



Political and Legal Foundations of Fire Protection

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Legal Liability Issues of Standard Operating Procedures
VS
Other Titles for Guidance Documents

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By: K. Tim Pridemore

There is a theory among many in the fire service that eliminating standard operating *procedures* and replacing them with standard operating *guidelines*, or “best practices” will provide a shield against liability if an operation leads to a bad outcome. The theory is generally stated as follows: “If you have SOP’s and don’t follow them, you can be held liable for failing to follow your own procedures. If you use standard operating guidelines and don’t follow them...well, they were just a guide line anyway”. As Nicholson puts it, "SOGs allow increased flexibility in responding to complex fire scenes, encouraging the full utilization of firefighters' knowledge, skills and abilities.”¹

In this paper I intend to examine cases where actions have been brought against fire departments on the basis of an alleged failure to follow internal guidance documents. My intent in making this examination is two-fold. First, I wish to assess what effect the title of the document has on the outcome of the case. In other words, I want to find out if there is a greater shield to liability provided by guidelines than by procedures. My second purpose is to delineate those practices and issues which do provide at least some shield to liability.

For the purposes of this paper, I ask that the reader allow me to use the term *Standard Operating Procedure (SOP)* to indicate only guidance documents which carry that title. I also ask that you indulge me while I consolidate *Standard Operating Guidelines (SOG)*, *Best Practices*, *Operating Instructions*, *Procedural Instructions*, and all other titles under the heading of Guidelines.

¹ Nicholson, William C. Combating Terrorism in the Environmental Trenches – Preparing for Terrorism 9 Widner Law Symposium Journal 295 (2003)

Under our legal doctrines, failing to follow a Standard Operating Procedure, Standard Operating Guideline, Best Practice, or any other guidance document cannot, in and of itself, create liability against any firefighter or fire department. In order to prevail in any tort action, the plaintiff must prove that the defendant had a duty of care toward the plaintiff, and that he breached that duty through something he did or didn't do, and that that breach was the actual cause of harm suffered by the plaintiff.² No one argues that the simple act of not adhering to a guidance document is not, absent any actual harm, a predicate of liability. The question is, when pre-existing guidance is not followed and harm does follow, does the title of the document change the view of the courts relative to liability?

If a fire officer makes a fire ground decision to take or not take some action and that decision results in a negative outcome, i.e. death, injury, or property damage, then a plaintiff can argue that this omission or commission breached some duty of care owed to the plaintiff. If all other aspects of the requirement to prove liability can then be shown, and absent any other shield to liability, the Court could then most certainly find for the plaintiff regardless of the title of the guidance document. In other words, it is not the failure to follow a guidance document that creates the grounds for a court action, it is the negative outcome of the decision.

The Court systems of the United States do recognize their role in the protection of society at large. To that end, many Courts have stated that they are not willing to interfere in the actions of a fire department or other emergency response agency in a manner that would induce them to spend an excess amount of time considering the possibility of liability.

Now, let us turn our attention to some actual cases where a negative outcome did occur and examine the courts actions.

² Callahan, Timothy, Fire Service and the Law 2nd ed. PP 77 – National Fire Protection Association, Quincy MA (1987)

Consider the case of Shawn Young of Springfield, IL. On November 1, 1995, he was injured in an accident in which his truck was struck in an intersection by a City of Springfield Fire Department Vehicle which was responding to an automatic alarm.³ In Count II of his complaint, Young alleged that the conduct of firefighter Paul Forgas, the driver of the fire department's vehicle, "was willful and wanton in that Forgas drove in utter disregard for the safety of others lawfully entering the intersection and was guilty of consciously disregarding the safety of (the) plaintiff. In support of these allegations, plaintiff cites Forgas' violation of *fire departments safe operating procedures (Operating Procedures)*". (Emphasis added) This document "*requires* that emergency vehicle operators stop and account for all lanes of traffic before entering an intersection".⁴ (Emphasis added)

Here, we have a clear case of a firefighter being individually named (in Count IV) for failing to obey the "procedures set forth by the fire department". In addition, Count V of the complaint levies the same charges against the City of Springfield under the doctrine of Respondent Superior.⁵ This would seem to be the classic case of being sued for not following your own procedures. Young argued that both Forgas and the City of Springfield had assumed a duty toward Young by the adoption of the *safe operating procedures*. These issues were dismissed during a hearing for summary judgment. The reason for dismissal was failure to state a claim.

The case then reached the Illinois Court of Appeals which up held the dismissal of counts IV and V.⁶ The court's reasons included very clearly, "that the Springfield Fire Department's

³ Young v Forgas, 720 N.E.2nd 360 (Illinois Appeals 4th District, 1999) at I-11

⁴ Id Young at I-11

⁵ Id Young at I-11

⁶ Id Young at III

implementation of the Operating Procedures does not constitute an assumption of duty that alters the duty owed to the plaintiff.⁷ The remaining charges in the complaint were sent back to the trial court for further consideration.

There are two other issues that I find illuminating about this case. First, the charges that were sent back to the lower court include those of negligence against Forgas, and willful and wonton conduct on the part of both Forgas and the fire department. If these issues are decided against the defendant it will be on the basis of the negative outcome and not on the basis of failure to follow standard operating procedures. Second, the lower court clearly recognized that an adequate shield to liability is essential for the provision of public safety. We can see this in their comment which, cited from *Buell v Oakland Fire Protection District Board*⁸, “if emergency vehicle operators were haunted by the possibility of facing personal liability for negligence, driver performance would be hampered.”⁹

Fire ground decisions may be questioned as easily as those involving vehicle accidents. Consider the case of Pamela D. Kershner of Burlington, Iowa. On January 25, 1996, she placed a call to 9-1-1 reporting a fire in her clothes dryer located in an enclosed back porch. In response to the call, battalion chief Larry Werner dispatched only one engine and three firefighters. When they arrived at the plaintiff’s home, they found a fire which was, at the time, confined to the back porch.¹⁰

It is generally recognized that the typical strategic approach to this situation would be to attack the fire from the interior of the house, the unburned side. And, as we are aware, entering the house absent sufficient personnel to provide for rapid intervention would be in contradiction

⁷ Id young at II-10

⁸ *Buell v Oakland Fire Protection Board* 327 Ill.APP.3rd 940,944,178 (1992)

⁹ Young at II A (1)

¹⁰ *Kershner v City of Burlington* 618 N.W.2nd 340 (Iowa 2000) at I

to acceptable fire fighting practices. Apparently knowing this as well, the officer of the first due engine elected to call for assistance and wait for them to arrive prior to making entry. There is no mention in the case document that any other attempt was made to fight the fire. Additional assistance arrived within three to five minutes, but the fire eventually consumed the entire structure.¹¹

At the time of the incident, the actions of the fire department should have been guided by their *service response policy*.¹² Under this policy the first alarm should have consisted of two engines and a command vehicle with a total of seven firefighters and officers. The reduced alarm staffing prompted the plaintiff to file the action contending “that the immunity provisions of chapter 670 (Iowa State Code) do not apply when a governmental subdivision fails to follow written policies governing the conduct and actions of its officers and employees in carrying out their official duties.”¹³

Here again we have a clear case of a fire department not following its own written guidance, except in this case the document is titled a service response procedure instead of safe operating procedures. Again we note that the title of the document did not dissuade the plaintiff from bringing action. And here again we have a situation where the trial court provided summary judgment in favor of the defendant even in the light of what to other firefighters would seem to be a clear case serious tactical errors in the operation. (Since it is highly unlikely that the dryer was sitting in the yard and, therefore highly likely that it was inside the house, and since at least four firefighters would be required to mount a safe attack, why did Chief Werner not dispatch at least that many? Alternately, once the officer of the first in company saw the situation, why did he not mount an attack from outside the structure in a manner that could

¹¹ Id Kershner at I

¹² Id Kershner at II-B

¹³ Id Kershner at 3-B

overpower the fire. While the potential for damage would be greater than from a “textbook” attack, the actual damage due to inaction was greater still.)

A motion to the trial court for summary judgment was granted based on the Iowa Tort Liability of Governmental Subdivisions Act. The plaintiff appealed and the case was reviewed.

On October 11, 2000, the Supreme Court of Iowa handed down a decision holding that “the district court properly determined that plaintiff’s negligence claim against the city was barred under Iowa Code section 670.4(11), the emergency response exemption which caused the defendant city to be immune from liability to plaintiff.”¹⁴

In the section of the analysis relevant to the thesis of this paper the court opined, “We find no convincing argument as to why the immunity provisions of chapter 670 should not apply in this case *even though the fire department may not have followed its own written service response policy* in dispatching fire equipment and personnel to plaintiff’s fire. We also find no evidence that the city, by adoption of the written service policy, intended to impose on itself or its employees a mandatory duty of care toward persons within the city as a basis of civil liability...”¹⁵ (Emphasis added)

The most striking feature of this decision is that it actually cites *Young v Forgas* discussed above. In doing so, the court made no distinction between the use of the term “procedure” from *Young* and the term “policy” in *Kershner*. You will also note that in both of these cases, the document titles were not even discussed. The state’s tort immunity provisions have held sway and the allegations of negligence based on failure to follow policies or procedures have been cast aside. I believe this squarely supports my position that protection lies in statutory or sovereign immunity and not in the title of a guidance document.

¹⁴ Id kershener at IV

¹⁵ Id Kershner at III-D-[4]

Neither of these cases though falls squarely on the title of Standard Operating Procedures. A case that does however is the case of Bridges v City of Memphis.¹⁶ You may recall the Regis Tower Apartment fire which occurred April 11, 1994. In that fire William Bridges and Lt Michael Mathis were killed. Widely reported in fire service trade publications, this incident was probably cited in a number of training programs under the theme of “how not to do it.” It is germane to this discussion since it involves a direct challenge to the term “Standard Operating Procedures”.

This case is more complicated since it involves not only issues of negligence but questions surrounding application of the fireman’s rule and the exclusive remedy protections of workers compensation. Other issues notwithstanding, the court was asked to decide what role failure to follow standard operating procedures played in determination of liability.

The case was originally heard by the circuit court pf Shelby County. There was significant discussion of how changes which occurred in the Tennessee State Code¹⁷ would affect the claim of liability. The lower court dismissed the case which was then appealed to the Tennessee Court of Appeals. In the end, the dismissal was reversed and the case sent back to the lower court.

In their ruling, the court of appeals noted that fire departments could be sued for negligence if “the plaintiffs properly could show that their injuries resulted from fire department employee’s performance of or failure to perform, a *non discretionary act*.”¹⁸ (emphasis added) The court then went to great length to discuss what is and is not a discretionary act. Their

¹⁶ Bridges v City of Memphis and City of Memphis Fire Department. 952 S.W.2n 841 (Tenn. App. 1997)

¹⁷ Tennessee Code at 29-20-407b(1980 & supp 1996)

¹⁸ Id Bridges at 844

conclusion appears to be based heavily on what the State of Tennessee refers to as the planning-operational test.¹⁹

Condensed from the opinion, the test generally states:

“If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision. These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules...

On the other hand, a decision resulting from a determination based on pre-existing laws, regulations, policies, or standards usually indicates that its maker is performing an operational act. Similarly, operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not “discretionary functions” within the meaning of the Tennessee Governmental Tort Liability act. In other words, “the discretionary functions exception (will) not apply to a claim that government employees failed to comply with regulations or policies designed to guide their actions in a particular situation.”²⁰ (Internal quotes omitted)

In other words, to effectively use the, “they are just guidelines anyway” defense, a Tennessee fire department would have to prove that the guidelines weren’t actually even guidelines and that, in every situation the incident commander was completely free to exercise his own judgment. If all of the acts undertaken by the fire department were truly “discretionary” then liability would be avoided. I think it would be difficult to convince a jury that a Standard Operating Guideline does not meet the definition of a “policy designed to guide (the) actions (of an incident commander) in a particular situation.”²¹

The court seemed to feel that the authority to decide that issue should rest with the jury. When they reversed on this issue the court reasoned that, “it may well be that a subsequent development of facts in this case will reveal that many of the acts of Fire Department personnel were “discretionary” as opposed to “operational.” At this point, in the proceedings, however, the

¹⁹ Id Bridges at 845

²⁰ Id Bridges at 845

²¹ Id Bridges at 845

Plaintiff's complaint contains adequate allegations of non-discretionary or operational, acts on the part of the Fire Department personnel to withstand the Defendant's motion to dismiss."²²

It seems then that, in the state of Tennessee, a fire department can be held liable for non-discretionary acts and that they can be held liable based on how the decision is reached, not on the title of the document that outlines the decision. Once again, it is the tort liability statute providing the liability shield, not the fire department's internal document titles.

As a final case, I would like to examine a situation were a fire department was sued for not having Standard Operating Procedures, Standard Operating Guidelines, Best Practices, or anything else. The case of *Ramos v Town of Branford* is both tragic and instructive. It involved the November 28th, 1996 fire that killed firefighter Edward Ramos.²³ According to the complaint filed by Ramos' widow, the defendants (Branford Fire Department and Chief Peter Buonome) "recklessly failed to promulgate, implement and enforce policies with respect to fire fighting procedures and safety policies."²⁴

In this case evidence was offered to show that the defendants "had failed to comply with specific NFPA and OSHA (requirements) concerning personal protective clothing and equipment, personnel certifications, communications problems at the fire scene and the lack of a (fire) ground accountability program."²⁵

Here we have a case where a number of national consensus standards and federal regulations were not followed and no standard operating procedures, guidelines or other guidance documents were in place. Yet the court still ruled that the defendants were shielded from liability. In affirming the lower court's summary judgment, the appeals court stated,

²² *Id* Bridges at 846

²³ *Ramos v Town of Branford* (CT) 778 A.2d 972 (Conn. App. 2001)

²⁴ *Ramos* at 974

²⁵ *Ramos* at 980

“without a showing that the employer’s violation of safety regulations were committed with a conscious and deliberate intent directed to the purpose of inflicting an injury, a wrongful failure to act to prevent an injury is not the equivalent of an intention to cause injury.”²⁶ It would be hard to imagine a situation where such a court would give a greater weight to the title of an internal fire department document than it would give to a set of internationally recognized standards of care and a body of federal regulations combined. It is interesting to note that in Tennessee the courts may have found this same failure to comply with a federal regulation to be a non-discretionary act and therefore not shielded by immunity statutes.

One reviewer of this paper pointed out that “The court here simply ruled that ignorance does not necessarily result in liability.” I think the point is that even in the absence of any guidance document and with a clear violation of basic principles of fire department management the court still ruled that the fire department was not liable. If this is the case, it would be difficult to imagine a situation where a somewhat better managed department was held liable (at least in Connecticut) for choosing to call their guidance documents “procedures” in stead of “guidelines”.

If it is true that the title of a guidance document does not provide a shield to liability then what does? And what actions can fire departments take to protect themselves from liability?

There are three answers to the first question. First, sovereign immunity recognized in case law still provides some shield. While this doctrine has been under attack for many years, it still holds some sway in the recognition that emergency response would be degraded if every action taken had to include an analysis of potential liability. Second, statutory immunity is provided in many states. Since the laws and applications thereof are different in every state, there are, potentially, fifty different possible answers to the question, “can I be liable for this?”

²⁶ Id Ramos at 981

The third protection from liability is the presence of high quality training programs and effective operations. While not a bar to being sued, this does reduce the exposure to potential damages.

In order to protect themselves, fire departments should first educate themselves about the legal issues that surround fire protection. Learning the laws of the state in which operations are conducted will help officers understand what their duties and responsibilities are. Emergency responders should also examine closely all procedures and guidelines, regardless of title, and ensure that they adequately address issues of safety and flexibility. Finally, training, equipping, and operating the fire department in the best possible manner reduces both the frequency and severity of mistakes. I must note that, while well managed and properly trained fire departments should have fewer and less serious mistakes, this will not necessarily reduce liability when an incident does occur.

Finally, this analysis does not examine the issue of industrial fire departments. In an incident (at a release of hazardous materials for example) where people not employed by the plant are injured, there are, to my knowledge, no statutory immunity protections for the actions taken by an emergency responder. And when injuries do involve plant employees, the issues surrounding the worker's compensation rules of fifty different states create a legal landscape every bit as complex as that for municipal fire departments.

In conclusion, this seems to be both a simple and a complex issue at the same time. Courts seem to recognize the need to allow public fire departments to perform their work without a constant shadow of tort liability hanging over them. This seems to flow from a recognition that when a fire department gets involved in the affairs of a citizen it is most often because something serious has gone wrong and that the fire department may, in the end, be powerless to stop it. It also appears that the title of a guidance document does not have an effect on the ability to defend

against legal action while the tort immunity statutes of the state will. Additionally, it appears that actions for negligence brought by firefighters and those brought by the public we serve will be viewed in very different ways and the outcome of those actions will, again, depend upon the complex interactions of a number of laws and doctrines. And finally, well trained firefighters correctly using proper equipment will reduce the potential for undesirable outcomes which will, in turn, reduce the potential for legal actions in the first place.