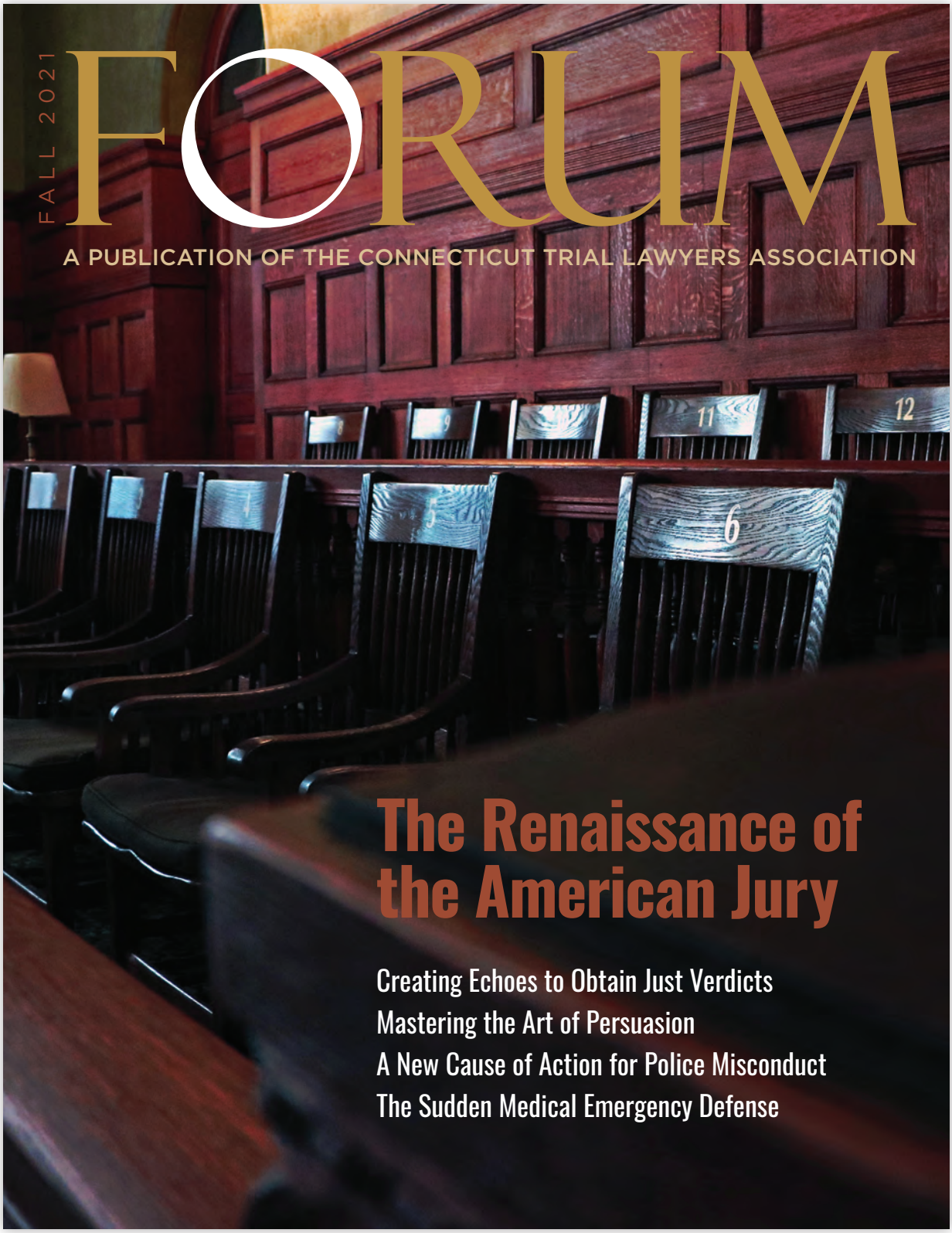

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LIABILITY of Ambulances and Emergency Providers

This article is intended to assist attorneys involved or interested in ambulance malpractice suits by outlining the basic structure of such cases together with applicable laws and relevant procedures.

A Bronx jury awarded $172 million dollars in a lawsuit against the New York City Fire Department Bureau of Emergency Medical Services.[1] The case arose from a 1998 incident that left 12-year-old Tiffany Applewhite paralyzed, with severe brain damage and unable to speak. The claims against the emergency providers included their failure to have proper equipment on hand to treat Tiffany's anaphylactic shock and resultant cardiac arrest. Rather than take her to the hospital, first responding EMS personnel called for another ambulance, which arrived 20 minutes later. By the time Tiffany did arrive at the hospital, she had suffered permanent brain damage.

In October 2021, a Fresno, California, jury awarded nearly $50 million to Nicholas Merlo's family against American Ambulance. Nicholas, a middle school administrator who was expecting his first child in a matter of weeks, went to a surgicenter for an endoscopy. His oxygen levels dropped during the procedure and a nurse anesthetist inserted a breathing tube before sending Nicholas to the hospital via American Ambulance. On the ride to the hospital, a paramedic removed the breathing tube but could not insert a new one. By the time the ambulance reached the hospital, Nicholas was still alive, but he had suffered a severe lack of oxygen and cardiac arrest. Nicholas will live the rest of his life in a persistent vegetative state.

These cases are examples of the dire consequences that can result from negligence by emergency providers including EMS companies, paramedics and emergency medical technicians. Large awards for your client are possible despite the fact that society generally holds these first responders in great esteem, especially following Covid, as is evident from the signs that adorn front yards saying, "Thank You!" This preconceived bias in favor of first responders is something you will have to confront directly in any case in this setting – at least for the next several years.

Who is the defendant?

An important first step in evaluating a potential case against an emergency provider is to determine who is the defendant and what legal consequences flow from that defendant's status. Ambulances may be operated by private companies, governmental entities such as municipalities, or volunteer associations. Depending on who the defendant is, there may be notice statutes, short statutes of limitations and immunity from liability in ordinary negligence to consider.

General Statutes § 7-308 contains a 6-month notice provision and 1-year statute of limitations in actions against a volunteer firefighter, volunteer ambulance member or volunteer fire police officer. The statute provides municipal indemnity for these individuals arising out of any claim or lawsuit for negligence in the performance of their duties. Lawsuits against these persons are generally subject to the defense of governmental immunity, which attaches absent an applicable exception to the qualified immunity of municipal agents engaged in discretionary acts. The provision of emergency medical services to members of the public has been held to be a discretionary act to which the identifiable victim/imminent harm exception does not apply.[2]

Connecticut's Good Samaritan Law, General Statutes § 52-557b (a), also provides immunity for acts of negligence to health care providers who voluntarily render emergency medical assistance outside the course of their ordinary employment. The immunity does not extend, however, to acts of gross, wilful or wanton negligence. Under subsection (b), paid or voluntary firefighters, police officers, teachers and other identified individuals who render emergency first aid to persons in need shall not be civilly liable for acts of negligence. However, these individuals may similarly be liable for acts of gross, wilful or wanton negligence.

There is no appellate authority that addresses the application of the Good Samaritan Law to for-profit ambulance companies. One key unanswered question on the appellate level is whether the statutory immunity extends to for-profit business entities that employ classes individuals enumerated in the statute. Two trial court decisions have held that § 52-557b does not extend immunity to for-profit emergency providers or to employers of emergency providers who are immune under § 52-557b. Those decisions are *Sena v. Am. Med. Response of Connecticut, Inc.* and *Bember v. Am. Med. Response of CT, Inc.*[3]

In *Sena* and *Bember* the defendant was the omnipresent American Medical Response. Both decisions hold that nowhere in § 52-557b were for-profit business entities or employers explicitly included among those eligible for immunity. Nor could the extension of immunity to employers of enumerated emergency personnel be inferred from the statute. In *Sena,* Judge Kamp ruled that "had the legislature intended to broaden immunity to employers of those listed as qualified for immunity or to include, specifically, for-profit businesses that provide emergency medical services, such as the defendant, then the legislature could have done so." Judge Kamp further stated that immunity "could increase harm to the public [and] would diminish the general legal accountability that employers have for the harmful actions of their employees. It may motivate for-profit business entities to cut costs wherever they can…and severely limit injured plaintiffs' sources of compensation for their injuries." In *Bember,* Judge Wilson noted that immunity would "incentivize for-profit business entities and employers... to take shortcuts in training and reeducation."

Is a pre-suit good faith report required?

The prudent course is to comply fully with the pre-suit requirements of General Statutes § 52-190a by conducting a proper good faith inquiry and obtaining the right opinion letter from a similar health care provider, rather than risk dismissal. In *Torres v. Am. Med. Response of Conn.*,[4] the court held a pre-suit good faith opinion was required in an action against an emergency provider and dismissed the case because the plaintiff had not obtained one. The court noted that the plaintiff's complaint specifically alleged that the defendant was described as a "corporation...engaged in the business of providing health care and/or professional emergency medical care and transportation to emergency medical facilities," which brought the claim within the purview of § 52-190a. On the other hand, in *Shomsky v. City of Shelton Police Dep't,*[5] a negligent delay in dispatching an

ambulance was held to sound in ordinary negligence based on a finding that the plaintiff's claims against the defendant did not relate to the provision of "actual care and treatment administered to the plaintiff's decedent at the scene of the emergency, but rather to a delay in responding to the call for emergency services." Still, my advice is better safe than sorry, so I would recommend getting an opinion letter.

Allegations of negligence

EMS entities may be directly liable for corporate negligence and vicariously liable under respondeat superior. Allegations of corporate negligence may include, e.g., the failure to maintain equipment properly, the failure to have proper equipment and other medical supplies available, negligent hiring, negligent retention, negligent training, the failure to supervise properly, and the failure to have in force and effect policies for proper patient care.

Potential claims against first responders are as limitless as claims against other health care providers. But remember to consider allegations particular to the first responder setting like delayed response time, delay in or refusal to transport the patient to the hospital, malfunctioning or missing ambulance equipment, insufficient knowledge regarding use of medical equipment, failure to confer/coordinate with other emergency providers, and failure to provide accurate information to the hospital staff at hand-off.

> Dire consequences can result from negligence by emergency providers.

Allegations of gross negligence?

As mentioned above, § 52-557b states that immunity will not apply to acts or omissions constituting gross negligence. Connecticut common law has never recognized degrees of negligence as slight, ordinary, and gross in the law of torts, thus, Connecticut does not recognize the tort of gross negligence as a separate basis of liability. Our courts have, however, addressed the question of whether a defendant's conduct constitutes gross negligence. Gross negligence is "very great or excessive negligence, or want of, or failure to exercise, even slight or scant care or slight diligence....[G]ross negligence [means] no care at all, or the omission of such care which even the most inattentive and thoughtless seldom fail to make their concern, evincing reckless temperment and lack of care, practically [wilful] in its nature... Gross negligence...implies an extreme departure from the ordinary standard of care, aggravated disregard for the rights and safety of others, or negligencesubstantial-ly and appreciably greater than ordinary negligence."[6]

There is no appellate authority that addresses whether the legislature has, by implication, created a separate cause of action for gross negligence under § 52-557b.[7] Cases are split as to whether gross negligence must be specifically pled in a separate count to avoid the immunity conferred by § 52-557b.

Bost v. Town of Hamden[8] involved the application of § 52-557b to emergency personnel from the Hamden Fire Department who removed or disabled a permanent tracheostomy in plaintiff's decedent thereby causing lack of oxygen and death. The court held that the purpose of § 52-557b is to confer immunity and not to create a cause of action in gross negligence, per se. In other words, if a plaintiff proves that the defendant's conduct ultimately rose to the level of gross negligence, he may avail himself of the exception to immunity granted under the statute. In *Bost*, the plaintiff's complaint did not contain a separate count for gross negligence. Rather, the plaintiff made specific allegations that the firefighters who tended to plaintiff's decedent removed the tracheostomy tube when they were told not to, acted outside the scope of their practice in doing so, lacked training to remove and rein sert tracheostomy tubes, and failed to promptly communicate that his tracheostomy tube had been removed to the paramedics who arrived to treat plaintiff's decedent. The court concluded that these allegations presented genuine issues of material fact sufficient to defeat defendant's summary judgment motion.[9]

In *Dziadowicz v. Am. Med. Response of Conn., Inc.*, the court granted defendant's motion to strike a separate count alleging gross negligence. The court held that a cause of action brought under § 52-557b is still "common-law negligence." The plaintiff can still assert the facts which would support a claim of gross negligence; she was simply unable to assert it as a separate and free standing count from ordinary negligence. In granting the motion to strike, the court held that the plaintiff should be permitted to plead over the first count to allege such facts as would support a claim of "acts or omissions constituting gross, wilful or wanton negligence" pursuant to § 52-557(b).

On the other hand, in *Glorioso v. Police Dep't of Burlington*,[10] the court held it was proper for a plaintiff to plead a separate count alleging gross negligence to avoid § 52-557b immunity:

> A plaintiff who seeks to make a claim under the exception from immunity for gross, wilful, and wanton negligence faces a definite problem in pleading. If that plaintiff pleads only negligence, with the intention of providing that the acts or omissions actually constituted gross, wilful or wanton negligence, the claim is at risk under the immunity provision...If the plaintiff pleads the words of the exception,...the response, made by the [defendant] in the present case, is that Connecticut does not recognize distinct causes of action for gross negligence.

In *Glorioso*, the court concluded that "a cause of action for negligence of various degrees, including gross negligence, exists at common law and that liability for gross negligence was not abolished by the Good Samaritan Law. The appellate courts continue to recognize that in some situations a plaintiff may demonstrate that a defendant engaged in a more blatant degree of negligence that the courts refer to as gross negligence."[11] In *Hansen v. Mohegan Fire Co.*,[12] the court allowed a separate cause of action in gross negligence to survive a motion for summary judgment, finding that § 52-557b created such a claim by implication.

In *Cordero v. Am. Med. Response*,[13] the court held that a plaintiff confronted with a Good Samaritan Law defense should be allowed to plead gross negligence. Reasoning that this was the better view, the court stated: "This is because the immunity provided by the statute is limited, and a plaintiff should be allowed to claim more than the level of negligence to which the statutory immunity applies....The contrary view would lead to the conclusion that by not providing immunity for gross negligence, the legislature was not providing immunity for a cause of action that did not exist anyway. A statute should not be interpreted in a manner that creates an absurd result."

Given the split in authority it would seem to make sense to plead a separate count of gross negligence and allow the court to rule whether such a separate count should stand or whether gross negligence is provable under a count sounding in negligence.

Tactical considerations

At present, juries are likely to be sympathetic toward first responders. An effective line of attack may be to frame the case to blame the employer, not the paramedic or EMT who was just doing his or her job. For instance, the lack of certain equipment on board an ambulance may limit a certain response or intervention by an emergency provider and cause harm to a patient. The decision not to have such equipment available on an ambulance may result from corporate-wide cost savings considerations. Pursuing discovery directed at how the corporation arrived at this decision with an eye to developing a corporate negligence theory of liability takes the focus off the first responder and places it on the corporation and its profit motive.

Author's note: Professional publications such as "EMS World" https://www.hmpgloballearningnetwork.com/site/emsworld and the "Journal of Emergency Medical Services" (JEMS) https://www.jems.com/ are robust sources of information and standards of care.

1 See *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420 (2013).
2 *Brock-Hall Dairy Co. v. New Haven*, 122 Conn. 321, 324 (1937); cited in *Glorioso v. Police Dep't of Town of Burlington*, 49 Conn. Supp. 200, 205 (2004).
3 *Sena*, LEXIS 125, Superior Court, Superior Court of CT, Judicial District of Fairfield, D.N. FBTCV156048410 (January 18, 2017) (Kamp, J.); and *Bember*, LEXIS 2866, Superior Court of CT, Judicial District of New Haven, D.N. CV146049824S (Nov. 15, 2016) (Wilson, J.).
4 LEXIS 2580, Superior Court of CT, Judicial District of Hartford, D.N. CV000802360 (September 6, 2021) (Peck, J.).
5 LEXIS 3130, Superior Court of CT, Judicial District of Ansonia-Milford, D.N. CV970058215S (Nov. 25, 1997) (Thompson, J.).
6 *19 Perry Street, LLC v. Unionville Water Co.*, 294 Conn. 611, 631 n.11 (2010).
7 See *Dziadowicz v. Am. Med. Response of Conn., Inc.*, LEXIS 264, Superior Court of CT, Judicial District of New Britain, D.N. CV116010944 (Jan. 22, 2012) (Swienton, J.).
8 LEXIS 1954, Superior Court of CT, Judicial District of New Haven, D.N. NNHCV095031935S (Aug. 29, 2013) (Nazzaro, J.).
9 Compare this case with *Hockman v. Eddy*, LEXIS 676, Superior Court of CT, Judicial District of Ansonia-Milford, D.N. CV136013530 (March 24, 2014) (Brazzel-Massaro, J.).
10 48 Conn. Supp. 10 (2003).
11 *Id.* at 17.
12 LEXIS 2864, Superior Court of CT, Judicial District of New London, D.N. CV 960111388 (October 1, 2001) (Corradino, J.).
13 LEXIS 1107 at *5, Superior Court of CT, Judicial District of New Haven, D.N. CV020458609S (April 23, 2004) (Devlin, J.).