to sue.

Most negligence cases fail because the plaintiff is unable to prove causation. The plaintiff must show that the breach of the duty caused the damages. If another cause intervened, then the plaintiff must show that it was still the breach of duty that ultimately caused the damages. Tests for causation vary by state, but include some of the following: whether the damages were foreseeable if there was a breach of duty; whether the damages would have occurred “but for” the breach of duty; or whether the breach was a substantial factor in causing the damages.

There are many defenses that might be available to a defendant in a negligence claim. In an emergency-related negligence case, the defendant might include the responder, the deploying entity, or both. Some of the defenses provide complete defenses in that the case will be dismissed without a finding of liability, while other defenses are partial and result in a reduction in the damage award.

Some states have adopted sovereign and charitable immunity laws or tort claim acts. The laws provide either complete defenses to monetary damage claims to prevent bankrupting the organization or simply limit the amount of damages that may be assessed against governmental or charitable entities, such as hospitals. Some state laws also specify that governmental and charitable entities do not have to indemnify or provide protection for intentional acts of agents and employees. A responder from the private sector or from a nongovernmental or volunteer organization may not be protected by these immunity laws, unless there is a nexus between the responder and the government or charitable entity, such as the government entity’s deployment of the volunteer responder. Volunteer responders who are not protected by immunity laws could bear the burden of paying damages for negligent acts, thus putting their personal assets at risk if they do not have adequate insurance coverage.

The defenses of contributory and comparative negligence are cousins that have quite different results when used in a tort action. Contributory negligence is a complete defense. If the plaintiff contributed in any way to the damages claimed, the case is dismissed and there is no liability assessed to the defendant. Comparative negligence, on the other hand, is a partial defense that reduces the amount of damages owed by the defendant based on the amount of negligence attributed to the plaintiff.

Assumption of the risk and misuse are also available defenses. Assumption of the risk means what it says – a person who responds to an emergency may assume certain risks that might be associated with this response. Because such response is the job of many first responders their risk is usually covered by liability and worker’s compensation insurance. Second responder volunteers, however, are the ones who may find there is no coverage for their injuries on the basis that they assumed the risk when they responded to the emergency. Misuse might involve injury of a responder who is not using equipment properly and is injured or injures others. If an attempt is made to sue the manufacturer of the equipment, the manufacturer is likely to claim misuse. Training is very necessary for all responders to avoid this defense.

Finally, self defense and defense of property are possible defenses in emergency situations. These defenses vary among states, but in general, people are allowed to use reasonable force to protect themselves and others, and they may use deadly force when deadly force is being used against them. Some states even allow use of force to protect one’s property, but usually not deadly force. These defenses are most likely to be used when there are intentional acts, possibly criminal in nature, occurring during an emergency.

## **6. The Issue of Worker’s Compensation**

Any injury or harm to a responder during an emergency should be covered by worker’s compensation insurance. Although insurance companies that provide worker’s compensation insurance audit the entity

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they insure for purposes of providing coverage and knowing who is insured, it is impossible to list every responder who might be involved in an emergency until it occurs. Thus, an insurer must be willing to cover some people who may be unknown until the emergency occurs. Because most insurers want to know who they are providing coverage for, legislative mandates will probably be necessary to resolve the worker's compensation issue, unless otherwise decided by the courts. Therefore, some responders, especially second responder volunteers who suffer injuries, may not be covered by anyone's insurance, especially since premiums may make such coverage prohibitive if paid for by local governments or nongovernmental or volunteer organizations.

An example of a recent law that addresses worker's compensation for emergency volunteers is, in part, the following New Hampshire statute adopted in 2005.

RSA 281-A:2, VII(a) (6) (2006)

. . . In the absence of any mutual aid agreement or other similar written agreement that specifically addresses the issue of workers' compensation benefits, any person who acts as an agent to the department of health and human services or the department of safety by providing assistance in response to a specific public health or public safety incident. Such person shall be deemed an employee of the state for the purposes of this chapter. In order to be eligible for workers' compensation benefits under this chapter the person shall have been specifically designated in writing as an agent by the commissioner of the department of health and human services or the commissioner of the department of safety, or their respective designees, in accordance with the provisions of RSA 508:17-a. This subparagraph applies only to such designated agents who are not receiving compensation from either the department of health and human services or the department of safety, other than possible reimbursement for expenses actually incurred for such services, such as travel expenses, but who may be receiving compensation from his or her regular employer or from any other source. . . .

### **7. Good Samaritan Laws**

Good Samaritan laws protect people who assist others in emergency situations from liability and are based on a legal duty, and some would suggest a moral duty, to assist others in need of aid. People don't assist victims in peril for a number of reasons. One may be that the person believes someone else with better skills is already providing assistance. However, the main reason why people fail to provide assistance is that they believe if you provide assistance and cause additional injuries you could be sued for damages. In some states this is true, so the purpose of the Good Samaritan laws is to limit the rights of those who are assisted to file personal injury lawsuits against the "Good Samaritans" when something goes wrong.

At common law no one had a legal duty to assist another person, even if that person might die if assistance was not rendered. Today, every state has adopted some form of a Good Samaritan law that may establish a legal duty to assist. These laws generally concern the rendering of emergency medical assistance, but with the growth in emergency management these laws could apply in other situations. Some states have decided there is no general legal duty to assist anyone, which means people don't have to render assistance unless they want to. On the other hand, some states, such as Rhode Island, Minnesota, and Vermont, have duty-to-assist statutes that require every person to render assistance to

victims in peril, while other states limit the duty to those who have the necessary skills to provide assistance, usually those with medical training. The state of Hawaii requires that, at a minimum, a person should obtain or summon assistance for the victim in peril. Finally, some states provide for criminal charges when a person fails to provide assistance.

Some of the Good Samaritan law permutations include the following:

- A person with special expertise, such as someone who is medically trained, must provide assistance;
- Everyone who can has a duty to assist a person in need;
- A person who has a special status relationship with the victim in peril must provide aid, e.g., a parent is expected to render assistance to a child;
- Persons with contractual duties are to provide assistance;
- Any person who places another person in peril is to provide aid; and
- Any person who begins to provide assistance is obligated to continue providing assistance.

Good Samaritan laws provide various types of immunity and liability protection for persons who assist those in peril. Some states provide complete immunity for anyone who acts as a “Good Samaritan,” while other states allow only partial immunity and add in a “reasonable care” or “good faith” standard. Many states provide immunity to medically-trained persons or those who would normally assist in a similar emergency and expect to be paid for their services, while other states require that the assistance be provided gratuitously in order to receive the immunity and liability protection. Finally, some state laws do not permit any immunity or liability protection for people who assist without appropriate training, skills, and certifications.

An example of a state law that provides complete immunity for any person who assists in an emergency is the below statute from Nebraska:

R.R.S. Neb. § 25-21,186 (2006)

No person who renders emergency care at the scene of an accident or other emergency gratuitously, shall be held liable for any civil damages as a result of any act or omission by such person in rendering the emergency care or as a result of any act or failure to act to provide or arrange for medical treatment or care for the injured person.

Connecticut is a state that requires a person to have some first aid or medical knowledge before claiming immunity under its Good Samaritan law. A partial excerpt from the Connecticut statute provides the following:

Conn. Gen. Stat. § 52-557b (2006)

. . . A person licensed to practice medicine and surgery . . . or members of the same professions licensed to practice in any other state of the United States, a person licensed as a registered nurse . . . or certified as a licensed practical nurse . . . , a medical technician or any person operating a cardiopulmonary resuscitator or an automatic external defibrillator, or a person trained in cardiopulmonary resuscitation or in the use of an

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automatic external defibrillator in accordance with the standards set forth by the American Red Cross or American Heart Association, who, voluntarily and gratuitously and other than in the ordinary course of such person's employment or practice, renders emergency medical or professional assistance to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injuries which result from acts or omissions by such person in rendering the emergency care, which may constitute ordinary negligence.

Finally, the state of Vermont has a mandatory duty-to-assist law. In Vermont if an able person does not render assistance that person could face a fine. In part, the Vermont law provides the following:

12 Vt. Stat. Ann. § 519 (2006)

(a) A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others....

(c) A person who willfully violates subsection (a) of this section shall be fined not more than \$ 100.00.

**8. State VPAs, Homeland Security, and Related State Laws.<sup>xxviii</sup>**

Many states have adopted versions of the VPA and have made changes to Good Samaritan laws, especially since 9/11 and the creation of the Department of Homeland Security (DHS). States have adopted the VPA mandates that provide immunity for activities within the scope of duty and which are not considered grossly negligence, reckless or wanton. Some statutes provide immunity and Good Samaritan protection for animal care and food donations. Moreover, other states limit a governmental or nongovernmental entity's responsibility for negligent acts of volunteers to the limits of existing insurance policies. However, some states have modified the Federal VPA to provide additional, and in some cases unique immunity and liability provisions, as illustrated by the following examples:

- **Immunity from motor vehicle accidents.** South Dakota extends the liability immunity to operation of a motor vehicle during emergency care, which is excluded in the federal VPA.

S.D. Codified Laws § 20-9-4.1 (2006)

No peace officer, conservation officer, member of any fire department, police department and their first aid, rescue or emergency squad, or any citizen acting as such as a volunteer, or any other person is liable for any civil damages as a result of their acts of commission or omission arising out of and in the course of their rendering in good faith, any emergency care and services during an emergency which is in their judgment indicated and necessary at the time. Such relief from liability for civil damages shall extend to the operation of any motor vehicle in connection with any such care or services.

- **Clarification of responsibility for fire fighters outside their home municipalities.** North Carolina makes it clear that paid and volunteer fire fighters who aid another municipality have immunity coverage from their home municipalities.

N.C. Gen. Stat. § 58 -80-45 (2006)

When responding to a call and while working at a fire or other emergency outside the limits of the municipality by which they are regularly employed or in volunteer fire service, all members of the State Volunteer Fire Department shall have the same authority, rights, privileges and immunities which are afforded them while responding to calls within their home municipality. In permitting its fire department or equipment to attend an emergency or answer a call beyond the municipal limits, whether under the terms of this Article or otherwise, a municipality shall be deemed in exercise of a governmental function, and shall hold the privileges and immunities attendant upon the exercise of such functions within its corporate limits.

- **State immunity coverage for all volunteers.** California recognizes that any person could be asked to volunteer during an emergency and thus provides immunity for volunteers through the state.

Cal. Gov. Code § 8657 (2006)

(a) Volunteers duly enrolled or registered with the Office of Emergency Services or any disaster council of any political subdivision, or unregistered persons duly impressed into service during a state of war emergency, a state of emergency, or a local emergency, in carrying out, complying with, or attempting to comply with, any order or regulation issued or promulgated pursuant to the provisions of this chapter or any local ordinance, or performing any of their authorized functions or duties or training for the performance of their authorized functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of the state and its political subdivisions performing similar work for their respective entities.

(b) No political subdivision or other public agency under any circumstances, nor the officers, employees, agents, or duly enrolled or registered volunteers thereof, or unregistered persons duly impressed into service during a state of war emergency, a state of emergency, or a local emergency, acting within the scope of their official duties under this chapter or any local ordinance shall be liable for personal injury or property damage sustained by any duly enrolled or registered volunteer engaged in or training for emergency preparedness or relief activity, or by any unregistered person duly impressed into service during a state of war emergency, a state of emergency, or a local emergency and engaged in such service. The foregoing shall not affect the right of any such person to receive benefits or compensation which may be specifically provided by the provisions of any federal or state statute nor shall it affect the right of any person to recover under the terms of any policy of insurance....

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- **Red Cross volunteers immune from civil damages.** Louisiana expressly provides immunity for Red Cross volunteer.

La. R. S. 9:2793.2 (2006)

A. No person who in good faith gratuitously renders any emergency service as a volunteer on behalf of the American Red Cross shall be liable for any civil damages as a result of any act or omission in rendering such care or services or as a result of any act or failure to act or failure to provide or arrange for further services.

- **Faith-based volunteers immune from civil damages.** Wisconsin has two provisions that expressly provide immunity for Catholic and other church volunteers.

Wis. Stats. §§ 187.33 & 187.43 (2006)

(1) DEFINITION.

In this section, "volunteer" means an individual, other than an employee of the incorporated Roman Catholic church, who provides services to or on behalf of the incorporated Roman Catholic church without compensation.

(2) IMMUNITY.

. . . a volunteer is not liable to any person for damages, settlements, fees, fines, penalties or other monetary liabilities arising from any act or omission as a volunteer, . . .

- **Volunteers indemnified by the state.** Illinois expressly provides for indemnification of volunteers by treating them as state employees and covering their negligent acts under the State Employee Indemnification Act.

5 ILCS 350/1 (2006)

(b) The term "employee" means . . . individuals or organizations who perform volunteer services for the State where such volunteer relationship is reduced to writing, . . .

- **State to provide legal representation for state volunteers.** Both Washington and Vermont provide legal representation to volunteers who are sued because of their volunteer work.

Rev. Code Wash. § 4.92.060 (2006)

Whenever an action or proceeding for damages shall be instituted against any state . . . volunteer . . . arising from acts or omissions while performing, or in good faith purporting to perform, official duties, . . ., such . . . volunteer, . . . may request the attorney general to authorize the defense of said action or proceeding at the expense of the state.

3 Vt. Stat. Ann. § 1101 (2006)

a) In any civil action against a state employee for alleged damage, injury, loss or deprivation of rights arising from an act or omission to act in the performance of the employee's official duties it shall be the obligation of the state to defend the action on behalf of the employee and to provide legal representation for that purpose at state expense, except to the extent that such representation is provided by an insurance carrier, or except in an action resulting from the service of civil process.

(b) For purposes of this chapter, "state employee" . . . includes, without limitation:

. . .

(4) any person who volunteers for a state agency by providing services at the request of that agency and under the direction and control of that agency, but who does not receive hourly or salary compensation.

- **Benefits for volunteers provided by the state.** Virginia provides benefits for volunteers in several of the homeland-security related entities, including food, meals, vehicles, liability insurance coverage, and sovereign immunity.

V.A. Code Ann. § 2.2-3605 (2006)

A. Meals may be furnished without charge to regular-service volunteers if scheduled work assignments extend over an established meal period. Meals may be furnished without charge to occasional-service volunteers at the discretion of the department's executive head.

B. Lodging, if available, may be furnished temporarily, at no charge, to regular-service volunteers.

C. Transportation reimbursement may be furnished those volunteers whose presence is determined to be necessary to the department. . . . Volunteers may utilize state vehicles in the performance of their duties, subject to those regulations governing use of state vehicles by paid staff.

D. Liability insurance may be provided by the department utilizing their services both to regular-service and occasional-service volunteers to the same extent as may be provided by the department to its paid staff. Volunteers in state and local service, including, but not limited to, any person who serves in a Medical Reserve Corps (MRC) unit or on a Community Emergency Response Team (CERT), shall enjoy the protection of the Commonwealth's sovereign immunity to the same extent as paid staff.

A few states, such as Texas, and as noted under Virginia above, have adopted provisions related to homeland security activities. The Texas law provides the following, in part:

Tex. Gov. Code § 421.061 (2006)

(a) An officer or employee of a state or local agency performing a homeland security activity or a volunteer performing a homeland security activity at the request or under the direction of an officer or employee of a state or local agency is considered for purposes ... to be a member of the state military forces ordered into active service of the state by proper authority and is considered to be discharging a duty in that capacity....

Arkansas, if the volunteer has liability coverage, then a claim may be made against such coverage up to the limits of the policy before the immunity protection of the volunteer protection act applies.

Volunteer not vicariously liable for the acts of another volunteer.

## **9. Public Policy Considerations for Legislative Bodies in Adopting Homeland Security-Related Laws**

Injuries and harm to co-responders and the people the responders are helping should be covered by liability and worker's compensation insurance. Because most of the people responding to an emergency will be considered agents of the governmental or nongovernmental entity that deploys them, there is more likely to be liability insurance coverage for emergency responders, as long as their acts are not intentional or grossly negligent, than there is likely to be worker's compensation insurance. The U.S.A. Freedom Corps may in the future make homeland security moneys available to governmental entities to pay insurance premiums for all responders – employees as well as second responder volunteers – who may fall under the local government's liability protection umbrella. However, this coverage will still be costly and state legislatures may need to consider other solutions to resolve these liability issues.

The Public Entity Risk Institute (PERI) is scheduled to complete its Volunteer Liability Research Project, funded by DHS, by the end of July, 2007. Among the research to be conducted is a detailed study of liability laws throughout the United States in order to provide model statutory provisions that states can adopt. State legislatures will need to consider several issues before adopting these new liability laws pertaining to volunteers in emergency situations. At a minimum, the public policy issues that legislative bodies should consider in adopting these laws include some of the following:

- Should emergency volunteers be provided partial or complete immunity from liability and from lawsuits concerning acts or omission during a declared emergency?
- Who should receive immunity – agents, co-agents, principals?
- What should the immunity cover – immunity from liability, lawsuits, or both?
- Should licensed insurance carriers be required to cover emergency volunteers as part of the deploying entity's worker's compensation and liability coverage?
- Should local government and nongovernmental entities be required to purchase worker's compensation and liability insurance to cover emergency volunteers, who would be treated as governmental employees during all aspects of an emergency, not limited to response and recovery?
- Should the federal, state, or both governments provide funding to assist local governmental and nongovernmental entities to pay increased insurance premiums for coverage of emergency volunteers?

- Should the ultimate responsibility for exercising reasonable care in deploying emergency volunteers be that of the local government and the agency in charge of the emergency under NIMS, who must decide who, when, and where to deploy responders?
- Should entities that deploy emergency volunteers be required to meet minimal risk management standards before insurance coverage is provided, such as conducting or at least ensuring that criminal background checks have been conducted on all volunteers; only utilizing volunteers who are registered and included in a federal database because they have adequate credentials, licenses, and have received training; and only deploying emergency volunteers who have proper identification as required by the deploying entity or a uniform NIMs system?
- Which volunteer designation – state employee, local employee, etc. -- provides the best immunity and liability protection?
- Should homeland security-related volunteers be uniformly considered activated members of a state military for purposes of providing liability and worker’s compensation coverage?

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\*\* **Attorney CAROL ROLF** is Assistant Professor and Director of the Criminal Justice and Legal Studies program at Rivier College and has taught business law courses for over 15 years. Before concentrating on teaching, Attorney Rolf practiced law full time for more than 20 years and is licensed to practice in New Hampshire and Massachusetts. As part of her general law practice, Attorney Rolf represented many business entities. In addition to a law degree, Attorney Rolf has a Masters in Business Administration and a Masters in Counseling, both of which complement the multi-disciplinary Criminal Justice program.

## NOTES:

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<sup>i</sup> President Bush adopted the executive order Homeland Security Presidential Directive 8 (HSPD-8) on December 17, 2003. Its purpose is the following: “This directive establishes policies to strengthen the preparedness of the United States to prevent and respond to threatened or actual domestic terrorist attacks, major disasters, and other emergencies by requiring a national domestic all-hazards preparedness goal, establishing mechanisms for improved delivery of Federal preparedness assistance to State and local governments, and outlining actions to strengthen preparedness capabilities of Federal, State, and local entities.” HSPD-8 continues with: “The Secretary shall work with other appropriate Federal departments and agencies as well as State and local governments and the private sector to encourage active citizen participation and involvement in preparedness efforts. The Secretary shall periodically review and identify the best community practices for integrating private citizen capabilities into local preparedness efforts.” HSPD-5 also supports governmental partnering with volunteers and the private sector as follows: “The Federal Government recognizes the role that the private and nongovernmental sectors play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies. The Secretary will coordinate with the private and nongovernmental sectors to ensure adequate planning, equipment, training, and exercise activities and to promote partnerships to address incident management capabilities.”

<sup>ii</sup> A link to the 2002 State of the Union Address and information on the U.S.A. Freedom Corps is at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>

<sup>iii</sup> FEMA reported that during the response to Hurricane Katrina it partnered with 408 volunteer organizations.

<sup>iv</sup> Corporation for National and Community Service, “Volunteer Growth in American: A Review of Trends Since 1974.,” December 2006.

<sup>v</sup> Volunteer Protection Act of 1997, 111 Stat. 218; 42 U.S.C. § 14501 et. seq.

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- <sup>vi</sup> The VPA requires nonprofit entities to follow risk management procedures including training of volunteers.
- <sup>vii</sup> The National Incident Management System (NIMS) was developed by the Secretary of Homeland Security after President Bush issued Homeland Security Presidential Directive 5 (HSPD-5) on February 28, 2003. The NIMS provides a uniform system that can be used by all responders to national emergencies and disasters. Additional information on NIMS is available at <http://www.fema.gov/nims/>
- <sup>viii</sup> The Incident Command System (ICS) is part of NIMS and provides a method of unified command in which all responders are operating under the direction of the person in charge of the incident.
- <sup>ix</sup> The U.S.A. Freedom Corps is housed in the White House, while Congress has turned over most of the disaster and emergency preparation, response, and recovery authority to the Department of Homeland Security under the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).
- <sup>x</sup> Additional information concerning the NCCC is at <http://www.citizencorps.gov/councils/national.shtm>
- <sup>xi</sup> [http://www.usafreedomcorps.gov/about\\_usafc/programs/citizencorps.asp](http://www.usafreedomcorps.gov/about_usafc/programs/citizencorps.asp)
- <sup>xii</sup> The amount and purposes of the funding appropriations for the Citizen Corps programs has been different every year since its inception. One of the purposes may in the future include the funding of insurance policy premiums for volunteer responders involved in emergency response and recovery.
- <sup>xiii</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).
- <sup>xiv</sup> Additional information concerning CERTS is at <http://www.citizencorps.gov/programs/cert.shtm>
- <sup>xv</sup> Additional information concerning FC is at <http://www.citizencorps.gov/programs/firecorps.shtm>
- <sup>xvi</sup> Additional information concerning MRC is at <http://www.citizencorps.gov/programs/medical.shtm>
- <sup>xvii</sup> Additional information concerning NWP is at <http://www.citizencorps.gov/programs/watch.shtm>
- <sup>xviii</sup> Additional information concerning VIPS is at <http://www.citizencorps.gov/programs/vips.shtm>
- <sup>xix</sup> Additional information on President Bush's Executive Order is at [http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0829.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0829.xml)
- <sup>xx</sup> Laws are both statutory and common law. Common law comes from court decisions. In the areas of contract and tort law most states rely on court decisions or common law.
- <sup>xxi</sup> *See generally* Jerry, R.H. & Robert, S.E., Modern Federalism Issues and American Business: Article & Essay: Regulating the Business of Insurance: Federalism in an Age of Difficult Risk, 41 Wake Forest L. Rev. 835 (2006) (arguing that only the federal government is able to diversify risk effectively and insure against major catastrophic terrorist acts).
- <sup>xxii</sup> Assault involves placing a person in reasonable and imminent fear of an unwanted touching.
- <sup>xxiii</sup> Battery involves an unwanted touching.
- <sup>xxiv</sup> False imprisonment in an emergency situation might include confining a person and preventing that person from freely moving about without a legitimate reason and without that person's consent.
- <sup>xxv</sup> Some of the negligent acts or omissions during an emergency might include failing to properly screen for credentialed and properly trained volunteers before they are deployed; assigning a volunteer to a task the volunteer is unable to handle; acting carelessly in assessing and triaging victims or in administering first aid and medical care; carelessly operating motor vehicles

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or equipment; failing to properly document activities at the emergency scene; and failing to provide adequate information concerning mitigation measures to prevent further human injuries and property damage.

<sup>xxvi</sup> See *Dinsky v. Framingham*, 386 Mass. 801, 438 N.E.2d 51 (1962) (holding that duty is owed to the public and not individual). *But see* Mass. Gen. Laws ch. 258, § 10(J)(1) (2002) (providing exception to public duty doctrine where assurances are given directly to the victim or family members by a governmental official).

<sup>xxvii</sup> Damages are not limited to physical claims. Personal injury and negligence claims often include mental distress or anguish damages, which are limited in most states to tort claims and are not permitted in contract actions. Thus, plaintiffs may bring two counts in a lawsuit -- one for a breach of contract and another count based on a tort claim in order to add on the mental anguish damages.

<sup>xxviii</sup> For a comprehensive review of state liability and immunity protection laws *see* Nonprofit Risk Management Center. State Liability Laws for Charitable Organizations and Volunteers, 4<sup>th</sup> ed. (Sept., 2001 with 2005 and 2006 updates), free download available at <http://www.nonprofitrisk.org/pubs/sll.htm>