



ASLEEP AT THE WHEEL

By: G. Christopher Kelly

Fatigue and Liability in EMS

Accidents happen. You have all been through them, with and without patients on board. And the first question after an accident? Usually it's "is everyone all right?". But as night follows day, the next question is "whose fault was it?". Because as everyone knows, "accidents" are rarely purely accidental, someone was negligent; and negligence leads to fault.

So, when an "accident" happens involving an Ambulance, who is at fault depends on who was negligent. It may be another driver who disregarded the lights and sirens, it may be the EMT driving the ambulance who was driving too fast for the road conditions, or it maybe the entity that put the ambulance on the road with an unsafe driver (or any combination of these). "Unsafe" may mean a driver who the service knew had a bad driving record, or it may mean a driver that the service put on the road that they knew (or should have known because of the length of his or her shift) was tired.

Of course careless driving, driving too fast, and even mechanical problems (such as brake failure or a flat tire) can cause a wreck. But just as dangerous as these is fatigue. Fatigue causes automobile accidents and results in injuries every day. In fact, because of the danger of sleepy drivers, many States are implementing laws against driving tired. Commercial truck drivers are highly regulated in the amount of time that they spend on and off the road. But, even with the regulations which commercial truckers have to comply, it is in commercial trucking that we see reported the most instances of companies being held liable for the wrecks caused by their sleepy employees.

But how does carelessness or fatigue figure into negligence and fault? If you are driving a car, and you know you are getting tired and your eye lids are getting heavy, yet you continue to drive, then you are taking a known risk. And when your eyes close and you drift into another lane, causing a wreck, it was your negligence in driving when you knew that you might fall asleep that cause the wreck; therefore you are at fault.

So if you are at fault, who are you liable to, that is, who can sue you for the damages you caused to them? First we need to understand a little more about "fault" and negligence. As I mentioned above, it can be a combination of factors that point to the fault of one or more parties to an automobile collision. Weighing these factors is referred to as "comparing fault" or "comparative fault" in legalese. Depending on the State you are in, your fault may be measured against the fault of other drivers. For example, in the situation above where a driver nods off and crosses over into another lane (assume the driver drifts to the right), if the other driver you hit was passing you on the right in violation of State law, then that driver might also be partially at fault. If a jury decides that the other drivers' damages and injuries are worth \$100,000, but that driver was 10% at fault in the accident, then you would have to pay 90% of the damages. Again, "comparative fault" varies from State to State, but this example gives you the general idea.

There is one other issue that comes up when a driver is working for someone else and is on the job at the time of the accident (as opposed to someone driving themselves on a

personal errand) and that is who is liable, the employee or the company? Again, it depends on the State in which the accident occurs, but in general an employer will be liable for the damages caused by its employee and the employee will also be personally liable for the damages. This is referred to as “joint and several liability”. But if you think, ‘good my employer can pay for my part’, you may be wrong. Even though the injured party might be able to recover from either the company or the employee (and would usually choose to go after assets of the company because it would presumably have “deeper pockets” than the employee), the employee might owe the company back for his or her part of the damages. This is referred to as “contribution”. Of course this usually only comes into play when there is no insurance or when insurance does not cover the full amount of the damages. To further complicate things, State laws or employee contracts might make specific provision for these situations that would throw any general rule out the window.

Suffice it to say that liability issues for auto accidents are much more complex than I can address in a short article. But, with this abbreviated crash course in automobile collision law over, let's consider the various situations of who owes who what after a wreck, and after figuring out who was at fault:

Of course the service and the EMT driver may be liable to the patient. Unless the accident was entirely the fault of another driver(s) (0% fault attributed to the ambulance), then the service and EMT will be liable to the patient for their portion of the fault in the accident. And if the accident was caused by a driver falling asleep, then the service *and* the driver will be at fault. The driver is at fault for driving while sleeping and risking exactly what ended up happening, and the service is liable either because they put a driver on the road who they knew was working a long shift and/or simply because they are responsible for the conduct of their employees.

The service and driver may be liable to third parties drivers who were not at fault or maybe even to other drivers who were partially at fault. As was discussed above, comparing fault may leave the service/driver liable even to a third party who was partially at fault in the accident as long as the fault of the service/driver was more. Going back to the example of falling asleep at the wheel, if the fault of the driver who fell asleep was 90% and the other driver who was passing on the right was only 10%, then in most states the other driver can still recover damages from the service and driver.

The service and driver may be liable to other employees in the vehicle, and likely under separate theories. The service, regardless of their role (or their percentage of fault) will likely be liable to the other employee (EMT or Paramedic) under worker's compensation laws, since the injury occurred in the course of employment. The driver may also be personally liable separately to the other employee under the general theory of negligence. This might or might not be covered under the service's insurance policy.

Finally, even if the driver is “at fault” when doing a comparative fault analysis, the service may still be liable to that driver under worker's compensation laws. In some cases, where the employee is acting outside of the scope of his employment (i.e. he or she has done something illegal such as drinking and driving), the employer might not be liable. However, for purposes of our discussion, if the employee is fatigued due to his duties as an EMT for the service, then the service will likely be liable to that EMT under the States' worker's compensation laws. Insurance premiums being what they are, worker's comp claims and automobile liability claims are something to avoid if at all possible. And the way to avoid them is to make your place as safe to work in as is possible, even if that place is on wheels.

What a tangled and potentially costly web you weave when you hit the streets, especially if you have not done everything you can to limit your share of the fault in the case of an automobile accident. Making sure that your vehicles are well maintained and that your drivers are well trained and rested are keys to limiting the costly results of automobile accidents in the EMS world.

Christopher Kelly is an attorney who practices primarily in Federal statutory and regulatory healthcare law, with a focus on the EMS industry. He can be contacted at gck@hsbw.com or (404) 881-1200 for more information. Nothing in this article is intended to be legal advice. Tort law (including liability issues like those discussed in this article) are complex and vary greatly from State to State. For up-to-date, specific legal advice about the laws mentioned in this article or about your states' laws, you should consult an attorney.