From the EMS Call to the Courtroom

Basics of The Law &The EMS Provider

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DISCLAIMER

I am not an attorney!

This is an informational presentation.

If you are named in a lawsuit, seek professional counsel and representation by an attorney.

This is in no way intended to provide legal advice.

Points of Discussion

- Components of the Legal System
- Navigating your way through a lawsuit
- Duties of the pre-hospital provider
- Rights and privacy
- Scope of Practice
- Good Sam Immunity
- Negligence
- Due Process
- Documentation

and Case Study...

3 Branches of Government

- Legislative Branch – Elected officials responsible for creating and enacting law
- Executive Branch – Regulatory & enforcement agencies that report to the state's chief executive
- Judicial Branch – The courts – responsible for enforcement of the policies & procedures established by the executive branch

Actions

- Civil
  - Plaintiff initiates a lawsuit – seeks redress from the defendant, usually in the form of a monetary sum
  - Defendant – the party alleged to have caused harm
- Criminal
  - Government initiates the legal action against a party who has been charged with violating a law
    - Felonies
    - Misdemeanors
    - Summary Offenses

Example

- EMT responds to “Difficulty Breathing”
- EMT exceeds the legal speed limit enroute, travels through an intersection & collides with another vehicle
- Driver of the other vehicle is a fatality

What happens next?

Answer?

- EMT is charged & arrested for causing the other driver's death
- EMT may be indicted
- EMT may be incarcerated, have financial penalties imposed, serve probation; or any combination of these

Now what?

Answer?

- Civil Lawsuit / Complaint is filed for "Wrongful Death"
- Separate from the criminal action
- May be assessed compensatory damages, and punitive damages if found to be grossly negligent

Compensatory v. Punitive

- Compensatory Damages
  - Cost associated with the actual harm that correlates to returning the plaintiff to the same standard of life (wrongful death cases)
- Punitive Damages
  - Additional fees designed to “punish” the party that is found liable
  - Court may also award “treble” damages in extreme cases

Anatomy of a Lawsuit

- A “cause of action” must exist
  - Actions/omissions outside of the “standard of care”
- Research must be completed
  - Interviews
  - Document review
  - HIPAA
- Statute of Limitations
  - Virginia Code § 8.01-243.A provides action must be brought within 2 years after the “cause of action” accrues *

Statute of Limitations (continued)

- Must be within the "statute of limitations"
  - There ARE exceptions
  - Virginia: VA Code § 8.01-230 provides the "right of action" does not occur until an injury is sustained, and not when the resulting damage is discovered

**SOL clock begins to run when injury occurs, not necessarily when the accident occurs*

Complaint & Answer

- Once it is determined a “cause of action” exists and other criteria have been met, the plaintiff files the complaint
- The defendant usually has 28 days to file an answer
- Documents filed with the court are referred to as “pleadings”
- Pleadings must meet the timelines established in the statutory “Rules of Civil Procedure” for the particular jurisdiction

Discovery

- Process by which all available information, requested regarding the case, is exchanged between parties
- Request for the production of documents
  - Including current standards of education, protocols, standards of care, certain performance records, vehicle maintenance records, continuing education records, etc, etc, etc
- Interrogatories
- Depositions – to seek firsthand or direct knowledge

Discovery (continued)

- Certain documents may be excluded from the discover process, such as:
  - Compelled statements* & other personnel documents regulated by statutory privilege
  - Quality Assurance documents
  - Medical records

**Note: Certain compelled statements may be used in regulatory investigations; however, the discover process is not applicable during this phase!*

Motions

- A motion is an application to the court requesting an order or a ruling
  - Usually made in reference to a pending "action"
    - May concern a "point of law"
    - May be a "discretionary" matter
    - May be regarding "admissibility of evidence"
    - May challenge alleged "facts", or the "statute of limitations"

These are not all inclusive!

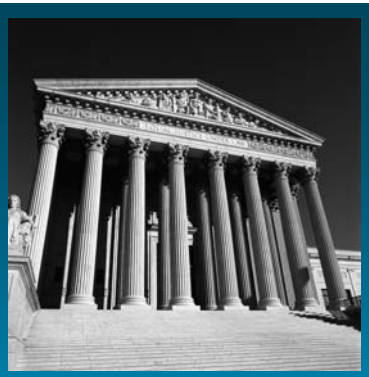
Options – “ADR”
Alternative Dispute Resolution

- Mediation: attempt to reach an agreement to a dispute
- Arbitration: presentation of case to an impartial person or panel in a forum other than court
- Settlement: a private agreement between the plaintiff and the defendant that resolves the conflict without judicial intervention

Options (continued)

- Trial: the formal proceeding governed by judicial oversight that resolves the conflict
  - Bench Trial: only a judge is presiding, such as when the defendant waives a jury proceeding
  - If a jury is used, they apply the “ordinary reasonable person standard”

Court



- Always tell the truth
- Appearance portrays credibility
- Don’t volunteer information
- Do not guess
- Do not express anger or try to argue with counsel

Analytical Thinkers

Duties of EMS Personnel

- Duty to maintain current certification
- Duty to participate in training activities and requirements by your OMD
- Duty to maintain your equipment
- Duty to the patient
- Duty to provide care within your level of qualification and the level of agency licensure
- Duty to document completely, accurately, and in a timely fashion

Rights

"every human being of adult years and sound mind has a right to determine what shall be done with his own body"

Justice Benjamin Cardozo, 1914, Schoendorff v. Society of New York Hospital

This became the foundation of informed consent. The "doctrine of informed consent" continues to be upheld in all jurisdictions!

Consent

- Informed / Expressed: permission to treat or not treat, obtained after detailed explanation of the potential risks involved in receiving or not receiving care

- Implied: a legal presumption that permission to provide care is in the best interest of the patient and the patient would be presumed to have given consent

Minor's – A Form of Implied Consent

14 Years or Older

- VA Code § 54.1-2969.C
  - Provides a minor in need of emergency care can be treated without consent of legal authority, but if the minor is 14 years or over and able to respond, he or she must be consulted for his or her consent
  - The authority to consent necessarily contains the authority not to consent, or in other words, to refuse

Emancipation

Note: Emancipation is not established by marriage, but only by a court order, according to VA Code §§ 16.1-33.1 et seq. The fact of marriage is merely a piece of evidence the court may consider in determining emancipation

Competence

- Patient must have the capacity to grant consent
- Doctrine of implied consent has been extended in most jurisdictions to include temporary incompetence secondary to intoxication
- Contact medical direction / document

Scope of Practice

- Licensure v. Certification
  - Licensure: permits the practice of medicine in other professions, e.g. nursing
  - Certification: an assertion of fact that the provider has completed training
- Perform Emergency Medical Care – do not practice medicine

"The level & type of care that a provider can legally render under the state law & local EMS protocols"

Medical Direction
A Requirement!

The EMT's role is to serve as the eyes, ears, and the hands of the physician, in the field; and to perform the technical skills they are authorized to use in the provision of emergency medical care!

Immunities

- Good Samaritan
  - VA § 8.01-225
    - Any person who .....
      - In good faith ...
      - In the absence of gross negligence ...
      - Without compensation ....
      - Is a volunteer in good standing & certified ...
        - *Etc, etc, etc .....*

Good Sam Immunity (cont)

- VA § 8.01–225.01
  - Immunity during disasters
    - Abandonment – during triage
    - Wrongful death arising from
    - Health care providers
      - Volunteer
      - Compensated
  - Note: In the absence of gross negligence or willful misconduct

Sovereign Immunity

- United States Court of Appeals, Fourth Circuit, Eastern District of Virginia
  - 1991, Judge Claude M. Hilton – Decision
    - Overman v. Numerous NOVA VFD's
      - Rescue companies were entitled to sovereign immunity because of the control the state and county exercise over them

Sovereign Immunity (cont)

- Circuit Court of City of Alexandria
  - 1984, Judge Wiley R. Wright, Jr – Opinion
    - Irby v. Mitzi Gill, Ellen Nolan & City of Alexandria
      - City of Alexandria entitled to sovereign immunity because the provision of EMS is a governmental function
      - Court overruled the plea in bar as to the EMS providers, finding that they could be held liable for their actions
      - Court ruled the ambulance attendants' decision/duty was ministerial, not discretionary

Immunity

- If you provide care off duty, document as you would if you were on duty, send copy to your medical director – this may reduce your exposure to liability

Negligence

Negligence, as a legal standard, is the failure to exercise that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances

Barron's Law Dictionary, Fifth Edition,2003

Negligent Tort

- Elements:
  - Duty to the plaintiff
  - Breached the duty
  - Plaintiff suffered injury as a result
  - The injury was a reasonably foreseeable consequence (proximate cause)
    - Gross Negligence: conduct or a failure to act that is so reckless that it demonstrates a substantial lack of concern for whether an injury will result

Note: Government employees may be immune from ordinary negligence and still liable if found to be grossly negligent

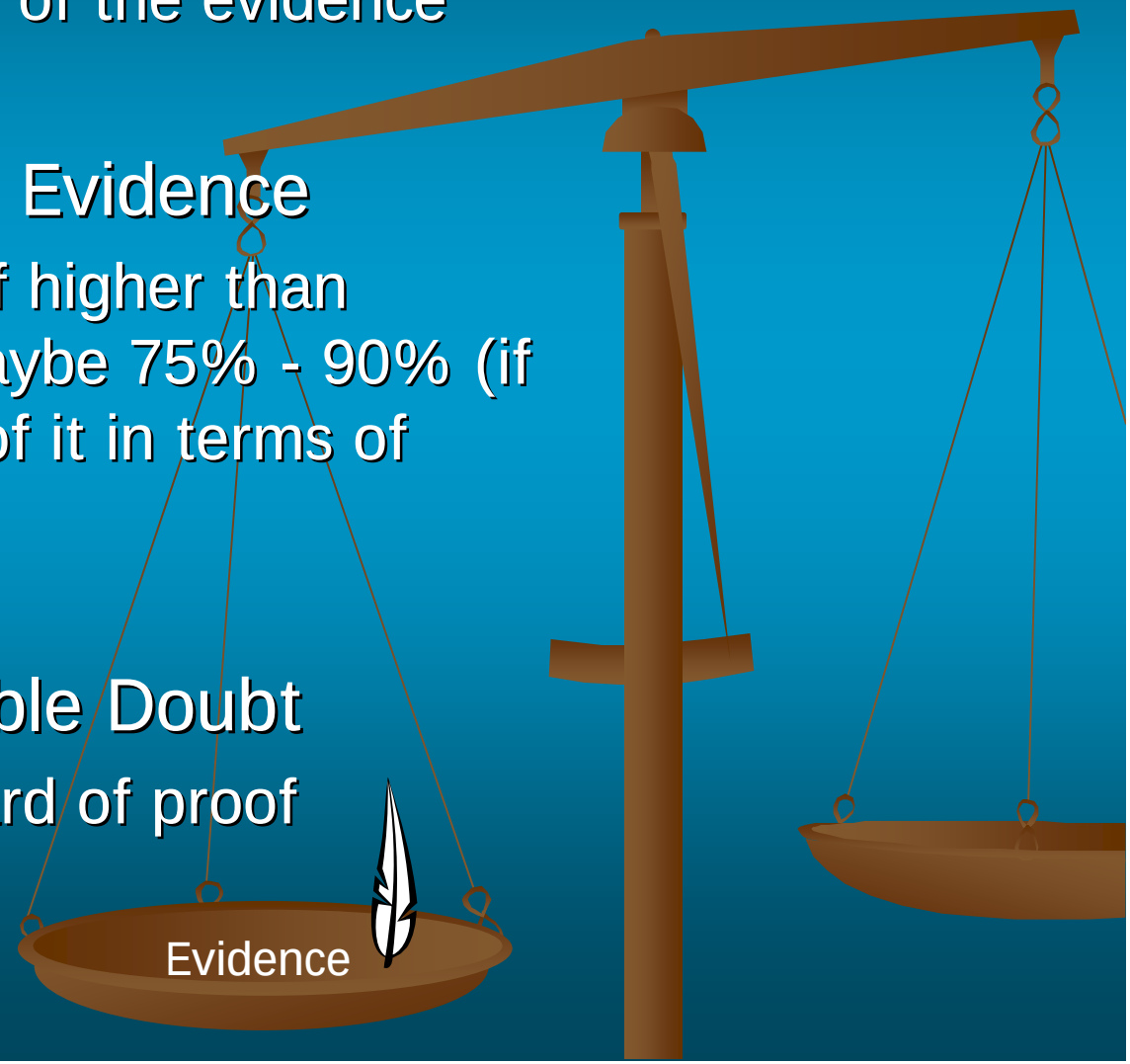
Gross Negligence

- Willful & wanton disregard
  - Providing care beyond your scope of practice
  - Unsafe driving
  - Driving with emergency lights and sirens when there is no emergency suspected to exist
  - Failure to contact medical direction when “out of the box” procedures are going to be used
  - Abandoning a patient

Not all inclusive

Burden of Proof

- Preponderance of the Evidence
  - The greater weight of the evidence
- Clear & Convincing Evidence
  - A standard of proof higher than preponderance, maybe 75% - 90% (if you were to think of it in terms of percentages)
- Beyond a Reasonable Doubt
  - The highest standard of proof



Administrative / Regulatory Law

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Due Process

- Virginia Administrative Process Act (APA)
  - § 2.2-4000 et seq
    - Provides that an employee, regulant has a right to have an administrative hearing when any disciplinary action is taken that impacts his/her certification
    - Adjudication Officer presides
  - Specific Provisions in Virginia
    - Health, safety & welfare of the citizens of the Commonwealth

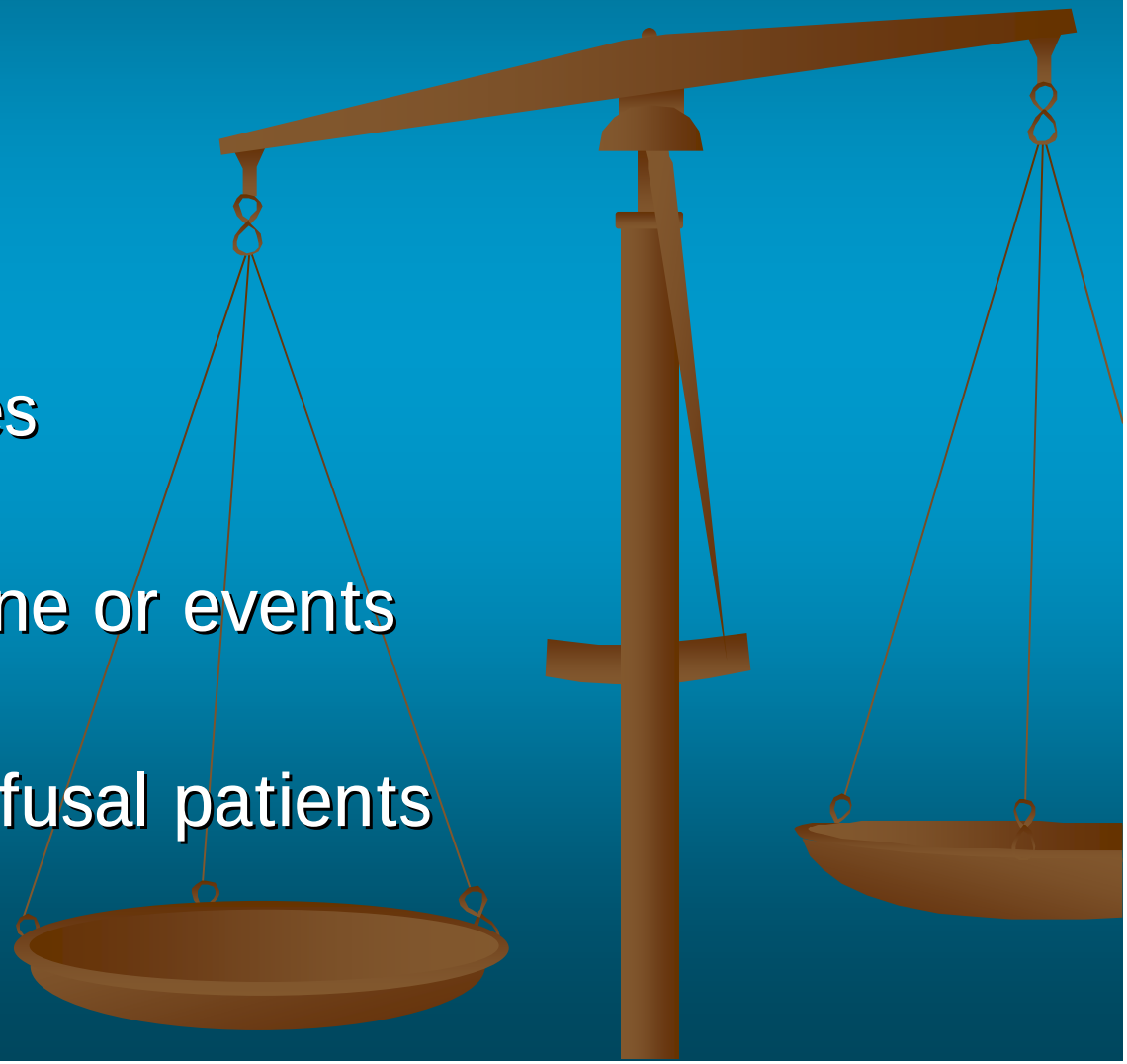
Documentation

- Golden Rule
- Complete, Accurate, Timely (CAT)

- Professional
- Confidentiality & Security of Records

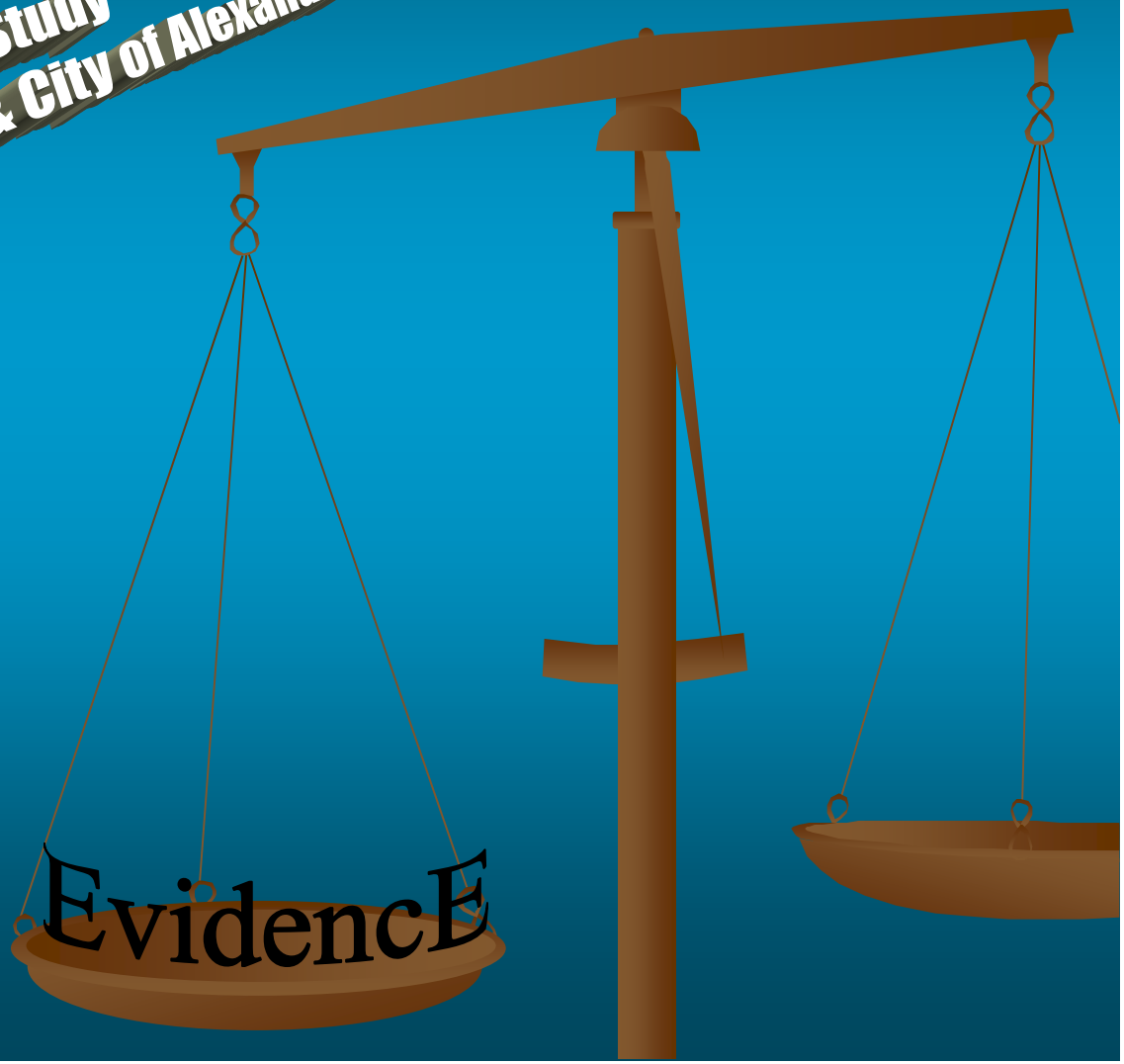
Did you write it down?

- Consent
- All findings
- Pertinent negatives
- Description of scene or events
- Advice given to refusal patients



Case Study

Irby v. Gill, Nolan, & City of Alexandria



Irby v. Mitzi Gill, Ellen Nolan, & the City of Alexandria, Virginia

- May 2, 1980 – Plaintiff's husband became ill, her daughter summoned an emergency ambulance, Alexandria Fire Department
- Paramedic Ellen Nolan (AIC) responded to the call & transported the patient to the Alexandria Hospital
- The patient was released later in the morning

Irby v. Gill, Nolan & City of Alexandria (cont)

- Patient's condition worsens and another daughter calls to request an emergency ambulance to respond back to the residence
- Paramedics Mitzi Gill (AIC) & Ellen Nolan respond to the residence
- While enroute, Paramedic Nolan tells Paramedic Gill she took the patient to the hospital earlier that day
- Upon arrival, the 2 paramedics talked to the plaintiff and one of her daughters but allegedly never examined the patient

Irby v. Gill, Nolan & City of Alexandria (cont)

- Paramedic Gill informed the plaintiff they could not take the patient back to the hospital because a fire department rule prohibited her from transporting the patient to the hospital a second time within a 24 hour period

Irby v. Gill, Nolan & City of Alexandria (cont)

- Family persisted in their request, Paramedics Gill & Nolan gave them the telephone number of another ambulance service & left

Irby v. Gill, Nolan & City of Alexandria (cont)

- Family calls private ambulance service to find out they do not provide service in the City of Alexandria
- Family again calls City of Alexandria requesting an ambulance; whereupon, a battalion chief ordered that an ambulance be dispatched immediately to the residence

Irby v. Gill, Nolan & City of Alexandria (cont)

- This ambulance transported the patient back to the Alexandria Hospital.....

in a coma

Alexandria FD Order

- Effective November 1, 1979, patients with the following complaints may be denied transport by Emergency Medical Services units and referred to alternate transportation:
  - 1) patients with external boils
  - 2) patients complaining of toothaches
  - 3) a patient's second call for transport within 24 hours*

FD Order (cont)

*NOTE: If the patient is obviously ill or injured transport as usual. Before denying transport to the patient, EMS personnel must contact the Emergency Department where the patient was previously seen, relate his/her present history, and be guided by the ED physician's recommendation. If the ED physician advises no transport, his name must be recorded on the ambulance field incident report with circumstances of the incident

Immediate Actions

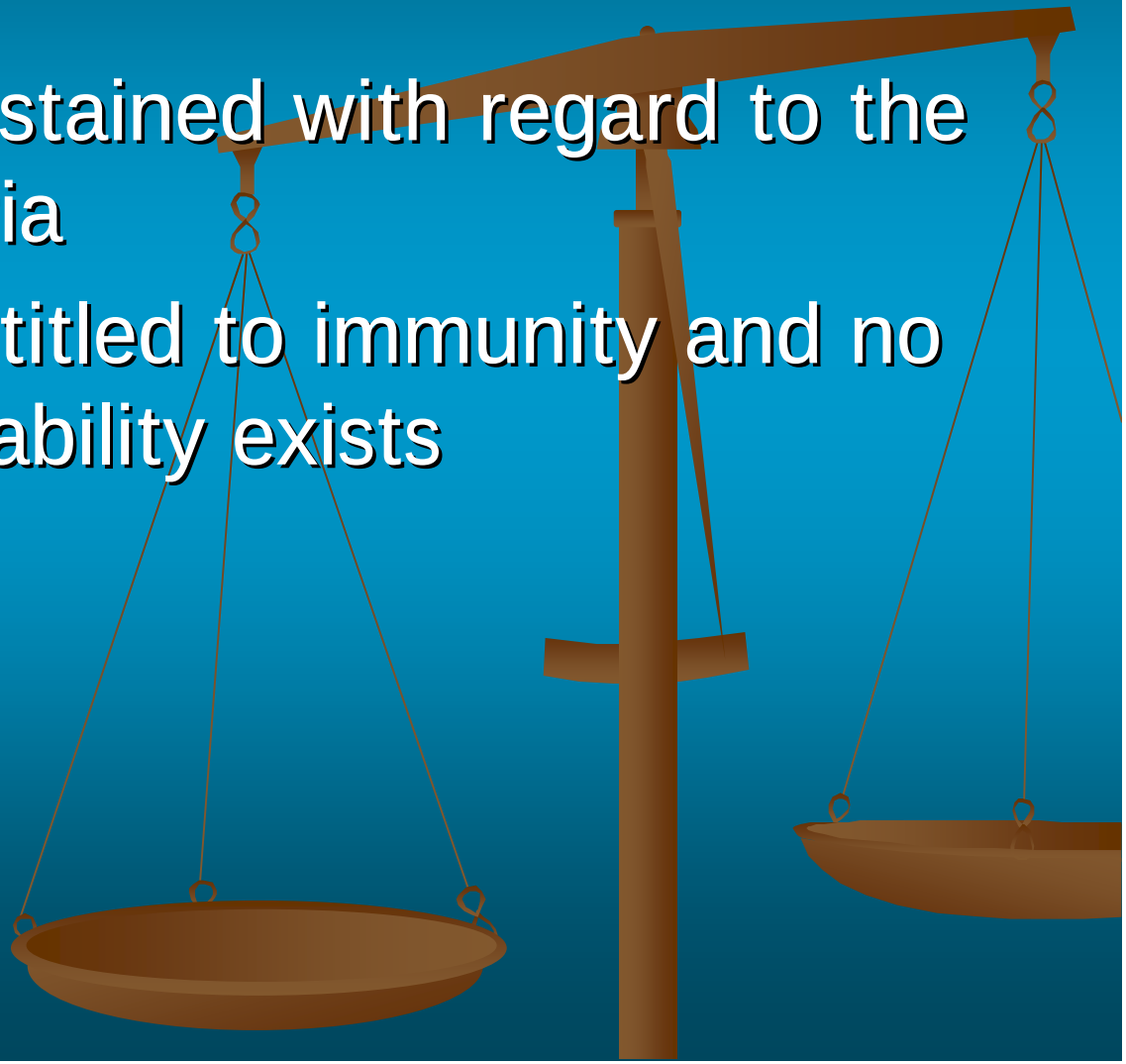
- Disciplinary Action by Charles H. Rule, Fire Chief, City of Alexandria
  - Mitzi Gill, EMT-P: 234 hours suspended w/o pay, no leave accrual
  - Ellen Nolan, EMT-P: 40 hours suspended w/o pay

Circuit Court for the City of Alexandria

- March 1, 1984
  - In the absence of a ruling from the Virginia Supreme Court, Judge Wiley R. Wright, Jr. held that the provision of emergency ambulance service is both a government & a proprietary function (because there is a $35.00 fee charged); however where it appears that a function is both governmental & proprietary, the governmental aspect predominates

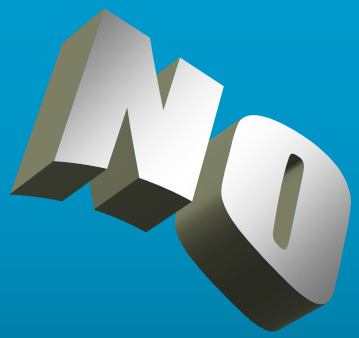
Circuit Court for the City of Alexandria (cont)

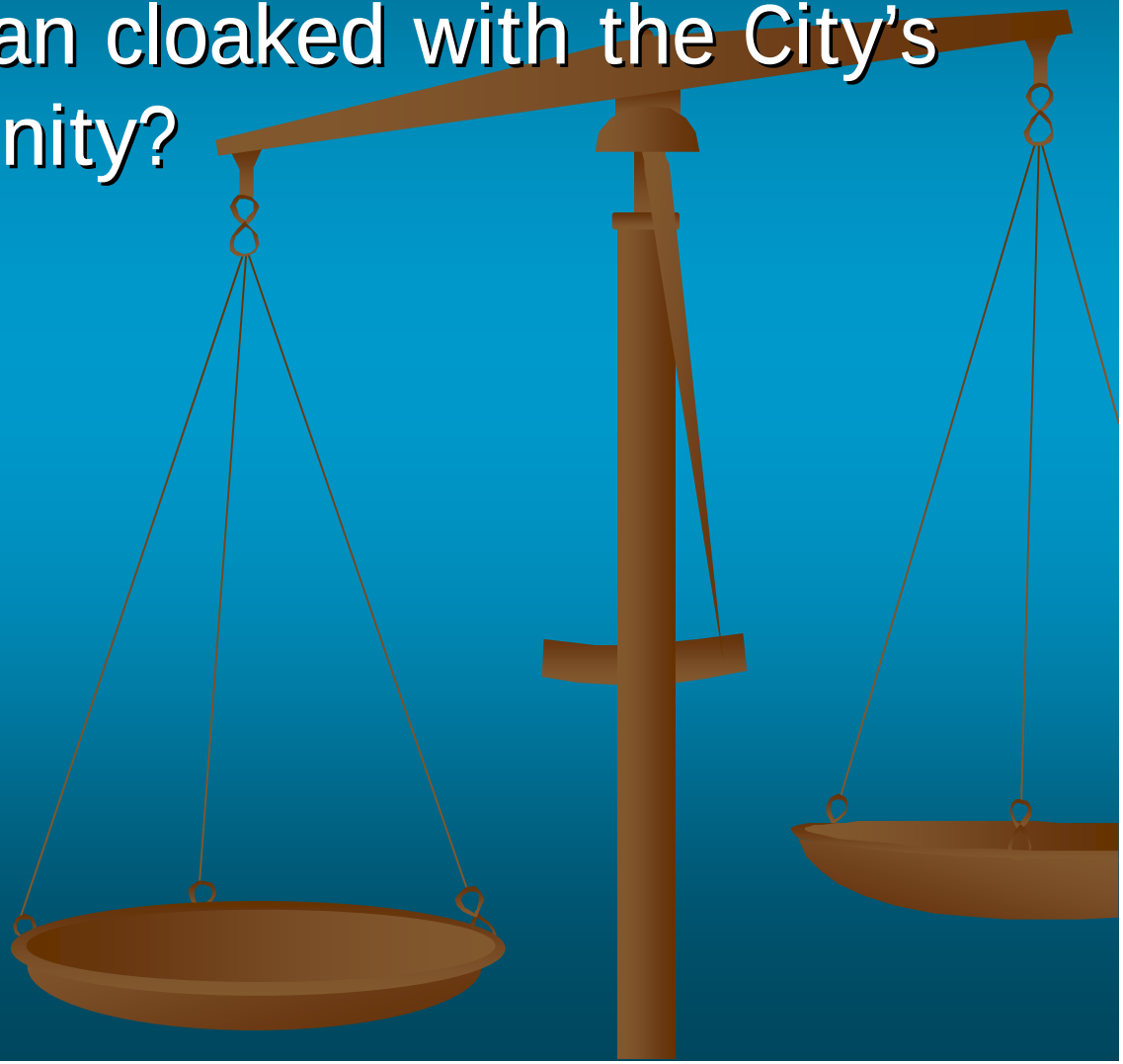
- Plea in bar is sustained with regard to the City of Alexandria
- Alexandria is entitled to immunity and no municipal tort liability exists



Immunity???

- Are Gill and Nolan cloaked with the City's sovereign immunity?





Claim

- Patient lapsed into unconsciousness while rescue squad was present, nevertheless, crew left
- Patient suffered brain damage as a result of hypoxia – denied oxygen for 45 minutes
- Family members present claiming intentional infliction of emotional distress
- Patient never regained consciousness
- Willful, wanton, intentional torts, committed by City employees resulting in the deprivation of life
- Mr. Irby died 10/24/1980

Interrogatories

- #20: Were any disciplinary actions taken against Mitzi Gill or Ellen Nolan as a result of their activities on May 2, 1980?

- Defense objection: Immaterial, irrelevant, and not discoverable.

Circuit Court

- Compels production of documents
- Enters as evidence
- “Motion for Judgment” filed
  - $ 500,000 in compensatory damages
  - $ 500,000 in punitive damages

Circuit Court (cont)

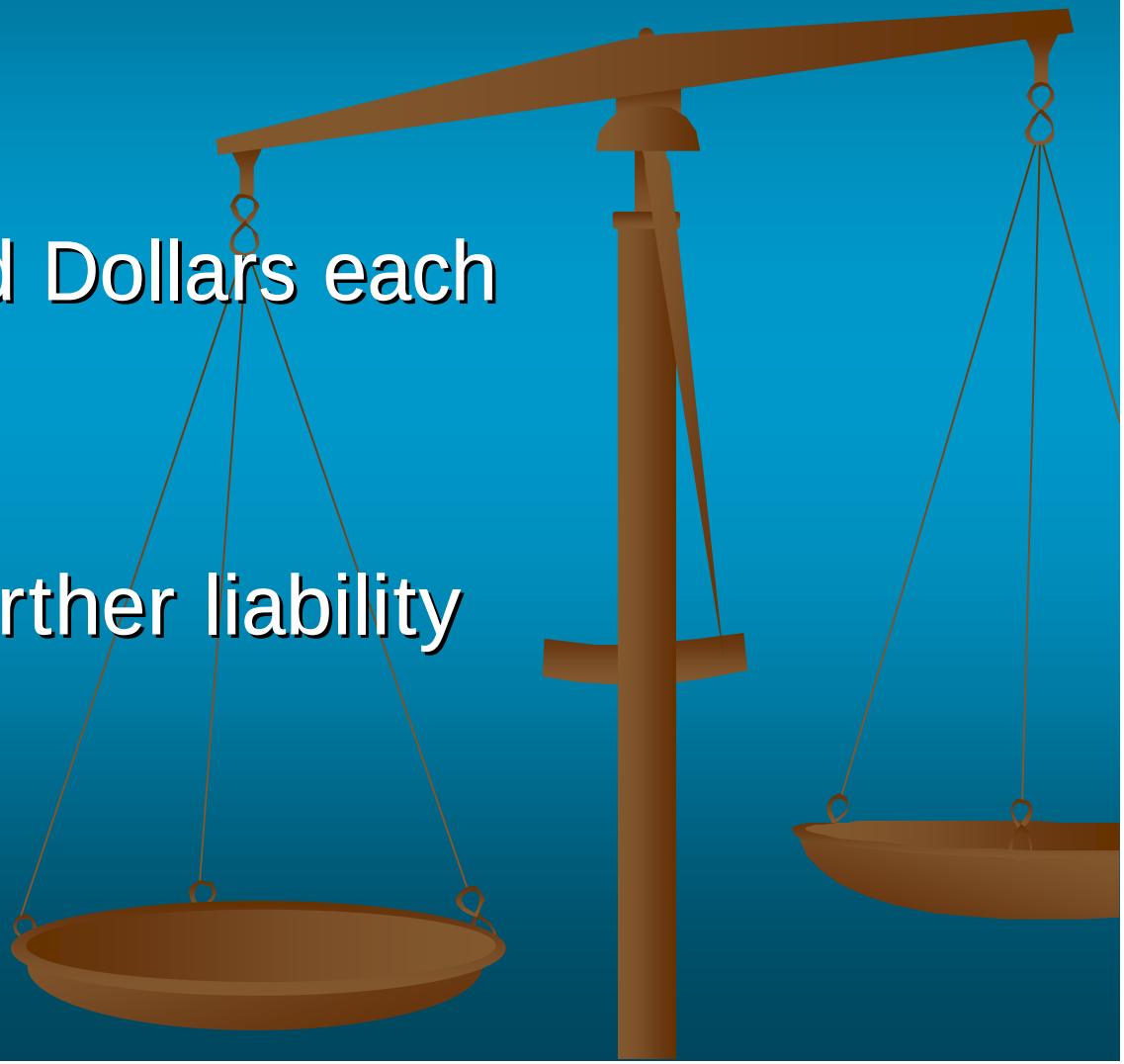
- Supplement filed:
  - Dr. Francis J. Whelan will testify that he has reviewed all records, chronology of events, and finds Mr. Irby suffered serious physical damage directly as a result of not being evaluated and given immediate basic life support measures. In addition, Mr. Irby did suffer physical damage, physical & emotional pain as a result of the inadequate & negligent performance by the EMT's, Gill & Nolan.

Order

- April 10th, 1984
  - It is ADJUDGED AND ORDERED that ...
  - The defendants, Mitzi Gill and Ellen Nolan, were guilty of gross negligence, and thus are not entitled to the protection of governmental immunity.....

Petition for Compromise

- Thirty Thousand Dollars each
  - Mitzi Gill
  - Ellen Nolan
- Release from further liability



Order

- February 27th, 1985
  - Ordered by the Circuit Court of Alexandria, as per the Petition for Compromise Settlement for Death by Wrongful Act

Questions???