> FEATURE

Emergency Vehicle Tort Liability Due Regard V. Reckless

BY LEE GUTSCHENRITTER AND GARY THOMPSON

In an urban environment, it is almost an everyday occurrence to witness a first responder emergency vehicle (typically with lights and sirens flashing and blaring) speeding through city streets. The more prudent drivers of these emergency vehicles remain aware of their surroundings and slow down as they approach intersections to make sure they are clear so they may safely proceed with their emergency response. Regrettably, this does not always happen, and collisions involving innocent third parties occur. In Georgia, there is a statutory remedy for innocent third parties injured in such incidents. The same statute, however, also provides legal protection for emergency vehicle operators.

Whether the emergency vehicle is a firetruck, a police vehicle, or an EMT ambulance, the law concerning tort liability for emergency vehicle operation is governed by O.C.G.A. § 40-6-6. Section 40-6-6 is a critical statute in understanding tort liability for first responders and emergency vehicle operators. It reads in full:

(a) The driver of an authorized emergency vehicle or law enforcement vehicle, when responding to an emergency call, when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this Code section.

(b) The driver of an authorized emergency vehicle or law enforcement vehicle may:

(1) Park or stand, irrespective of the provisions of this chapter;

(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(3) Exceed the maximum speed limits so long as he or she does not endanger life or property; and

(4) Disregard regulations governing direction of movement or turning in specified directions.

(c) The exceptions granted by this Code section to an authorized emergency vehicle shall apply only when such vehicle is making use of an audible signal and use of a flashing or revolving red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle, except that a vehicle belonging to a federal, state, or local law enforcement agency and operated as such shall be making use of an audible signal and a flashing or revolving blue light with the same visibility to the front of the vehicle.

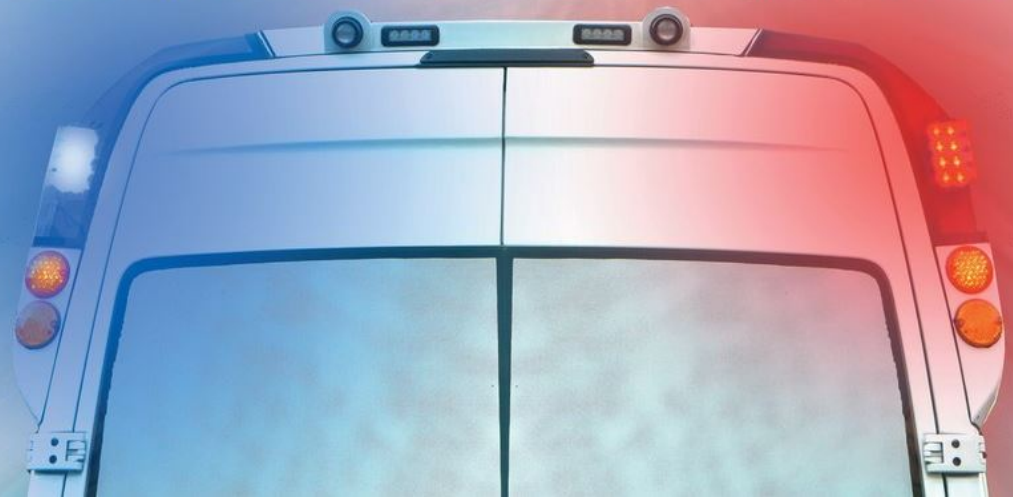
(d)(1) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons.

(2) When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit. Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.

(3) The provisions of this subsection shall apply only to issues of causation and duty and shall not affect the existence or absence of immunity which shall be determined as otherwise provided by law.

(4) Claims arising out of this subsection which are brought against local government entities, their officers, agents, servants, attorneys, and employees shall be subject to the procedures and limitations contained in Chapter 92 of Title 36.

(e) It shall be unlawful for any person to operate an authorized emergency vehicle with flashing lights other than as authorized by subsection (c) of this Code section.



O.C.G.A. § 40-6-6 provides that emergency vehicle operators may legally exceed the posted speed limit and grants other exceptions under the law to disregard traffic control devices. There are, however, limits to these privileges. As set forth in subsection (b)(3) of the statute, all first responders, even if their lights and sirens are displayed and audible, must not "endanger life or property" in the operation of their vehicles. Moreover, even though first responders are authorized to exceed posted speed limits and proceed past designated stop signs and red lights when responding to an "emergency," they still must exercise "due regard for the safety of all persons." O.C.G.A. § 40-6-6(d)(1).

WHAT IS AN "EMERGENCY CALL"?

While often overlooked, the sine qua non of exercising the privileges set forth in the statute is that the driver of an authorized emergency vehicle or law enforcement vehicle must be "responding to an emergency call." O.C.G.A. § 40-6-6(a). The question then arises: What is an "emergency call"? Does there have to be an objective emergency involved before the privileges available under the statute may be exercised? Is the subjective belief of an officer sufficient, or must there be a reasonable basis for believing that a real emergency is involved? In this regard, Georgia law is somewhat undeveloped – even though it appears, based on the current state of the law, that the operator of an emergency vehicle must have a reasonable basis to believe that they are, in fact, responding to an emergency before they may legally rely upon the privileges afforded to them.

A typical alleged "emergency call" occurs when an "officer needs assistance" call goes out over the radio. A practitioner must then determine the nature of the call being made and discover, through police radio recordings obtained in discovery and at the deposition of the responding officer, exactly what assistance was needed. For instance, a situation where an officer is involved in a violent confrontation with a suspect would certainly qualify as an "emergency call"; an officer responding to a non-violent shoplifting situation, however, would not qualify as an "emergency." As a practitioner, you must determine what the responding officer knew when responding to the "officer needs assistance" call.

In Georgia, whether a vehicle is driven in response to an emergency call depends not solely upon whether there is an emergency-in-fact but also upon the nature of the call received and the situation as presented to the mind of the driver. In making this determination, the Court has held it is not only material, but essential, to consider these facts. It is not enough that an operator subjectively and in good faith believes that an emergency exists; the driver must have reasonable grounds for such belief. Emergency calls are recorded and should always be requested in the initial discovery requests or in Freedom of Information Act requests before suit is filed. It is essential to request audio of the initial 911 call as well as the 911 operator's radio transmission to the responding officer describing the nature of the so-called emergency.

In City of Macon v. Smith, 117 Ga. App. 363 (1968), the Court of Appeals held that a responding emergency official must have a reasonable basis for their belief that an emergency is actually involved in order to exercise the privileges available under the statute. Otherwise, they may not exercise such privileges. This prohibits fire, police, and emergency responders from speeding through an urban environment anytime they wish, particularly if not responding to an actual emergency.

Consequently, if a collision occurs involving an innocent third party, the burden is upon the emergency operator to establish that they were entitled to rely upon the privileges found in the statute. This is an affirmative defense, Myerholtz v. Garrett, 111 Ga. App. 361 (1965), and, in order to claim the privilege of being able to exceed posted speed limits and/or disregard traffic control devices, the emergency vehicle operator must establish that there was a reasonable basis to believe that they were, in fact, responding to an "emergency call."

Even if the objective evidence indicates otherwise, an officer may still be entitled to assert the privileges set forth in the statute provided their belief was reasonable under the circumstances presented. See City of Macon v. Smith, 117 Ga. App. at 368. But again, a subjective belief alone is insufficient.

LIGHTS & SIRENS

What happens when an authorized emergency vehicle is exceeding posted speed limits and/or disregards traffic control devices but does not make use of audible signals or the use of flashing or revolving red lights? As set forth in O.C.G.A. § 40-6-6(c), the exceptions granted by the code section apply only when a siren and flashing lights are in use. If an emergency responder does not use audible signals and flashing lights, he or she cannot assert the privileges under the statute.

Moreover, even if an operator does has visible lights and an audible siren, and is responding to an actual bona fide emergency, under O.C.G.A. § 40-6-6(d)(1) they are still not relieved of the duty to "drive with due regard for the safety of all persons." What does this phrase mean? The courts have held that typically it means exercising ordinary care for the safety of others. Thompson v. Payne, 216 Ga. App. 217 (1995). This phrase, "due regard," is a negligence concept and, if a responding officer negligently operates his/her vehicle–even though allowed to speed and/or disregard traffic control devices, and even though utilizing lights and siren–they can nonetheless be held civilly liable if they fail to exercise the care required by law. Id. For example, if an officer is responding to an emergency but is traveling at triple the speed limit in a residential neighborhood or a school district, questions would arise as to whether such high speeds were warranted. While all cases are factually specific, the point to be made is that there may be a jury question on whether due regard was exercised, but in this context, the burden will shift to the plaintiff to establish negligence in the typical tort sense.

POLICE CHASES

While O.C.G.A. § 40-6-6 refers to emergency vehicle operations generally, there is a separate subsection of the statute which specifically refers to police chases. Obviously, a police vehicle could be considered as responding to an "emergency" during a police chase, but the Georgia Legislature made clear that there is a different standard of legal liability for police chases. O.C.G.A. § 40-6-6(d)(2). Under Georgia law, a police department cannot be held liable for the acts of its officer during a police chase unless a reckless disregard of police procedure is a proximate cause of injury or damage to a third party. Thus, the generalized concept of "due regard" does not apply in a police chase context. When the police are chasing a criminal suspect and that suspect (or the police vehicle) plows into an innocent third party and injures or kills them, there is not a viable personal injury or wrongful death claim unless it can be established that the pursuing officer acted in reckless disregard of proper police procedure either in the initiation of the pursuit or the continuation thereof.

While Georgia law is still evolving in this context, because there is no statutory or sovereign immunity, all "emergency" cases have to be evaluated under the language set forth in the statute.

While some police chases may not involve "emergencies" as that term is defined generally, it should still be understood that the burden of proof is different for a "police chase" pursuit case than for the typical "emergency vehicle" case where there is an accident involving an emergency vehicle (such as a fire truck, ambulance, or police vehicle responding to a call) and an innocent third party. The difference between a pursuit case, as addressed by §40-6-6(d)(2), and those more generally addressed in this Article, are more particularly explained in a prior article, also appearing in the *Verdict*. (The *Verdict* Summer 2015 Edition: "High Speed Police Chases and Injured Innocent Bystanders" by Richard W. Hendrix and Nicole Archambault.)

WHO PAYS?

If a police officer, firetruck driver, or first responder EMT should injure an innocent third party, the individual officer cannot be held personally liable. Indeed, under O.C.G.A. § 36-92-3, the officer cannot even be sued in his or her individual capacity. Instead, the local government agency for whom they work must be named as the defendant. In these cases, the Legislature has waived its immunity up to the statutory maximum of $500,000.00 per person, and $700,000.00 per incident (and possibly above those limits if the jurisdiction has purchased private coverage over these statutory minimum amounts.) O.C.G.A. §§ 33-24-51 and 36-92-2. Thus, the good news is that the practitioner does not have to worry about sovereign immunity in these cases. The bad news is that if an innocent third party is seriously injured or killed by a first responder who is operating with lights and siren and in such a manner so as not to endanger life or property, then even a death claim may not be actionable simply because it occurred during the operation of an emergency vehicle.

In Georgia there is yet another statutory provision that must be carefully considered in evaluating cases of this nature. That is the apportionment statute. O.C.G.A § 51-12-33. In any case where there is a factual dispute as to whether the emergency operator was exercising "due regard" for the safety of the public, the next issue will be whether the injured person was contributorily or comparatively negligent and/or if the injured person was a passenger, whether the driver of the car also contributed to the collision by failing to yield to the emergency vehicle. Here again is yet another procedural hurdle for the innocent third party seriously injured or killed by an emergency vehicle. Even if the tort victim can prove that the affirmative defenses available under the statute are not available to the defendant, there likely will be a question concerning apportionment if a third-party driver is involved. Even if the plaintiff is the person driving the vehicle hit by the emergency vehicle, issues of contributory fault or comparative negligence will likely be raised as a defense. In short, almost all of these cases will involve issues of proximate cause in addition to the other issues set forth above.

CONCLUSION

Society wants emergency vehicle operators to respond expeditiously in order to save lives and protect the public at large. Nonetheless, the Georgia Legislature has wisely recognized that this does not give emergency operators carte blanche authority to speed or disregard traffic control devices under all circumstances, nor does it immunize emergency operators who fail to exercise "due regard" for the safety of others. As set forth in the statute, the entities for whom these drivers work can be held civilly liable if operators negligently endanger life or property in the operation of their vehicle. Thus, O.C.G.A. § 40-6-6 balances the need to promote safety and protect lives in an emergency situation against the equally important need to protect innocent third parties who are unconnected with the emergency. "[U]nder O.C.G.A. § 40-6-6(d), an officer's performance of his professional duty is not to be considered paramount to the duty that he owes to other members of the driving public … [I]t is equally important that innocent persons not be maimed or killed." Thompson, 216 Ga. App. at 218 (emphasis in original). An "officer's avoidance of civil liability … is solely dependent upon the officer's own adherence to his duty to drive with the requisite due regard for the safety of others."

While Georgia law is still evolving in this context, all "emergency" cases have to be evaluated under the language set forth in the statute. There are practical considerations as well: emergency operators can make sympathetic defendants. An ideal case will involve an injured third party who is completely innocent and unconnected to the event, and it is questionable whether an "emergency" is actually involved, or where the operation of the emergency vehicle was clearly negligent under ordinary principles of due care or "due regard." ●

ABOUT THE AUTHORS

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