



Outside Counsel

The '411' on 911 Litigation- Proving Municipalities' Liability

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A person has difficulty breathing or some other medical emergency. A call is made to 911 for help. An operator tells the caller what to do and says that help is on the way. The caller relies on the instructions given and instead of taking other action, follows the advice and awaits the prompt arrival of an ambulance with properly trained and equipped personnel. Precious seconds become minutes and the window of opportunity of the caller taking other action has closed they are committed to waiting for the ambulance. The ambulance is late, and when it finally arrives, it does not have the proper crew and equipment, and is unable to administer crucial life-saving medication.

By the time the patient is brought to the hospital, it is too little too late, and they have either died or suffered serious and irreversible damage. The family of the injured or deceased has lost its source of economic and emotional support and comes to your office with one question: Can you help them?

While generally a municipality has no duty to protect its citizens from harm, where a special duty to protect a person arises, such as where a municipality undertakes the rendition of specific aid to an individual, the municipality may be cast in liability for negligently failing to do so; in *Cuffy v. City of New York*, the Court set forth the four-part test necessary to establish a special duty.¹ These are:

1. an assumption by the municipality, through promises or actions, of an

affirmative duty to act on behalf of the party who was injured;

2. knowledge on the part of the municipality's agents that inaction could lead to harm;

3. some form of direct contact between the municipality's agents and the injured party; and

4. that party's justifiable reliance on the municipality's affirmative undertaking.

While not enumerated as part of the four-part test, the plaintiff must also establish that the municipality's acts lulled the injured party into a false sense of security so that their justifiable reliance upon the municipality's promises or actions is causally related to the incident that resulted in the injury.

In *DeLong v. County of Erie*, the Court of Appeals first recognized that a special duty may be established in the context of a negligent response to a call made for help from 911.² Subsequently, the courts acknowledged that a delay in responding to a call to 911 for emergency medical services may also be actionable.³ The court has also made clear that a "special relationship" will be narrowly construed and while the "direct contact" requirement is not limited only to the injured person, and may be satisfied where the person making the request was acting on behalf of his or her immediate family that lived in the same household, it will not be extended any further.⁴

How Calls Are Processed

The following is a general overview of how 911 calls are processed in New York City and is not intended to be detailed or comprehensive. A caller dials "911," where an operator from the Communications Division of the New York City Police Department (NYPD)

responds by first determining the nature of the call: is it a police, fire or a medical emergency. Since 1996, the New York City Fire Department (FDNY) is responsible for operating New York City's Emergency Medical Services (EMS).⁵

Once the call has been properly routed to EMS, its call operator will ask certain written questions in order to ascertain the nature and severity of the medical emergency so that the call can be prioritized. Each operator enters data into the computer system simultaneously as the caller gives the information. These notes can be printed in hard copy format and are known as Sprint Sheets.

The entries made by the EMS operator are routed to an EMS dispatcher. Based on the priority assigned to the call, the dispatcher will have the computer search its database for the best suited or closest available medical emergency vehicle (ambulance) to respond to the call. Certain types of medical emergencies require an Advanced Life Support (ALS) unit, that has personnel qualified to administer certain medications that the ambulance is equipped with. Other calls may only need a Basic Life Support (BLS) unit assigned.

The actions taken by the dispatcher, such as when and which unit is assigned to a call, and the estimated time of arrival of the unit at the scene, are also noted on the Sprint Sheet. When an ambulance responds to a call, an Ambulance Call Report (ACR) is filled out, and where the injured person is brought to a hospital, a copy of the ACR from the unit that transported the patient to the hospital is supposed to become part of the hospital's chart.

All calls made to 911 are recorded, with the exact time that the call is received

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and ended being noted on the tape. As soon as counsel learns of the potential case, they should endeavor to obtain the audio tapes from the Communications Divisions of the NYPD as well as from the FDNY. The radio calls made to and from the ambulances and dispatcher are also recorded on the tapes. Without cause, these tapes are not routinely kept forever, so counsel can serve "So Ordered" subpoena duces tecums or Orders to Show Cause to compel production of the tapes and the Sprint Sheets. The Sprint Sheets and tapes will give vital information not only about the subject call(s), but of other activities and call volume for the times in question. The failure of the City to promptly furnish these items does not obviate the necessity to file a timely notice of claim, and summons and complaint.

As multiple ambulances may have been assigned to a call, during the course of discovery, counsel should obtain all ACRs prepared by all ambulances that responded to the call. Each ambulance has an identifying number, as does each member of the EMS crew. Each ambulance unit has a call history that is kept both electronically and a handwritten "hard copy," that details its actions and contains important information. The NYPD Sprint Sheets will reveal if a Radio Mobile Patrol (RMP) car was also assigned to the call, and if so, the records and activity logs (memo books) of the responding police officers should also be obtained. The Computer Aided Dispatch (CAD) records can be used to learn not only about EMS's response to the call in question, but the activities and whereabouts of the ambulance in question as well as all other ambulances.

The training manuals for the operators and dispatchers that detail the proper procedures that are supposed to be followed, and the codes that allow one to interpret the Sprint Sheets, CAD printouts and other records should be obtained.⁶ Counsel should obtain the Cardex Manual, pertinent Algorithms (used in prioritizing the calls) and Pre-Arrival Instructions for the operators. The municipality's applicable EMS protocols should be obtained. Depositions of the operators, dispatchers, and EMS personnel involved should be conducted, and counsel

will be well served by familiarizing themselves with the NYS Protocols for EMS responders, and NYS Department of Health State EMS Code.⁷ Appropriate expert witnesses to establish the liability, proximate cause, and damages sustained, should be retained.

Trial Considerations

Demonstrative evidence is important in every trial, and enlargements of important records, such as the Sprint Sheet and ACR, are helpful. A timeline is also important to show the key delays: the time from when the call to 911 was made until the time that an ambulance arrived at the scene, and the time from when the call was made to 911 until the time that an ambulance brought the injured party to the hospital. A map of the area and a "Mapquest" showing the distance and times it should take to travel from point "A" to point "B" may also be useful.

Counsel should pay special attention to developing factually how and why the 911 operator's statement to the caller were specific enough to be an affirmative undertaking on which a party could justifiably rely.⁸

Anticipating Defenses

Counsel for the plaintiff should anticipate the defenses, factual, budgetary, and legal, that will be offered, and be prepared to rebut them. The main defense will usually be that there were no ambulances available. Knowledge of available private ambulance companies, volunteer ambulance companies and non-municipal hospital ambulances, as well as of the mandated Mutual Aid Agreements with nearby municipalities to provide additional backup ambulances, and of the publications of the State EMS Council and its subcommittees, of the Regional EMS Council and their committees, the EMS Program Agencies, and other pertinent materials, may prove invaluable in successfully rebutting this defense.

Counsel may also use this defense against the defendant if the 911 operator or dispatcher knew that there were no ambulances available, then they could have told the truth to the caller and given them a choice and a chance to make other arrangements, instead of

misleading the caller and lulling them into a sense of false security that help was on the way, and thereby inducing their detrimental reliance.

While a budgetary defense may not be appropriate⁹ and a motion in limine may be made to preclude such an argument, counsel should be prepared to note that the City receives private funding to pay for the costs associated with obtaining and maintaining the telecommunications equipment and telephone services needed to provide an enhanced 911 emergency system to service the City of New York.¹⁰

The whole point of a "911" system is to provide emergency medical services, and emergency means immediate; delays can cause death or serious injury. A taxicab costs less money than an ambulance. If a caller would have been better off dialing "411" than "911," then counsel may be able to obtain just compensation for their client.

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1. 69 N.Y.2d 255 (1987).

2. 60 N.Y.2d 296 (1983).

3. *Canty v. New York City Health & Hospitals Corp.*, 158 A.D.2d 271 (1st Dept. 1990); *Adderley v. City of New York*, 304 A.D.2d 485 (1st Dept. 2003), mot. for lv. to app. den., 100 N.Y.2d 511 (2003).

4. *Laratro v. City of New York*, 8 N.Y.3d 79 (2006); *Cuffy*, supra; *Sorichettiv. City of New York*, 65 N.Y.2d 461 (1985). See, *Adderley*, supra, (Record on Appeal).

5. NYC Charter 487.

6. Depending on the facts of the case and claims made, the "EVOC" (Emergency Vehicle Operation Course) manual for operation and maintenance of the ambulance may be necessary as well.

7. See, Pub. Health Law 3002(2); 10 NYCRR 800 et seq.

8. See, *Laratro v. City of New York*, infra.

9. See, *Zipkin v. City of New York*, 196 A.D.2d 865 (2nd Dept. 1993), mot. for lv. to app. den., 82 N.Y.2d 665 (1994).

10. NYC Admin. Code 11-2323.