

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 195 w/CS Emergency Medical Dispatch
SPONSOR(S): Bilirakis; and others
TIED BILLS: none **IDEN./SIM. BILLS:** CS/SB 338

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Claims (Sub)	10Y, 0N	Birtman	Havlicak
2) Judiciary	17Y, 0N, w/CS	Birtman	Havlicak
3) State Administration	6 Y, 0 N	Bond	Everhart
4) Health Care			
5) Judicial Appropriations (Sub)			
6) Appropriations			

SUMMARY ANALYSIS

This bill creates the Emergency Medical Dispatch Act. This bill provides that, where an emergency medical dispatcher has been provided certain training and has followed certain protocols, the dispatcher and the dispatcher's agency will be presumed to not have acted negligently. This bill also allows emergency medical dispatch services to participate in the Emergency Medical Services Grant Program.

This bill does not appear to have a fiscal impact on state or local government.

See "Comments" section herein regarding drafting issues in this bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0195d.sa.doc
DATE: April 8, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

This bill provides for an evidentiary presumption applicable to tort cases, which could possibly relieve a person from responsibility for his, her, or their negligent act.

B. EFFECT OF PROPOSED CHANGES:

Background

Tort law is the law that governs whether a person injured due to the fault of another may recover monetary damages against the wrongdoer. In general, to recover in tort, a plaintiff must show that the defendant owed some duty to the plaintiff, that the defendant breached that duty, and that the plaintiff was injured as a result of that breach of a duty. The breach of a duty is commonly referred to by the term negligence.

Emergency medical dispatch is neither defined nor regulated by statute. The emergency telephone number ‘911’ was created to provide citizens with rapid direct access to public service agencies with the objective of reducing the response time to emergency situations.¹

The area of emergency medical dispatch is fraught with the potential for committing a negligent act. An emergency medical dispatcher who receives an emergency call must immediately evaluate the situation, determine the appropriate level of response, and may instruct bystanders on how to help the injured person until professional help can arrive. For instance, a dispatch directing the ambulance to drive normally with traffic to assist a drowning victim may be found negligent in having the ambulance drive too slowly; and a dispatch directing an ambulance to needlessly go “full speed with lights and sirens” to a victim with a broken finger may be found negligent should the ambulance suffer an accident along the way. While these examples are extreme and obvious, in practice there can be gray areas, and accident victims always have the benefit of hindsight together with time for contemplation.

There is neither a common law nor statutory duty for a law enforcement agency to respond to a 911 call absent a ‘special duty’ owed to a person in peril.² Whether a ‘special duty’ exists to respond to a 911 call has not been directly answered by the Florida Supreme Court, though the court has taken oral argument on the question and has not yet issued an opinion.³ In general, however, once the call is accepted and some action is taken on the call, a legal duty is presumed.

¹ See s. 365.171, F.S.

² See *Everton v. Willard*, 468 So.2d 936 (Fla. 1985) (A law enforcement officer’s duty to protect the citizens is a general duty owed to the public as a whole; no duty of care is created absent a special duty to the victim.)

³ See *State Department of Highway Patrol v. Pollack*, 745 So.2d 446 (Fla. 3rd DCA 1999); review granted 760 So.2d 947 (Fla. 2000); 760 So.2d 948 (Fla. 2000); 799 So.2d 218 (Fla. 2001) (The 3rd DCA held that violation of FHP’s internal operating procedures in failing to dispatch an officer was not sufficient to impose liability; Pollack appealed arguing that

Current tort law provides that an emergency dispatch service may be liable in tort should an employee of the service act in a negligent manner while answering a 911 call. There are no statutory limits on such a lawsuit if the emergency dispatch service is a private entity. If that emergency dispatch service is a governmental entity, the sovereign immunity caps (\$100,000 per person or \$200,000 per incident)⁴ apply. The plaintiff alleging negligence must prove the three elements of a tort suit (duty, breach, and damages).

Section 90.301 - 90.304, F.S., which are portions of the Florida Evidence Code, define presumptions and their effect upon legal proceedings. Section 90.301(1), F.S, provides that a “presumption is an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established.” Section 90.301(2), F.S., provides that a presumption may be rebuttable or conclusive. Section 90.302, F.S., specifies that a rebuttable presumption is either:

- (1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or
- (2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the fact.

A presumption that serves “primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy,” shifts only the burden of producing evidence.⁵ Such a presumption is called a “vanishing presumption” because any evidence to rebut the presumption eliminates the presumption from the proceeding altogether.⁶ Any other presumption (i.e., a presumption that does serve primarily to implement public policy) shifts the burden of proof, and therefore does not “vanish” upon production of rebuttal evidence.⁷

Effect of Bill

This bill creates the Emergency Medical Dispatch Act. This bill does not regulate emergency medical dispatch services, though it does provide an incentive for entities who provide emergency dispatch services to provide training and to follow standard guidelines in the operation of the service. Specifically, the bill defines the following terms:

- “Emergency medical dispatch” is defined as the function of utilizing established emergency dispatch protocols.
- “Emergency medical dispatcher” is defined as a person who is trained or certified in the prompt and accurate processing of calls for emergency medical assistance.
- “Emergency medical dispatch agency” is defined as any private or public entity responsible for the emergency medical dispatch by emergency medical dispatchers.
- “Emergency medical dispatch protocol” is defined as guidelines for processing calls for emergency medical assistance or for the dispatching of emergency medical services in a prehospital setting which are substantially similar to standards set forth by the American Society

dispatch is an operational duty for which immunity should not apply. Oral argument was held on February 6, 2002; an opinion has not yet been issued.)

⁴ See Article 10, Section 13 of the State Constitution (the state may waive its immunity through an enactment of general law); and s. 768.28(5), F.S. (state and local government entities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, subject to the \$100,000/\$200,000 limitation on liability.)

⁵ Section 90.303, F.S.

⁶ *Insurance Co. of Pennsylvania v. Guzman's Estate*, 421 So.2d 597, 601 (Fla. 4th DCA 1982).

⁷ See s. 90.304, F.S. See also *Caldwell v. Division of Retirement*, 372 So.2d 438 (Fla. 1979).

for Testing and Materials or the National Highway Traffic Safety Administration and which have been incorporated into an emergency medical dispatch training program.

The bill states that an emergency medical dispatcher is “presumed not to have acted negligently” if the emergency dispatch service properly trained its employees and implemented standard practices for medical dispatch. The presumption is not available to a governmental entity that enjoys sovereign immunity. The bill implies, but does not specifically require, that the particular dispatcher followed such protocols during the call that gave rise to the allegation of negligence. The bill does not specify the legal type of presumption, but it appears that this bill implements public policy, and thus creates a presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the fact.

Currently, the Department of Health is authorized to make grants to local agencies and emergency services organizations to assist in providing emergency medical services.⁸ The grant agreement requires, among other things, that all emergency vehicles and attendants must conform to state standards established by law or department rule.⁹ This bill amends s. 401.111, F.S., to include emergency medical dispatch as an emergency medical service for which a grant could be awarded.

C. SECTION DIRECTORY:

Section 1 creates s.768.1335, F.S., the ‘Emergency Medical Dispatch Act’; defines terms; and provides the presumption of non-negligence.

Section 2 amends s. 401.111, F.S., to include emergency medical dispatch in Department of Health grants.

Section 3 provides an effective date of September 11, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.
2. Expenditures: None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.
2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None (see fiscal comments).

D. FISCAL COMMENTS:

Any private entity choosing to follow emergency medical dispatch protocol in order to take advantage of the provisions of this bill would have to train personnel. The American Heart Association reports that such training costs range from \$250 to \$670 per individual. However, the bill provides for participation

⁸ See s. 401.111, F.S.

⁹ See s. 401.117, F.S.

in an existing grant program that might offset such costs; and it is possible that entities who agree to comply with the protocols could perhaps realize reduced liability insurance premiums. An individual harmed by the negligence of an emergency medical dispatcher may be delayed or prevented from recovering legal damages as a result of the changes made by this bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require cities or counties to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Comments by Committee on State Administration:

It is unclear what kind of presumption this bill creates. It is possible that the intent of the bill is to create a conclusive presumption that an emergency medical dispatch service, and its employees, is not negligent in certain circumstances. Such a conclusive presumption foreclosing a civil cause of action would be the same as giving a grant of immunity from civil liability. If the effect of this bill is to grant total immunity from civil liability, then it is possible that the courts may find that the bill violates the access to courts provision at art. I, s. 21, Fla.Const., which requires that the courts "be open to every person for redress of any injury". The legislature cannot abolish a civil cause of action without providing a reasonable alternative unless the legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.¹⁰

If this bill creates a rebuttable presumption, there still must be a rational connection between the presumption and the underlying fact. Here, the presumption of acting in a non-negligent manner is tied to the underlying fact of whether the employer provided training and procedures that are designed to assist persons suffering in a medical emergency while minimizing the potential harm to such individual. There appears to be a clear and rational connection between the presumption and the underlying fact.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Comments by Judiciary Committee:

Emergency medical dispatchers who are also government employees are not covered by sovereign immunity (and are personally liable) if such employee acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.¹¹ Private emergency medical dispatchers retain the presumption of non-negligence if the private employee acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, thus creating a discrepancy between public and private emergency medical dispatchers.

¹⁰ *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

¹¹ See s. 768.28(9)(a), F.S.

Comments by Committee on State Administration:

See Constitutional Issues above. It would assist private parties in interpretation of these provisions, and would thus avoid litigation costs, if this bill were amended to specify the type of presumption this bill creates by specific reference to the appropriate provision in ch. 90, F.S.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 26, 2003, the Judiciary Committee adopted a strike-all amendment, recommended by the Subcommittee on Claims, that made the following general changes:

- Deleted several 'whereas' clauses that might have created a cause of action against a government entity;
- Modified several definitions;
- Deleted the immunity provisions and replaced them with a presumption of non-negligence;

This analysis is drafted to the bill as amended.