

# Liability Issues and the Medical Reserve Corps

Claire Reiss, J.D., ARM  
Public Entity Risk Institute



# Goals of Session

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- Explore basic concepts in health care practitioner liability
- Discuss how liability issues affect your MRC

# What is Liability?

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Liability is legal responsibility for one's acts or omissions.

- Criminal law
- Civil law

# Sources of Liability Law

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- State case law
- State statutes
- Federal statutes

# Criminal Law

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Offenses that are serious enough to be prohibited by statute and prosecuted by the government.

- Assault and battery

# Civil Law

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Three types of liability under civil law:

- Contract
- Tort
- Statutory

# What is a Contract?

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A legally enforceable promise between two or more parties. Contracts can be both written and verbal.

# Contractual Liability in MRC Activities

- Failure to achieve a promised result
- Failure to use a standard of care to which you have committed
- Failure to render promised services
- Liability assumed in a contract with a response partner (indemnification and hold harmless clauses in contracts)

# What is a Tort?

A wrongful act or omission (other than a breach of contract) that causes harm to another, for which the law provides a remedy.

- Negligent torts
- Intentional torts
- Strict liability

# Negligent Torts

Negligent torts arise from the failure to use reasonable care under the circumstances, causing recoverable damages.

- Bad results aren't enough
- Professional liability – failure to use the degree of skill and care expected of a person in the profession

# Elements of Negligence

- A legal duty to the injured party to use due care;
- Breach of the duty to use due care; and
- Damages to the injured party caused by the failure to use due care.

# Major Potential Sources of Negligence Exposure in MRC Activity

- Credentialing, screening and volunteer assignments
- Patient history, assessment and triage
- Patient handling
- Informed consent
- Diagnosis, medication and treatment
- Patient transport
- Other operation of motor vehicles
- Documentation of patient care
- Operation of equipment
- Premises

# Major Negligence Consequences in MRC Activities

- Injury to patients
- Injury to volunteers
- Injury to response partner workers
- Damage to patient's property
- Damage to volunteer's property
- Damage to response partner's property

# Intentional Torts

Intentional torts arise from acts or omissions that are intentional rather than negligent.

- Intent to commit act/omission is required
- Intent to cause harm may not be required

# Major Types of Intentional Tort Liability Likely in MRC Activities

Assault – Intentional and unlawful threat of bodily harm to another, causing that person to have a well-founded fear of imminent harm.

Example: an unstable volunteer threatens to hit a patient who is complaining loudly about waiting for medical care.

# Major Types of Intentional Tort Liability Likely in MRC Activities

Battery – Unlawful and unprivileged touching of another person without permission.

Example: performing surgery in a non-emergency setting without the patient's informed consent.

# Major Types of Intentional Tort Liability Likely in MRC Activities

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False arrest/imprisonment – Intentional and unlawful detention of another.

Example: an *involuntary* isolation of patients not authorized under law.

# Major Types of Intentional Tort Liability Likely in MRC Activities

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Defamation – Making untrue public statements that damage the reputation of a person or organization.

Example: a frustrated volunteer tells the news media that a hospital response partner is incompetent.

# Major Types of Intentional Tort Liability Likely in MRC Activities

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Invasion of privacy – Unauthorized release of confidential information.

Example: a volunteer gives co-workers a patient's confidential health information without permission or privilege.

# Major Sources of Intentional Tort Exposure in MRC Activities

- Medication and treatment of patients
- Informed consent
- Isolation of patients exposed to communicable disease
- Possession and communication of health information about patients
- Security

# Strict Liability

Liability imposed in the absence of negligent or intentional wrongful acts or omissions.

- Statutory law
- Common (case) law

# Examples of Strict Liability

- Products liability (dangerously defective products)
- Abnormally dangerous instrumentalities (explosives such as fuel and oxygen)
- Ultra hazardous activities (handling of explosives)
- Workers' Compensation

# Additional Liability Concepts

- Beyond simple negligence: raising the bar on damages
- Vicarious liability
- Negligent hiring, supervision and retention
- Scope of practice
- Standard of care

# Beyond Simple Negligence: Raising the Bar on Damages

Punitive/exemplary damages may be awarded for:

- Gross negligence - reckless disregard of the consequences to the safety or property of another
- Willful acts - intentional, conscious and directed toward achieving a purpose
- Wanton acts - grossly negligent to the extent of being recklessly unconcerned with the safety of people or property
- Reckless behavior – similar to gross negligence

# Vicarious Liability

Indirect liability for the acts or omissions of another who is, or appears to be, acting under its control.

- An employer for employee within the scope of duties
- An employer for independent contractor performing non-delegable duties or ultra hazardous activities
- A nonprofit for a volunteer acting within the scope of assigned duties

# Negligent Hiring, Supervision or Retention

Direct liability of an employer for acts or omissions of employees or volunteers based on the employer's failure to use reasonable care in selecting workers, supervising their work, and terminating their services when necessary.

# Scope of Practice

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The range of professional activities that a licensed professional is permitted to perform under a state licensing statute, further defined by the professional's experience and training.

# Professional Standard of Care

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The standard of care for a health care professional is the “reasonable person” negligence doctrine in a professional services context.

# Example of a State Professional Standard of Care

“The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.”

Florida Statute 766.102

# Establishing the Professional Standard of Care in Litigation

- Expert witness
- Must be determined by the trial court to have sufficient expertise in the area of practice involved to be qualified to testify.

# Effects of Potential Liability on MRC

- Reduced ability to recruit volunteers
- Fewer local champions for MRC Development
- Fewer people willing to be MRC leaders
- Drained MRC financial resources
- Fewer successful partnerships built with:
  - Local government
  - Public health agencies
  - State emergency management agencies
  - Nongovernmental organizations
  - Hospitals and other medical institutions
  - Neighboring jurisdictions

# Internal Practices to Reduce Liability Risk

- Credentialing and assignment to appropriate duties
- Criminal background checks
- Verifying necessary licenses (professional, driving, watercraft)
- Clear activation and deactivation procedures
- Volunteer orientation, training and exercises
- Volunteer identification badges
- Written partnership agreements stating roles & responsibilities
- Written engagement/utilization records
- Procedures for keeping patient treatment notes
- Rules of conduct and grounds for dismissal
- Communications procedures
- Post-incident debriefing

# Current Statutory Efforts to Control Volunteer Liability Exposures

- Federal Volunteer Protection Act of 1997
- State Volunteer Protection Acts
- State Good Samaritan Laws
- State “Emergency Management” Statutes
- Individual MRC arrangements with response partners, governments, etc.

# Federal Volunteer Protection Act Limitations

- Nonprofit *organization* not protected
- Volunteer can be sued by nonprofit or government
- States can limit protection significantly and opt out in cases involving only state residents
- Gross negligence; willful, wanton and reckless misconduct; criminal actions and others excluded
- Operation of motor vehicles, watercraft and aircraft excluded
- Joint and several liability eliminated only for non-economic damages

# State Law Limitations

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Some states offer substantial protection, others do not.

# What Would an Ideal Law Look Like?



# Scope of Activities Covered

- Activities within scope of assignment
- Before a disaster, during training, planning and drills
- During disaster response
- Human caused and natural disasters
- Community health activities
- Transportation of injured during disaster
- Transportation of participants during drills
- Donations of goods, materials and premises

# Activation Requirements for Coverage During Events

- Governor
- Local government officials
- Local emergency management agency
- Request of response partners

# Who Should be Covered for Liability?

- The MRC organization
- Volunteers registered with the MRC
- Volunteers registered with the state or local EMA
- Emergent volunteers accepted on the scene
- Individuals or businesses that donate labor, equipment, goods, or premises
- Volunteers from other states

# How Should Liability Protection be Provided?

- Immunity
- Coverage as state or local government employee
- Coverage as federal employee

# How Should Volunteers Be Compensated for Injuries During Covered Activities?

- As state or local government employees
- As federal employees
- Through accidental injury policies providing coverage for deductibles or in excess of health insurance

# Related Issues

- Level of credentialing
- Temporary suspension of requirement to hold state license
- Temporarily expanded scope of practice for non-physician health care practitioners

# **Do Other Barriers Exist to Successful Development of MRCs?**

