SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 338

SPONSOR: Judiciary Committee and Senators Fasano and Argenziano

SUBJECT: Emergency Medical Dispatch Act

DATE: April 16, 2003 REVISED: 4/22/03

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Roberts	JU	Favorable/CS
2.	Wilson	Wilson	HC	Favorable
3.	White	Wilson	GO	Fav/3 amendments
4.			AHS	
5.			AP	
6.				

I. Summary:

This bill creates "The Emergency Medical Dispatch Act" to establish a statutory presumption that an emergency medical dispatcher or dispatch agency is not negligent for an act or omission that results in injury or damage under specified circumstances. The bill also expressly states that organizations or agencies seeking grants from the Department of Health for the provision of emergency medical services can do so also for emergency medical dispatch services.

This bill creates s. 768.1335, Florida Statutes, and amends s. 401.111, Florida Statutes.

II. Present Situation:

Emergency Medical Dispatch

Emergency medical dispatch generally refers to that part of an emergency medical services system in which a person receives an emergency call and dispatches the appropriate public safety agency to respond with needed services. In some circumstances, such person's responsibilities may extend beyond call-taking to issuing life-sustaining instructions pending the arrival of the needed emergency services. The terms "emergency medical dispatch" and "emergency medical dispatcher" are not currently used or defined in statute. Currently only 18 of the 50 states regulate emergency medical dispatch. Florida does not.

The only reference in statute similar to emergency dispatching is made in conjunction with the public safety dispatching as occurs currently under Florida's established statewide emergency telephone number "911" plan and the "E911" plan.[1] The plans (established by the State

[1] *See* "Florida Emergency Telephone Act" under s. 365.171, F.S., and the "Wireless Emergency Communications Act" under s. 365.172, F.S.

Technology Office and coordinated with state and local governmental entities and wireless service providers) are intended to provide the public with rapid direct access to public safety agencies to respond to emergency situations. A public safety agency is defined as a functional division of a public agency that may provide firefighting, law enforcement, ambulance, medical or other emergency services. The public safety agency that receives the incoming 911 call either processes the call to another public safety agency to respond to the call for needed emergency service or dispatches directly the appropriate emergency service agency to respond to the call.

Immunity

Under existing law, county, city and other governmental entities have sovereign immunity from tort liability subject to a statutory waiver.[2] Statutory sovereign immunity has been extended in some cases to agents or instrumentalities of the state, and to a select number of private persons or entities including privatized foster care providers, persons who assist in containing hazardous spills, good Samaritans, volunteer team physicians, and volunteers for non-profit organizations. *See* ss. 409.1671, 768.128, 768.13, 768.135, and 768.1355, F.S., respectively. The threshold for immunity is different for each category. With the exception of the privatized foster care providers, the categories consist of individuals in their volunteer capacity.

Sovereign immunity protects these entities or persons from suits. Under the statutory waiver of sovereign immunity, such protected entities or persons are liable for a tort action to pay up to $100,000 per person or $200,000 per incident[3] absent an agreement and available insurance proceeds. Any excess judgment or amount above that in a settlement agreement is subject to a legislative action. A person can only recover that excess amount through the passage of a successful legislative claim bill, provided that all other administrative and judicial remedies were previously exhausted.

In order for a governmental entity to be liable in tort, there must be an underlying statutory or common law duty of care. Claims arising from issues of *public* or general duty of care and of discretionary or planning-level[4] versus operational functions are not permitted against a governmental entity. Notably, the issues of whether the maintenance of the 911 system is a health, and welfare operational function of government and whether the duty is a special one owed to an individual or general one owed to the public are currently pending before the Florida Supreme Court.[5] In State Department of Highway Patrol v. Pollack, the appellate court held that violation of the Florida Highway Patrol's internal operating procedure in failing to dispatch an officer was not sufficient to impose liability and that there was no special duty owed to which the plaintiff appealed, arguing that the dispatch is an operational duty for which immunity should not apply.

---

[2] *See* Article 10, Section 13 of the *Florida 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.)

[3] The caps have not been increased since they were first enacted in 1973.

[4] Discretionary functions include areas of licensing, legislating, judicial decision—making, permitting, inspecting, designing, public improvements, and other types of high-level planning. *See Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 2589 (Fla. 1988)(4-part test)

[5] See State Department of Highway Patrol v. Pollack, 745 So.2d 446 (Fla. 3rd DCA 1999); rev. granted, 760 So.2d 947 (Fla. 2000); 760 So.2d 948 (Fla. 2000); 799 So.2d 218 (Fla. 2001)

As with any other public employee, a *public* dispatcher for emergency services under the existing the 911 system is not personally liable for an injury from his or her act or omission provided it occurred within the scope of employment. There is no immunity if the employee acted in bad faith, with malicious purpose, or in a manner exhibiting willful and wanton disregard for human rights, safety, or property. This is the same standard applied for determining whether to impose liability on a governmental entity for its employees. Under current law, *private* emergency dispatchers are not immune from liability for negligence.

Emergency Medical Services Grants

The Department of Health is authorized to make matching grants to local agencies and emergency services organizations to assist in providing emergency medical services. *See* s. 401.111, F.S. The grant agreement requires, among other things, that all emergency vehicles and attendants must conform to state standards established by law or department rule. *See* s. 401.117, F.S. The current statute does not preclude the department from granting funds to dispatch entities for implementing emergency medical dispatch programs as an improvement to existing emergency medical services.

Emergency Medical Standards and Protocols

There is currently no regulatory oversight of the profession of emergency medical dispatchers in Florida. As is typical with any unregulated profession, a number of entities develop and offer voluntary standards, protocols, training, and certification courses that a profession may follow. For example, in the area of emergency dispatch, standards, protocol, training, and certification are available or being developed from the American Society for Testing and Materials (ASTM),[6] the National Highway Traffic Safety Administration (NHTSA)[7] and the National Academies of Emergency Dispatch (NAED).[8] The NAED through its College of Fellows reportedly controls the medical priority dispatch system as a unified standard EMD protocol (the same applies to the new PPDS and FPDS protocols for police and fire dispatching, respectively). This latter control is akin to the control the American Heart Association has over the unified protocol standards used nationally for cardiopulmonary resuscitation (CPR), advanced cardiac life support (ACLS), and basic life support (BLS).

---

[6] The ASTM is a not-for-profit organization founded in 1898 that provides for the development and publication of voluntary consensus standards for materials, products, systems, and services in over 130 varied industry areas in the private and public sector. There are available currently: F1560-00 Standard Practice for Emergency Medical Dispatch Management, F1258-95 (2001) Standard Practice for Emergency Medical Dispatch, 1552-94(2002) Standard Practice for Training Instructor Qualification and Certification Eligibility of Emergency Medical Dispatchers, F1220-95(2001) Standard Guide for Emergency Medical Services System (EMSS) Telecommunications, and F1705-96(2002) Standard Guide for Training Emergency Medical Services Ambulance Operations. *See* <http://www.astm.org>

[7] The NHTSA is developing as part of its agenda in conjunction with a number of organizations including the American Heart Association an integrated emergency medical services system. It is not known whether they already have established protocols or standards. *See* < http://www.nhtsa.dot.gov>

[8] The NAED was formed in 1988 and represents itself as the leading certifying and a standard-setting organization for all aspects of emergency dispatch including the development of standards and protocols for medical, fire and police dispatch services. *See* <http://www.naemd.org> The NAED actually stands for 3 distinct academies: The National Academy of Emergency Medical Dispatch, The National Academy of Emergency Fire Dispatch, and The National Academy of Emergency Police Dispatch. The NAED provides an EMD certification registry and develops standards and protocols for emergency dispatching.

III. Effect of Proposed Changes:

The bill creates s. 768.1335, F.S., the Emergency Medical Dispatch Act. This Act does not relate to or provide for the regulation, licensure or certification of this profession.

The bill is preceded by fifteen 'whereas' clauses. The clauses primarily relate to the lack of consistent standards and quality of emergency medical dispatch centers, the role of emergency medical dispatch as an integral part of a quality emergency medical service system, and the importance of trained persons to dispatch emergency medical services.

The Act provides a statutory presumption of non-negligence for *private* and *public* emergency medical dispatchers or dispatch agencies and their agents or employees who are not otherwise immune under s. 768.28, F.S. As currently worded, this bill also gives a *public* emergency medical dispatcher or dispatch agency that is not otherwise immune from liability under the sovereign immunity provision of s. 768.28, F.S., the opportunity to limit liability based on the statutory presumption of non-negligence.

Specifically, the bill provides a presumption that an emergency medical dispatcher or agency or its agent or employee who uses emergency medical dispatch protocols is not negligent if injury or damage results from the use of those protocols. For purposes of the statutory presumption, the emergency medical dispatcher is defined as trained or certified to process calls for emergency medical assistance. The presumption is available if the emergency medical dispatcher or the emergency dispatch agency, its agents, or employees:

1) Properly trained their emergency medical dispatchers in an emergency medical dispatch that is substantially similar to standards set forth by by the American Society for Testing and Materials (ASTM) or the National Highway Traffic Safety Administration (NHTSA);
2) Implemented standard practices and management for emergency medical dispatch or practices that are substantially similar to those standards set forth by the ASTM or NHTSA; and
3) Utilized standard practices for training, instructor qualification, and certification eligibility for emergency medical dispatchers or standards that are substantially similar to those standards set forth by the ASTM or NHTSA.

Additional definitions are provided for the terms *emergency medical dispatch*, *emergency medical dispatch agency* and *emergency medical dispatch protocol.*

The bill also clarifies that emergency medical services includes emergency medical dispatch for purposes of those agencies and organizations seeking grants under s. 401.111, F.S., from the Department of Health.

The bill provides an effective date of September 11, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

This bill creates a statutory presumption[9] of non-negligence for emergency medical dispatchers or dispatch agencies or their agents or employees under specified circumstances. Based on the *whereas* clauses, it may be assumed that this statutory presumption is created for the purpose of implementing public policy to promote adherence to standards in the emergency medical dispatch profession through a limitation on liability in lieu of implementing professional regulation or licensure at this time.

As a matter of due process, courts require that there be an opportunity to rebut a presumed fact. Therefore only rebuttable presumptions are valid (conclusive presumptions are not) in Florida. Assuming that this statutory presumption is intended to be a rebuttable presumption, there are two classes of rebuttable presumptions:

1. *Burden of proof or persuasion for purposes of implementing public policy* (See s. 90.304, F.S.): When one party introduces underlying fact or groups of facts giving rise to a presumption, the burden shifts to the adverse party to persuade or disprove the presumed fact. If the adverse party introduces evidence to disprove the presumed fact, the presumption does not go away. The jury is told of the presumption and it is the jury's decision to determine what weight to give the contradictory evidence. That is, the jury must decide whether the contrary evidence was sufficient to overcome the presumption. The burden is greater on the party trying to disprove the presumed fact. That burden increases depending on the underlying public policy. Examples of this type of rebuttable presumption include: a marriage is presumed to be valid, a child born in wedlock is presumed to be legitimate, a judgment is presumed to be correct, and a scientific test that shows a probability of paternity at 95% or greater creates the presumption that the person is the biological father.

[9] A presumption is an assumption of a fact without any direct evidence of that fact. Instead the presumption is derived from another fact or group of facts. There has to be a reasonable basis or rational relationship between the underlying fact or group of facts and the fact that is presumed.

2. *Burden of producing evidence for procedural or evidentiary purposes* in the resolution of the civil action (See s. 90.303, F.S.): When one party introduces underlying fact or groups of facts giving rise to a presumption, the burden shifts to the adverse party to disprove the presumed fact. If the adverse party introduces evidence to disprove the presumed fact, the presumption goes away. That is why it is often referred to as the bursting bubble presumption. The jury is not told of the presumption and thus never has to decide what weight to give the contradictory evidence. Examples of this type of rebuttable presumption include: a letter mailed is a letter presumed to be received by the person who was supposed to get it; a person is presumed to be dead after an absence of 7 years; or a will that is lost is presumed to have been revoked.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private and *public* emergency medical service dispatch agencies or dispatchers may incur costs associated with training or certification and the implementation of any standards or protocols not already in place. There are a number of standard-setting organizations that may offer training or certification such as the National Academy of Emergency Medical Dispatch, the American Heart Association or other entities that may incorporate into their training or certification programs standards similar to those offered by the entities expressly mentioned in the bill. The American Heart Association estimates that training costs vary between $250 and $670 per person.

The bill clarifies that entities that voluntarily adopt an emergency medical dispatch program may offset expenses by securing grants to improve or expand emergency medical services from the Department of Health, something these entities are not necessarily precluded from doing so now under s. 401.111, F.S., and chapter 365, F.S., if emergency medical dispatch programs are considered a part of the 911 system.

C. Government Sector Impact:

The Department of Health reports no fiscal impact to its department.

VI. Technical Deficiencies:

According to s. 768.1335(3), F.S., as created by the bill, the presumption of non-negligence attaches:

> "if the emergency medical dispatcher; or the emergency dispatch agency, its agents, or employees:

(a) Properly trained their emergency medical dispatchers in an emergency medical dispatch that is substantially similar to standards set forth by the American Society for Testing and Materials or the National Highway Traffic Safety Administration;
(b) Implemented standard practices and management for emergency medical dispatch or practices that are substantially similar to those standards set forth by the American Society for Testing and Materials or the National Highway Traffic Safety Administration; and
(c) Utilized standard practices for training, instructor qualification, and certification eligibility for emergency medical dispatchers or standards that are substantially similar to those standards set forth by the American Society for Testing and Materials or the National Highway Traffic Safety Administration."

The requirements of paragraphs (a) through (c) appear to apply to all persons or entities entitled to the presumption of non-negligence; however, an emergency medical dispatcher would not be responsible for training, implementing standard practices and management, or for utilizing standard training practices. It may be desirable to amend the bill to clarify precisely what conduct is required of each person or entity for the presumption to attach.

In paragraphs (3)(b) and (3)(c) the bill refers to implementation and utilization of "standard practices" in lieu of standards that are substantially similar to those of the ASTM or NHTSA. The term "standard practices" is not defined in the bill. For clarity as to when the presumption of non-negligence attaches, it may be desirable to consider amending the bill to include such a definition.

VII. Related Issues:

It is not clear from the bill how this Act would affect the terminology and provisions relating to emergency dispatch under the 911 and E911 systems under chapter 365, F.S., as emergency dispatch has traditionally involved a governmental entity coordinating the system as a *public safety agency* with *answering points* to respond to emergency calls.

The bill provides a preamble consisting of 15 whereas clauses. Although not a part of the substantive bill, a preamble may be construed by the courts to determine legislative intent. Several of the clauses may be construed to give rise to an implied cause of action or could be introduced into trial against a governmental entity as factual evidence in a negligence action.

As discussed in the "Constitutional Issues" section above, the bill does not specify the type of presumption it is creating, i.e., conclusive or rebuttable. A conclusive presumption appears to be unconstitutional, as such amounts to granting absolute immunity.[10] In order to avoid litigation over this issue, it may be desirable to amend the bill to specify that it creates a rebuttable presumption.

[10] Article I, s. 21 of the Florida Constitution provides that the courts must, "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: (a) overpowering public necessity to abolish the right; and (b) no alternative method of meeting such public necessity. *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

VIII. Amendments:

#1 by Governmental Oversight and Productivity:
Deletes whereas clauses that may have been construed as creating a cause of action.

#2 by Governmental Oversight and Productivity:
Provides that the presumption of non-negligence applies to employees or agents of an emergency medical dispatch agency even if those employees or agents have not utilized the protocols.

#3 by Governmental Oversight and Productivity:
Deletes a semicolon.