

**EMERGENCY RESPONSE AND
EMERGENCY MANAGEMENT LAW**

ABOUT THE AUTHOR

William C. Nicholson is a nationally recognized expert on emergency response and emergency management law. He is Adjunct Professor of Law at the Widener University School of Law in Wilmington, Delaware, where he originated and teaches a two-credit seminar course entitled Terrorism and Emergency Law. The class features numerous well-known speakers from the terrorism and emergency law field. During Spring 2002, the speaker list included luminaries such as Michael D. Brown, Esq., Deputy Director Federal Emergency Management Agency (FEMA); John P. Carey, Esq., Senior Vice President, MBNA, N.A., Former General Counsel FEMA; and Professor Barry Kellman, Esq., DePaul University School of Law, Director, International Criminal Justice and Weapons Control Institute.

Mr. Nicholson served for 5^{1/2} years as General Counsel to the Indiana State Emergency Management Agency, the Indiana Department of Fire and Building Services, and the Indiana Public Safety Training Institute. He has published many articles on emergency management and response law, including *Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response ("HAZWOPER") Standard, Standard Operating Procedures, Mutual Aid and the Incident Command System*, as part of the ABA's 30th National Spring Conference on the Environment—Combating Terrorism in the Environmental Trenches, Widener Symposium L.J., Vol. 9, No. 2, 2003.

Mr. Nicholson speaks frequently on emergency preparedness and emergency management topics. Recently, he served on a panel entitled "The Legal Aftermath: Terrorism Laws and Disaster-Related Litigation" where he made a presentation entitled "Mutual Aid: Current Enactments and Potential Litigation." This event was part of the Courts in the Aftermath of September 11th: 9/11 Summit. This national summit for state court judges at all levels was sponsored by the New York Unified Court System and took place in New York City on September 25–27, 2002. Mr. Nicholson also acted as Governor's Legal Counsel during the Weapons of Mass Destruction Exercise at Preparing the Nation: A Policy Summit on Domestic Terrorism, sponsored by the National Governors Association, the National Emergency Management Association, and the Department of Justice/Office of Justice Programs in Washington, D.C. Mr. Nicholson presents training programs on emergency management law to an assortment of groups, including emergency managers, emergency responders, and attorneys. He serves on the Wilmington, Delaware, Local Emergency Planning Committee and the Project Impact Steering Committee.

For more information, see the author's web site at: <www.terrorism-emergency-law.com>

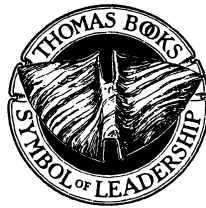
EMERGENCY RESPONSE AND EMERGENCY MANAGEMENT LAW

Cases and Materials

By

WILLIAM C. NICHOLSON

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*I dedicate this book
to the memory of my beloved father, James M. Nicholson,
who showed by example the good works an attorney
can do and inspired me to public service;
to my dear mother, Joan Barnes Nicholson,
who has supported me through thick and quite a bit of thin;
and to my darling wife, Nancy Schweda Nicholson,
who encourages me to live out my dreams, no matter where they may lead.*

PREFACE

As the first text to be published on emergency response and emergency management law, this book fills a large gap in the legal literature. First, emergency response law is considered with the goal of providing an understanding of the legal challenges faced on a daily basis by the dedicated public servants who are the frontline troops in emergent situations. The emergency response law contents are arranged in a tiered manner, beginning with the duty to respond and proceeding through the wide range of legal issues that arise during response. Broader issues of emergency management law follow. That discussion begins with the responsibilities of local and state governments, after which federal emergency management law is considered.

To set the stage for response law discussion, the text examines the origin and end of the duty to act. Legal issues arise even before response, including planning, training and exercising. Training accidents sometimes happen despite preventative measures. The text examines case law on the topic.

Case law explicates the major issues that arise from the use of emergency response vehicles. These topics include law enforcement's varying responses to "hot pursuit," vehicle accidents, and the potential for criminal charges against the driver of an emergency vehicle involved in an accident.

The first step in emergency response is usually dispatch. Even before an emergency responder arrives on the scene, legal issues may arise involving delayed dispatch, pre-arrival instructions or failure to meet dispatch standards.

The text evaluates topics of particular interest to Emergency Medical Services (EMS). Matter explored includes the ability of proper documentation to assist in protecting from liability, patient consent, treatment of minor patients, "Good Samaritan" acts, and delayed response to emergency scenes.

After an accident occurs, the response must be properly managed. Safety for responders flows from the legal requirements for use of the incident management system, well-written mutual aid agreements, and proper standard operating procedures. These elements create a "structure of safety." Failure to use them properly may result in both legal liability and death or injury to responders.

The law imposes additional requirements on a hazardous materials response. The Occupational Safety and Health Administration (OSHA) Hazardous Waste Operations and Emergency Response (HAZWOPER)

standard and Section 472 of the Life Safety Code of the National Fire Protection Association “Standard for Professional Competence of Responders to Hazardous Materials Incidents” provide a structure for such incidents. Case law discusses OSHA penalties for violations.

Volunteers may be either a vital resource or a legal liability. Competent volunteer organizations provide needed infrastructure for important support functions. At the other end of the spectrum, emergent volunteers repeatedly interfere in the smooth functioning of incidents. The federal Volunteer Protection Act of 1997 is a tort reform law providing a small measure of shelter for unpaid assistants.

The law contains important privileges and immunities for emergency responders. The common law “Fireman’s Rule” prevents responders from suing victims for injuries sustained while on duty, while the rescue doctrine carves out some protection for responders from the acts of others.

The response of the New York Fire and Police Departments to the attacks of September 11, 2001, as reported by the *New York Times*, provides important lessons for emergency responders. Choices made by managers affected the number of responder casualties resulting from this catastrophic event. The lessons learned apply to everyday events as well as to large-scale occurrences such as the New York attacks.

Emergency management is an all-hazards discipline that provides an invaluable tool for mitigation, preparedness, response, and recovery. It provides a structure for unifying all resources available to units of government. Mitigation lessens or eliminates the effect of potential emergencies. Preparedness includes planning, training to the plan, and exercising the plan, followed by revision of the plan to reflect lessons learned. Response is the actual reaction to emergencies and disasters, when the benefits of mitigation and preparedness result in increased safety for responders and more rapid control of events. Recovery involves restoring matters at least to their status before the event. Recovery blends into mitigation to help assure that future events are either avoided entirely or that their potential effects are lessened.

At the state level, gubernatorial emergency powers vary significantly. Both strong and weak governors have challenges created by the statutes that create and regulate their emergency powers.

Both state and local units of government have specific emergency planning requirements. Federal law requires that planning for release of Extremely Hazardous Substances be undertaken on the local level by the Local Emergency Planning Committee (LEPC). The responsibilities of emergency management, however, include planning for all hazards. The LEPC and local emergency management must, therefore, closely coordinate their plans in order to ensure that they provide a seamless approach to all hazards.

On the federal level, the Federal Emergency Management Agency

(FEMA) coordinates emergency management efforts. The Stafford Act and the Federal Response Plan (FRP) created pursuant thereto outline the manner in which the national government counters calamities. A variety of other federal plans work together with the FRP to assure complete federal support for responses to all types of disaster. One of FEMA's major responsibilities entails issuing, administering, and managing grants. Grantees and sub-grantees use many sources to assure that they utilize grants in a lawful manner. FEMA strongly emphasizes mitigation grants in order to lessen costs of subsequent disaster relief. Mitigation grants currently focus on natural hazards. The national focus on terrorism has led to FEMA's incorporation into a cabinet-level Department of Homeland Security.

Attorneys and emergency management are important partners for one another. Attorneys cannot continue to tell themselves that "it doesn't happen here." Emergency managers cannot continue to say, "This is an emergency. I don't have time for legalities." Both parties must learn the law beforehand, and take appropriate mitigation and planning steps to lessen the likelihood of litigation. They must also work together through the emergency management process in order to facilitate a response that is both safe and least likely to result in liability. The failure of an attorney advising the leader of a unit of government to understand emergency response and emergency management law may arguably be malpractice.

A variety of sources may result in negligence liability in emergency management. Many states have enacted statutory protections for executive decisions made during planning or response. Governmental immunity may also apply. Failure to fulfill statutory mandates, follow proper procedures or adhere to generally accepted practices may result in liability. Proper planning is vital.

The September 11, 2001 attacks on the World Trade Center Towers in New York City, as reported by the *New York Times*, contain important lessons for emergency management. Some of the difficulties encountered by the responders of the New York Police and Fire Departments could have been avoided had the Office of Emergency Management (OEM) been able to properly perform its duties. The OEM made attempts over time at improving interdepartmental coordination and communications, but much remained to be done at the time of the 9/11 attacks.

Emergency Response and Emergency Management Law: Cases and Materials surveys the law regulating response by the fire service, hazardous materials teams, emergency medical services, law enforcement, and volunteer groups. The text also examines the varying authorities underlying emergency management. Law school classes as well as practicing attorneys will find the text to be a vital resource for learning emergency response and emergency management law. The books' potential audience also includes emergency respon-

ders and emergency managers who will find its straightforward style to be both comprehensible and useful in their preparedness efforts. The work provides a firm base of legal knowledge for a partnership composed of emergency responders, emergency management professionals, and their attorneys. One of the book's major goals is passing on relevant, useful knowledge to another key attorney group: those who will be at the side of business and government chief executives in the aftermath of emergencies and disasters.

W.C.N.

INTRODUCTION

I was honored to serve from January 1995 through August 2000 as General Counsel for the Indiana State Emergency Management Agency, Department of Fire and Building Services, Public Safety Training Institute and Emergency Medical Services Commission. During this time, I had the pleasure of traveling around the State of Indiana to share with public and private sector emergency responders and emergency managers my perspective on their legal obligations. More importantly, I received their input on the legal issues that perplexed and worried them. We engaged in many long and sometimes philosophical discussions, occasionally lasting deep into the night. At some point during every one of our talks, one of the participants would ask me, “Bill, when are you going to write your book?” The question was always cast in terms of “when” not “whether.” When I would ask why they assumed I would write a book, the inevitable response was “because you don’t talk or act like a lawyer. You understand what we care about.”

While I was always complimented by acceptance as a friend, I worried about their evaluation of attorneys. Surely, it seemed to me, lawyers, emergency responders, and emergency managers must be working as a team. I could not conceive of how the situation could be otherwise, given the huge potential liabilities that lurk in the wings at every emergency and disaster scene. As time passed and I met a larger sample of business and local government attorneys, however, I found that the realities of their existence dictated a much different relationship. The fact is that attorneys for small to medium-sized businesses are tasked with a sometimes overwhelming range of responsibilities. Lawyers serving local government are generally part-time counsels, paid less for their county work than they earn in private practice. Further, local government lacks the resources to send them to obtain Continuing Legal Education (CLE) on issues in emergency response and emergency management. Such CLE is also not available. The fact is that there are very few attorneys who understand emergency response and emergency management law well enough to teach it to others.

When I became a member of the National Emergency Management Association (NEMA) Legal Counsels Committee, I discovered that this local situation existed on a nationwide basis. Even the states face challenges, due to the fact that many of them route legal counsel through representation of emergency response and emergency management entities without allowing

sufficient time for attorneys to gain expertise in the law.

While I attempted in a small way to address the need for wider understanding of these areas of the law through writing articles, the chorus of requests for a book continued to grow. This book is the culmination of seven years spent listening to emergency responders and emergency managers in the government and private sectors. The text also benefits from sharing with business as well as state and local government layers their frustrations at wanting to perform professionally for their clients with insufficient tools. While the book will be a valuable resource for these groups, the need for comprehensive training in emergency response and emergency management law remains.

ACKNOWLEDGMENTS

This book is the culmination of many years of planning, writing, research, and interaction with a wide variety of emergency responders, emergency managers, policy makers, and the attorneys who advise them. To name them all would be impossible. I must, however, share my thanks with many specific people. These individuals provided invaluable guidance as both my career in the infant specialty of emergency response and emergency management law, as well as this text, assume their shapes.

My wife, Nancy, both inspires and supports me in all the ways that spouses can help one another. The Honorable Birch Bayh has been a great mentor to me and a great public servant for us all. Superintendent Melvin J. Carraway of the Indiana State Police hired me as his General Counsel when he served as Executive Director of the Indiana State Emergency Management Agency. Mel's creative and insightful vision of public service is a continual inspiration. His successor as SEMA Executive Director, Patrick J. Ralston, provided strong leadership and a broad vision for the agency. SEMA's extremely experienced staff tried hard to educate me while I worked at the agency, and they continue to provide guidance regarding the issues involved in their work. While space precludes listing them all here, I wish to particularly thank Hoosier friends Deputy Director for Emergency Management Phil Roberts; Deputy Director for Emergency Medical Services Mike Garvey; Administrative Law Judge Bill Teegarden; State Fire Marshal Tracy Boatwright; Phil Brown; Dave Crose; Dave Barrabee; Manuela Johnson; Ken Rogers; Larry Long; Bill Franklin; Donna Wisthoff; Betsy Galloway; Rick Card; and Sherrie Crain. Particular thanks go to Jerry Hauer, who is currently Assistant Secretary of Health and Human Services in the Office of Emergency Public Health Preparedness as well as being an old hand at emergency management, who suggested Charles C Thomas Publisher, Ltd. as a publisher for this text. Jerry was to have been a reader, but his important work in prevention of bioterrorism leaves him less time than he would like for such pursuits.

I learned a great deal working with the Indiana Emergency Medical Services Commission, particularly former Chairman and Chief Jim Bright who shared his vast knowledge of dispatch issues, Commissioner Dr. Doreen Hojnicky who exemplifies the best a Medical Director can be, and Commissioner Myron Mackey of Bicknell, Indiana, a great champion of vol-

unteer fire and EMS responders. I owe a debt of appreciation to the members and leadership of the Emergency Management Alliance of Indiana, on whose Board of Directors I had the honor of serving as an ex-officio member. My friend Rick Schlegel deserves special mention for his insight into incident management issues. In Delaware, my fellow members of the Wilmington Local Emergency Planning Committee and the Project Impact Steering Committee have shared their wide-ranging experience in emergency planning and response—The Honorable Joe DePinto, George Giles, and Red Flegel deserve special mention.

Mary LaSota, my student research assistant at the Widener University School of Law, provided able backup on many aspects of the text. I especially thank her for enduring the tedium of typing out the lengthy and invaluable *Buttram* slip opinion published herein for the first time. I owe a debt to Jan Amen of the Texas Forestry Service for braving a building evacuated due to environmental problems to retrieve a copy of *Buttram* for me. I was very fortunate to obtain the input of a number of generous and knowledgeable readers of the text prior to its publication. They include Ohio Deputy Attorney General Tammy Little, who advises Ohio Emergency Management and serves as Chair of the Legal Counsels Committee of the National Emergency Management Association; Elaine Chan and Michael Herman of the FEMA Office of Legal Counsel; Bill Cumming, formerly of the FEMA Office of Legal Counsel (who is generally regarded as the institutional memory of that Office); Phil Roberts, Deputy Director for Indiana SEMA; Inspector Carl Holmes of the Philadelphia Police Department who also was one of the guinea pigs in the pilot presentation of my Terrorism and Emergency Law class at Widener Law School; and Deb Long, head of Business Continuity for Wilmington Trust Company, who gave me important insight into the perspective of private industry on these matters. My readers gave me feedback that resulted in a much better end product. I thank them for the improvements due to their efforts. I deserve credit for any shortcomings that persist in the book.

I particularly appreciate the kind support of Assistant Dean LeaNora Ruffin, my superior at the Widener University School of Law. LeaNora is the best kind of boss: she treats her people as unique individuals, and values the special contributions that each makes to the success of our office. I thank Dean Douglas Ray and Vice Dean Michael Goldberg at Widener for permitting me to teach my first-in-the-nation course in Terrorism and Emergency Law.

Above all, I wish to express my great gratitude to, and respect for, all of the emergency responders, emergency managers, and their attorney advisors with whom I have had the honor of coming in contact. I hope that this book helps you to be safer from both physical danger and potential legal liability.

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**EMERGENCY RESPONSE AND
EMERGENCY MANAGEMENT LAW**

Section I
EMERGENCY RESPONSE LAW



EMS and law enforcement act together at a major accident scene. Jeff Forster photo.

Chapter 1

DUTY TO ACT

The duty to act arises at different times for different emergency responders. A first responder coming on a scene without having been sent thereto by a supervising entity bears a different burden from his or her colleague who is dispatched in response to an incident. The duty to act may be extinguished under certain limited circumstances.

A. DUTY TO ACT

Whether a duty to act arose and whether it ever ended are central issues in the *American National Bank & Trust Company* case that follows. The reader should pay particular attention to the points made in the dissenting opinion, and consider why that perspective did not prevail.

American National Bank & Trust Company
v.
City of Chicago

Supreme Court of Illinois

192 Ill. 2d 274 (Ill. 2000)

Heiple, J., filed a dissenting opinion in which Bilandic and Rathje, J. J., joined.

Justice MILLER delivered the opinion of the court:

The plaintiff, American National Bank and Trust Company, as special administrator of the estate of Renee Kazmierowski, brought the present action in the circuit court of Cook County against the defendants, the City of Chicago and two of its paramedics, John Glennon and Kevin T. O'Malley. Raising several theories of liability, the plaintiff sought recovery for the defendants' alleged failure to respond properly to an emergency call by the