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A Patchwork Of Protection: Sources Of Volunteer Immunity For Medical & Public Health Volunteers

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In the wake of tragedies over the past four years, the United States has seen a renewed interest in volunteerism. Volunteers have become crucial to the success of many existing aid programs and the basis for creation of new private, state, and federal programs. On a national level, the federal government created the Medical Reserve Corps (MRCs) to respond to public health emergencies, as well as to initiate and aid public health campaigns in local communities. Some states then incorporated MRCs into their volunteer structures, making them creatures of both federal and state law. The response to the MRC rallying call has been great. These volunteers are ready and willing to help, but they are understandably concerned about their potential tort liability.

Liability concerns are not unique to MRC volunteers. They apply to all those who will respond in medical and public health emergencies as well as volunteers in general. Indeed, under some state emergency response plans, volunteers could be assigned by public health authorities to work at hospitals or other healthcare facilities to support operations in "surge" situations. Prior to any event where these volunteers may be needed, one should understand the variety of federal and state laws and doctrines aimed at assuaging volunteers' concerns. This article provides an overview of typical volunteer protection laws and a list of preliminary questions that you should ask about your state's specific laws to help you determine whether medical and public health volunteers have immunity for their service.

I. Federal Volunteer Protection Act

In response to a steady decrease in volunteerism, Congress enacted the Federal Volunteer Protection Act (VPA or Act)¹ to provide immunity for volunteers. As federal legislation, the VPA pre-empts less protective state laws.² Excepted from pre-emption is legislation that requires an organization to adhere to risk management procedures; makes the organization liable as if its volunteers were employees; limits immunity with respect to actions brought by an officer of a state or local government; or provides for a secure source of recovery for individuals who are injured by a volunteer.³ States may opt out of VPA coverage by passing specific opt out legislation.⁴ So far, only New Hampshire has exercised this right.⁵

The crux of the VPA is its limitation of liability for volunteers of non-profit organizations or governmental entities. Volunteers will not be liable for economic harm caused by their negligence during the performance of their volunteer activities so long as the activities are "within the scope" of the volunteer's responsibilities in the non-profit organization or governmental entity.⁶ Organizations exempt from federal income tax pursuant to Internal Revenue Code § 501(c)(3) or "any not-for-profit organization which is organized and conducted for public benefit and operated primarily for . . . [among others] . . . health purposes qualifies as a 'non-profit organization' for purposes of the VPA."⁷ Volunteers must be licensed, certified, or authorized to perform those acts that require such authorization.⁸

While well intentioned, the VPA immunity is limited in numerous ways. Volunteers are only immune from liability for simple negligence resulting in economic, pecuniary losses.⁹ Included within this category are "loss of earnings, . . . medical expense loss, replacement services loss, loss due to death . . . and loss of business or employment opportunities."¹⁰ Injured individuals may sue, and recover punitive damage awards against,¹¹ volunteers who act with "gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."¹² The immunity does not extend to harm caused by operation of a motor vehicle or similar craft.¹³ Nor does it extend to misconduct that constitutes violence, a hate crime, a sexual offense or a violation of civil rights.¹⁴

Furthermore, injured individuals may still recover from the culpable volunteer for non-economic damages in an amount equal

to the proportion of the harm caused by the volunteer.¹⁵ Non-economic losses include "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature."¹⁶

This part of the Act limits much of the protection granted in the prior section. Non-economic damages can be substantial, perhaps exceeding economic damages. This "proportional liability" standard also creates significant uncertainty as to the extent of an individual volunteer's exposure as it becomes a question of fact to be determined by a judge or jury in subsequent litigation.

Yet another potential source of volunteer liability under the VPA stems from the fact that volunteers remain liable to the supervising non-profit organization or governmental entity for any cause of action the organization or entity may have against them.¹⁷ Similarly, the organization or entity remains liable to any injured recipient of volunteer services.¹⁸ This creates a possible loophole whereby an injured individual can sue the organization or entity and the organization or entity can seek recovery from the volunteer.

All in all, the VPA provides a base level of protection for volunteers, but it does not shield them entirely.

When examining the VPA with respect to your state's volunteer liability protections, ask:

1. Has my state opted out of coverage of the VPA?
2. Is my state's legislation more protective than the VPA?
3. Are the public health volunteers licensed, certified, or permitted to perform the acts they are being asked to perform?

II. State Volunteer Protection Acts

Many states have enacted their own "Volunteer Protection Acts." These statutes do just what their name suggests; they provide liability protection for volunteers. While the explicit goals of the statutes are much the same, the avenues for reaching those goals can vary significantly from state to state. For instance, Virginia's law provides sovereign immunity protection to state government volunteers only.¹⁹ Maryland takes another approach by giving volunteers, but not healthcare providers, immunity from simple negligence.²⁰ Colorado and Kentucky provide immunity to volunteers of non-profits who act in good faith and within the scope of their duties.²¹ Still other states may waive immunity for volunteers up to the amount of insurance the volunteer carries. This can be problematic in today's "tight" insurance market by exposing volunteers to non-renewal of their insurance.

Because of the differences in the state laws, you should ask the following questions when looking at your state's Volunteer Protection Act:

1. Does my state have a Volunteer Protection Act?
2. What kind of protection does the Act actually provide?
3. What is the definition of a volunteer?
4. For what acts are volunteers immune?
5. How does insurance affect the liability of a volunteer?

III. State Good Samaritan Acts

Good Samaritan Acts are typically designed to provide immunity to individuals rendering aid in specific situations. Most broadly, the Act will immunize anyone who renders medical care in an emergency situation.²² Restricting this far-reaching provision may be a provision that limits immunity to situations in which care is rendered at the scene of an accident, fire, or other emergency. Narrowing the protections even more may be a requirement that immunity only applies when care is given to ill or injured persons.

When thinking about the situations in which medical and public health volunteers may be called to act, one can envision these volunteers rendering aid to healthy individuals far away from the epicenter of the emergency. Simply imagine a mass vaccination scenario where thousands of healthy individuals congregate at the local high school's football field to receive their small pox vaccine because the virus was released in an adjacent major metropolitan area. The volunteers will be good samaritans for stepping up in a time of need, but they will not be protected by the most basic Good Samaritan Acts.

Some Good Samaritan Acts provide immunity for volunteer members of certain organizations, such as a ski patrol or school board. Some Acts grant immunity for certain services rendered such as CPR, administration of epinephrine, or use of an AED. Still other Acts would provide immunity in the mass vaccination situation described above.

The variability of Good Samaritan Acts render them unable to provide definite comfort and reassurance to medical and public health volunteers.

When looking at your state's Good Samaritan Act you should ask:

1. Does my state have a Good Samaritan Act?
2. If so, is its language specific or general?
3. If it is specific, will all the potential activities of medical and public health volunteers be covered?

IV. State Charitable Immunity

Charitable immunity is a doctrine recognized in a limited number of states. The remainder of the states have abolished the doctrine either statutorily or through the courts. The basic precept of charitable immunity remains the same whether found in a statute or case—namely, charities are immune from suit for negligence.

In some states, like Virginia, the doctrine has been expanded to give derivative immunity to employees, agents, and volunteers of the charity.²³ In other states, the doctrine is limited solely to the organization. In these states, volunteers and employees of charitable organizations still remain liable for their negligent acts. States can also limit the doctrine in various other ways, such as by waiving the immunity for negligent hiring and retention.²⁴

The definition of a "charity" varies from state to state as well. In some states, like North Carolina, charities are only those organizations that are tax exempt under § 501(c) of the Internal Revenue Code.²⁵ In other states, like Virginia, § 501(c) status is indicative of charitable status, but the organization must still demonstrate that it is not operated for profit or gain.²⁶

States also differ on which potential plaintiffs are barred by the doctrine. Possible categories of claimants include beneficiaries, invitees, members of the general public, and agents of the charity itself. Some states may bar only beneficiaries of charitable services where other states may provide blanket immunity to charities by barring all possible claimants.

When looking at charitable immunity in your state you should ask:

1. Does my state still recognize charitable immunity?
2. Has it been codified or is it still a creature of common law?
 - a. If it is still a creature of common law, is it stable or still evolving under the guidance of the court?
 - b. If it is codified, did the legislature change the common law?
3. What are the requirements to be classified as a charity?
4. Does charitable immunity extend to the charity's volunteers?
5. Are there limitations on charitable immunity?

V. State Sovereign Immunity

Just like charitable immunity, sovereign immunity can be a creature of both doctrine and statute. As a doctrine, sovereign immunity shields the state government from suit for tort liability. Through legislation, some states have chosen to waive their general immunity in statutes typically referred to as "tort liability acts" or "tort claims acts."

Where sovereign immunity exists, it can be extended to employees and agents of the government in an effort to ensure that the state government is fully shielded. States may also choose to extend sovereign immunity to volunteers of governmental agencies or political subdivisions of the state. In order for volunteers to be eligible for sovereign immunity, there usually needs to be a strong supervisory connection between the state government and the volunteer.

Once eligible for sovereign immunity, a person may either automatically gain the protection of the doctrine or may have to satisfy further tests before being granted immunity. Additional tests may focus on the amount of control the government exercises over the person claiming a sovereign immunity defense. States may also examine other factors such as the amount of discretion exercised by the volunteer in the performance of his or her volunteer activities; the state's interest in the activities being performed by the volunteers; and, the state's interest in how the volunteers actually performed in their activities and

accomplishes their mission.

Weight given to these factors and the evaluation thereof will vary from state to state. Use of this test often will result in differing grants of immunity for volunteers within the same organization. For instance, an MRC nurse responsible for triage may be granted immunity because her responsibilities involve the use of her best judgment and discretion. An MRC nurse responsible for directing traffic in the parking lot of a triage center, however, will probably not be granted immunity because her task does not involve a high degree of discretionary judgments.

When available, sovereign immunity is a strong shield with which to fight a claim of negligence. Unfortunately, finding the shield requires one to overcome many obstacles.

When evaluating sovereign immunity in your state, you should ask:

1. To which state entities does sovereign immunity apply?
2. Has the state waived its immunity through legislation? Is it a general waiver or a specific waiver?
3. Does sovereign immunity apply to employees, agents, and volunteers of the entity?
4. Are there statutes that specifically give volunteers sovereign immunity?
5. Will the volunteers be automatically immune or will they have to meet some other criteria for protection? Will the evaluation of that criteria be based on the task the volunteer has been assigned to perform?

VI. State Emergency Services and Disaster Laws

Emergency Services and Disaster Laws have been passed in numerous states. These laws typically govern situations in which a state of emergency has been declared, either locally, statewide, or nationally. Among other things, these laws typically provide volunteers with some form of immunity during declared emergencies. The immunities vary greatly from state to state. In some states, immunity is given to organizations and governmental entities. Volunteer immunity is then a derivative of the organizational immunity. In other states, immunity is given to volunteers directly.

Within the derivative or original immunity framework, variation still exists with respect to who is actually granted immunity. In some states, like North Carolina, only governmental volunteers are given immunity.²⁷ In Virginia, anyone gratuitously rendering aid involving a skill for which they are licensed or certified is given immunity.²⁸ In other states, like Arkansas, immunity is given to those who voluntarily and without compensation grant permission to others to use their property as a shelter during an emergency.²⁹ Still other states have a combination of the above and additional immunity provisions.

Many public health volunteers will be working in either "pre-declaration," non-declared emergency, or non-emergency situations. In such situations, they will not be covered by Emergency Services and Disaster Laws so other protection will be necessary.

When looking at your state's Emergency Services and Disaster Response law, you should ask:

1. What are the requisite "triggers" for the immunity to apply?
 - a. Does a disaster have to be declared?
 - b. Who can declare a disaster?
 - c. Is the coverage retroactive once a declaration is made?
2. What types of disasters does the statute contemplate? Is the emergency situation with which you are faced covered by the statute?
3. Does the statute focus on organizations? If organizations are the basis of immunity, will your organization qualify?
4. To whom does the immunity apply?
 - a. Anyone participating during a disaster?
 - b. Only those licensed to participate?
 - c. Only those authorized to participate?
 - d. Only those giving rights to property or goods?
 - e. Only those participating through a qualifying organization?
5. What acts does it cover?
 - a. Does it require that a volunteer stay within a certain "scope" to be covered?
 - b. Are volunteers only immunized for acts of simple negligence?
 - c. Are there any important exceptions such as negligence in operating a motor vehicle?

VII. Conclusion

The patchwork of state and federal laws and doctrines designed to provide immunity for volunteers is far from clear and easily navigable. Before tackling the in-depth check list created by the Centers for Disease Control and Prevention, one must first cull together all of the relevant statutes and cases to understand the basic premises and protections offered by each. This article offers a guide for that initial exploration.

It is likely that you will find that federal and state volunteer protection acts do not fully protect volunteers nor do most Good Samaritan Acts. Charitable immunity has been abolished in numerous states. Where it is still viable, public health volunteers may not be eligible because the public health organizations do not qualify as charities per se or the doctrine has not been extended to volunteers. Sovereign immunity requires that the volunteer exercise discretion in his activities and that the government supervise and direct volunteers in order to give them immunity. In some states, this is not feasible or desired. Finally, the Emergency Services and Disaster Response Laws only provide immunity during declared emergencies. This is far too narrow to cover all of the activities of medical and public health volunteers. The use of volunteers across state borders further complicates the analysis.

In order to ensure that individuals will continue to staff our MRCs and similar public health and medical volunteer corps in our communities, we need to develop coherent and comprehensive strategies to ensure that they will not be liable for mistakes of simple negligence committed during the performance of their duties. Before tackling such a worthwhile task, however, you must identify the current weak links in your state's volunteer liability chain. Only then can you definitely know which links are rusty and in need of replacement.

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¹ 42 U.S.C.S. §§ 14501 *et seq.*

² 42 U.S.C.S. § 14502(a) (2004).

³ 42 U.S.C.S. § 14503(d) (2004).

⁴ 42 U.S.C.S. § 14502(b) (2004).

⁵ 1998 NH ALS 129.

⁶ 42 U.S.C.S. § 14503(a) (2004).

⁷ 42 U.S.C.S. § 14505(4) (2004).

⁸ 42 U.S.C.S. § 14503(a)(2) (2004).

⁹ 42 U.S.C.S. § 14503(a) (2004).

¹⁰ 42 U.S.C.S. § 14505(1) (2004).

¹¹ 42 U.S.C.S. § 14503(e)(1) (2004).

¹² 42 U.S.C.S. § 14503(a)(3) (2004).

¹³ 42 U.S.C.S. § 14503(a)(4) (2004).

¹⁴ 42 U.S.C.S. § 14503(f) (2004).

¹⁵ 42 U.S.C.S. § 14504(b) (2004).

¹⁶ 42 U.S.C.S. § 14505(3) (2004).

¹⁷ 42 U.S.C.S. § 14503(b) (2004).

¹⁸ 42 U.S.C.S. § 14503(c) (2004).

¹⁹ See VA. CODE ANN. § 2.2-3600 *et seq.*

²⁰ MD. CTS. & JUD. PROC. CODE ANN. § 5-407(c) (2004).

²¹ COLO. REV. STAT. § 13-21-115.5 (2004) and KY. REV. STAT. § 411.200 (2004).

²² Good Samaritan Acts apply to individuals only. They will not provide immunity to medical and public health volunteer organizations, such as the MRCs. Without immunity, the organization can be sued and become liable through a judgment. If large enough, the judgment may cause the organization to disband, therefore leaving the volunteers without an outlet for their services, making moot any organized discussion of volunteer liability.

²³ See *Moore v. Warren*, 250 Va. 421 (1995).

²⁴ *Id.* at 422-23 (1995), citing *Straley v. Urbanna Chamber of Commerce*, 243 Va. 32, 35 (1992).

²⁵ N.C. GEN. STAT. § 1-539.10 (2004).

²⁶ See *Davidson v. Colonial Williamsburg Ford*, 817 F. Supp. 611, 613 (E.D. Va. 1993).

²⁷ N.C. GEN. STAT. § 166A-14 (2004) ("Emergency management workers" are immune from liability for death or injury caused while trying to comply with Act. "Emergency management workers" must be "subject to the order or control of or [acting] pursuant to a request of the State government or any political subdivision thereof").

²⁸ VA. CODE ANN. § 44-146.23(c) (2004).

²⁹ ARK. CODE ANN. § 12-75-125 (2004).

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