

**EMERGENCY RESPONSE AND
EMERGENCY MANAGEMENT LAW**

Second Edition

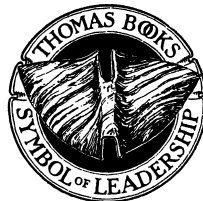
**EMERGENCY RESPONSE AND
EMERGENCY MANAGEMENT LAW**

Cases and Materials

By

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Thomas Arthur Gowling III

August 17, 1952 – September 5, 2011



Thomas A. Gowling III. Photo courtesy of Carol Gowling.

Tommy and I have been friends since high school. He served for many years as a member of several Volunteer Fire Departments (VFDs) in the Washington, DC area, including Cabin John, Bethesda-Chevy Chase, Rockville and Potomac.

I recall a number of times in our youth – while the rest of our friends and I were partying – when Tom was either absent for training or called to a scene. Tommy left, often as the fun was starting, much to our puzzlement. When he came back, smelling of smoke, he had that satisfied, quizzical little smile displayed by many volunteers.

Tommy was an adopted, only child whose Dad was diagnosed with Multiple Sclerosis only 3 weeks after the adoption was finalized. He had to grow up quickly. Tommy never hesitated to help around the house when called to do so, no matter what else was happening with his peers. Likewise, he jumped immediately when the call came to join his brother firefighters.

Tommy and I had many talks over the years about the relationship between law and emergency response as well as his experiences as a volunteer. The “boots on the ground” viewpoints of Tommy and several other serving emergency responders and emergency managers helped make the first edition a better text. Their criticisms of the first edition helped guide me to improve the second edition. Adding the section on Post-Traumatic Stress Disorder (PTSD) springs in part from a discussion Tommy and I had about how continued exposure to pain and violence affects emergency responders.

As an only child, Tommy wanted siblings very much. We who count ourselves among Tommy’s long-time friends were very blessed in having him – and one another – as a

kind of surrogate family. Nothing in his life gave Tommy greater happiness than his loving wife Carol and their close and caring family, including his three children, Megan Gowling, Katelyn Gowling, Ryan Gowling, and two stepdaughters, Brittany Karakostas and Kristina Karakostas. Never have I seen a blended family – or any family – closer than they are.

Among our discussions one late and soggy night, Tommy and I agreed that, like all emergency responders, he could retire to Fiddler's Green and that, as a sailor, I am eligible to end up there as well. He grudgingly admitted that even being a lawyer doesn't disqualify me. So, Tommy, save me a space and let's have a cold one when my time comes. Once again, we'll jaw over the pains and glories of the world with the emergency responders and sailors who have gone before.

PREFACE

This book is the second edition of a text that was well received by both academics and practitioners in the emergency response and emergency management world. While some counseled resting on the laurels garnered by that book, in the eight years since its publication there have been enough changes in law that major elements needed updating.

As the first book to be published on emergency response and emergency management law, the earlier text filled a substantial gap in the legal literature. The additional material covered by the second edition addresses historic expansions in the law that have taken place since the first edition's publication.

This book's structure carries forward from that of the first edition. The text begins with emergency response law, to assist in understanding the daily legal challenges faced by the dedicated public servants who serve as frontline troops in emergent situations. These 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, prearrival 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. This section contains a great deal of material added to the second

edition on the National Incident Management System (NIMS), National Response Plan (NRP), and National Response Framework (NRF), as well as the National Fire Protection Association Standard 1600 Standard on Disaster/Emergency Management and Business Continuity Programs (NFPA 1600).

The law imposes specific 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 may 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. Varying legal approaches by different states to the very real challenges posed by Post-Traumatic Stress Disorder illustrate that emergency responders are not equally protected everywhere. The World Trade Center Site Litigation provides important lessons for emergency responders who worked the site following the attack. 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. Different states approach this federal mandate in varying ways.

On the federal level, the Federal Emergency Management Agency (FEMA) coordinates emergency management efforts. The Stafford Act and the National Response Framework (NRF) created pursuant thereto provide a skeleton upon which the various levels of government build in order to counter calamities. A variety of other federal plans work together with the NRF 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 subgrantees use many sources to assure that they utilize grants in a lawful manner. FEMA emphasizes mitigation grants in order to lessen costs of subsequent disaster relief. When the first edition of this text was published, mitigation grants focused on natural hazards.

The national focus on terrorism led to FEMA's incorporation into the cabinet-level Department of Homeland Security (DHS). The subordination of tiny FEMA into the gargantuan DHS has brought with it many challenges, including losses of funding and some historic missions. FEMA's response to Hurricane Katrina in 2005 was largely seen as ineffectual and amateurish. An outcry for FEMA's renewed status as an independent agency resulted in legislation designed to ensure that its protected status within DHS would be restored, similar to that of the Secret Service and Coast Guard.

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. The text includes a recent article discussing the barriers facing attorneys and emergency managers as they do their best to protect their local jurisdictions from liability and other hazards.

Mitigation of legal risk is a difficult task, made even tougher in an economic environment that demands justification for every expenditure. All too often, the attitude of the fiscal body may be, "It hasn't happened. Wait for an event before we authorize expensive legal fees." The text posits a metric for calculating the risk of going without proactive legal advice for emergency management. The goal of this section is to give emergency managers a more concrete measurement to help those with the purse strings understand the risks of going without mitigation-level legal advice to emergency management.

An important part of mitigation revolves around wise land-use policies. Sometimes, however, wise land use may result in individuals who own property which loses all or part of its value due to these policies losing substantial value. The text includes a case examining the issues that arise when these interests conflict.

The lessons of emergent events often point to ways in which preparedness can be enhanced. One such road to improvement is paved with a number of laws and FEMA's Comprehensive Preparedness Guide (CPG) 101, Version 2.0 (November, 2010) which, among other matters, provide strong guidance and support for language services for persons with limited English proficiency

(LEP). The text examines legal requirements for language services to LEP populations in all phases of emergency management and provides practical guidance for finding competent interpreters and making them a part of the emergency management team.

Preparedness cases discuss aspects of planning issues. Another case delves into the Fifth U.S. Circuit Court of Appeals' advance preparedness plans for operations during a disaster.

An included law review article is a good short guide to emergency management law. One must recall, however, that every state has its own unique set of laws covering this area. So, while the article is a good general guide, it is a snapshot of the law in one jurisdiction – Florida – at one time. It may be of help to someone who has purchased the book, then put it on the shelf meaning to get to it later – only to find that later arrives along with a major disaster. (If this is the case – after the immediate trouble is over – read the recovery section, and consider the resources referenced there. Make sure to read the section on mitigation before recovery is too far along.)

The two cases resulting from Hurricane Katrina illustrate challenges during recovery. The first examines the remedies available to applicants for federal assistance for home rebuilding funds. Another case discusses FEMA's options when providing debris removal from a private canal following application for assistance by the local unit of government.

The Moving Forward Section examines the requirements that ethical law imposes on government employees and how those remain in place despite some ethical lapses during the period after 9/11. The book closes with a broadly viewed consideration of how our nation and its emergency management laws have changed in the wake of the September 11, 2001 attacks.

Emergency response and emergency management law are constantly evolving to meet the challenges of an ever-changing world. *Emergency Response and Emergency Management Law: Cases and Materials, Second Edition* 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 as well as its ever-increasing legal obligations. 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. As with the First Edition, this book should prove to be popular with students of emergency management at all levels in both emergency management-specific as well as public administration programs. The book's potential audience also includes practicing emergency responders 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 all four phases of emergency management – not only in the aftermath of emergencies and disasters.

INTRODUCTION TO THE SECOND EDITION

America has changed significantly since the appearance of the first edition of this text in 2003. The first edition came out almost two years after the terrorist attacks of September 11, 2001. By that time, the law regarding the book's subject matter had begun to alter markedly, including such landmark enactments as the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002. These far-reaching laws transformed the relationships between emergency management and emergency response at all levels of government. Even more importantly, though beyond the scope of this book, such laws, as well as perceived failures of government during this period (relevant examples of which are described herein), reinforced feelings of cynicism and disconnection from government among many of the populace. Ten years after the 9-11 attacks, the result is a lack of trust in government, marked by symptoms such as the rise of the "tea party" and limits on the ability of the Federal government to provide funding for the Keynesian solution of "priming the pump" to spend our way out of the recession in which we find ourselves.

The 2012 publication date for the second edition is not mere coincidence. This anniversary marks over a decade since the terrorist attacks of September 11, 2001 – events that significantly altered American perceptions of the nature and importance of the various threats facing the nation. Major reorderings of national priorities regarding emergency response and emergency management flowed from those changed perceptions. These reorderings were enshrined in the form of laws at the federal, state, and local levels.

The new legal developments have by and large flowed from the federal level downwards to the state and local units of government. They have resulted in numerous additional requirements for state and local responders. (Many of them in the form of the dreaded "unfunded mandates" of which the federal government is so fond.) The reader can decide for him- or herself the extent to which these have been valuable. Certainly, many have been endorsed by relevant, knowledgeable people at all levels (including the actual responders), whose voice is generally considered to be the most authoritative. Interestingly, several of the most basic legal requirements for emergency responders have remained unchanged.

Other aspects of the law have changed in huge ways. FEMA is no longer a small but independent agency. Instead, its concern with natural hazards is a small voice compared to the law enforcement focus in the Department of Homeland Security.

The addition of other, extensive legal mandates binding every emergency responder and emergency manager meant that the 2003 edition of this book

was simply becoming more dated, and less helpful, as every year went by. Given these new developments in the field, I had no option but to bring out an updated version of the text.

This truly is a new edition of the book. The majority of “new editions” have changed perhaps 10 percent of their content. As the reader can tell merely by hefting the text, this manuscript is significantly larger than the prior version, with about one-half its contents being totally new material. The reason for this is that the author has spent considerable time and effort in updating relevant portions of the text itself as well as enlisting the assistance of additional scholars with specific expertise. The goal is to assist in providing a tool that will help the emergency responder, emergency manager, and the lawyer – who **MUST** be a part of the team – to work closely with both of their organizations.

Responding to an emergency event in real time is difficult enough without simultaneously needing to internalize an unfamiliar area of law. Those who learn and understand the legal underpinnings of all phases of emergency management will be rewarded with a complete understanding of the discipline’s capabilities.

The reader should not be mistaken – understanding and complying with the law is not a free ticket to avoid involvement with the court system. In all emergency situations, something goes wrong, often catastrophically so. In our litigious society, for many people the first reaction when injury or property damage occurs is to sue someone, and that includes any government entities and individuals employed by them who may be involved in trying to fix the problem. For both the emergency responder and the emergency manager, however, knowing where the legal limits lie and complying with the law’s requirements permit utilizing their organization’s full resources to the edges of the envelope. This approach does not guarantee freedom from lawsuits – it merely makes it most likely that one will prevail in litigation and allows one to sleep at night with the fewest worries possible.

W.C.N.
Durham, N.C.
March 12, 2012

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W.C.N.

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**EMERGENCY RESPONSE AND
EMERGENCY MANAGEMENT LAW**

Section I

EMERGENCY RESPONSE LAW

All emergencies are local.



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.

PART 1. 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 decedent for medical assistance. The circuit court granted the defendants' motion for dismissal of the complaint. The appellate court affirmed that judgment in an unpublished

order. No. 1-97-1212 (unpublished order under Supreme Court Rule 23). We allowed the plaintiff's petition for leave to appeal (177 Ill.2d R. 315(a)), and we now affirm in part and reverse in part the judgment of the appellate court and remand the cause to the circuit court for further proceedings.

The following factual summary is derived from the allegations in the plaintiff's amended complaint and from the information contained in its accompanying exhibits, which include a transcript of the decedent's emergency call and the paramedics' report. At around 7:55 A.M. on April 24, 1995, the decedent, Renee Kazmierowski, suffered an asthma attack while at home at her