

NIMS DIRECTIVES AND LIABILITY

By BRADLEY M. PINSKY

When President Bush signed Homeland Security Directive 5 (HSPD-5), he likely did not envision increasing occasions for fire departments' and first responders' liability. HSPD-5 directed the secretary of the Department of Homeland Security (DHS) to develop and administer a National Incident Management System (NIMS), which would provide a consistent, nationwide approach for federal, state, local, and tribal governments to work together to prevent, prepare for, respond to, and recover from domestic security incidents. Most states have implemented NIMS; if a state fails to implement NIMS, the result is a loss of significant federal funding opportunities.

For possibly the first time, a high-level court in New York State held that the failure to follow a mandatory, nondiscretionary NIMS directive served as a basis for liability against a fire department.¹ Although the holding is law only in New York State, many states follow similar legal principles. The holding, therefore, should concern first responders in all states.

In this article, I will discuss the court's holding and its impact on first response agencies. Then I will ask you to consider other policies and procedures that the first response agency may have adopted that also possibly could lead to liability if the document does not include proper wording.

MARCH 7, 2002

On this date, the Manlius (NY) Fire Department in Onondaga County responded to a basement fire in a two-story residence in the Pompey Hill Fire District. An incident command structure was in place. At least one county fire coordinator (CFC) responded to assist in command operations. In central New York, fire departments are not "countywide" departments but are controlled by various smaller municipalities such as villages, cities, and fire districts. CFCs assist in locating resources.

Members of the first-due Manlius unit were assigned to perform vertical ventilation. Following its completion, they were assigned to fire suppression. Efforts to attack the basement fire had been ineffective, although the on-scene incident commander (IC) might not have fully known it.

Pretrial discovery revealed allegations that the CFC did not report to either the IC or the operations officer after his on-scene arrival. Instead, testimony revealed that the CFC decided to take a "quick look" at the fire. Testimony further alleged that the CFC told the firefighters about to enter the structure, "We're going to have to get a line in here." It is unclear exactly to what that statement referred. There is disputed testimony about whether the CFC was wearing a white (command) or black fire helmet. Thus, the question of whether the CFC assumed a command role outside of the incident's command structure arose. This fact was vital to the court's inquiry.

Immediately thereafter, two firefighters from Manlius Truck 2 entered the house's first-floor mud room, while a third firefighter fed the attack line to them from the garage. As the third firefighter tried entering the mud room, he saw that the first floor had collapsed and his fellow crew members had fallen into the involved basement. One of the fallen firefighters was able to reach

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up and grasp the third firefighter's hands.

The CFC, the Manlius deputy chief, and the third firefighter made rescue efforts. Unfortunately, the heavy involvement of the basement, first floor, and garage areas forced the rescuers' evacuation and the rescue effort's termination. Two firefighters died.

One of the firefighter's wives sued the CFC and Onondaga County, his employer. Although the law in many states precludes firefighters' families from suing a fire department or other fire agency for causing their injuries or death, New York State permits such suits under New York State General Municipal Law 205-a. The fallen firefighter's wife alleged that her husband's death was a direct result of the CFC's command given outside of that incident's command structure and, had that command not been given, her husband would not have entered the building at that time and died minutes later.

In most states, including New York State, juries cannot base liability on a firefighter's on-scene decision. That rule is based on the principle that the public should not second-guess a first responder's emergency decision or tactic.

New York State's second highest court ruled that the failure to follow NIMS may serve as a basis for liability, as it "mandates a reasonably defined and precedentially developed standard of care, and does not require the fact's trier to 'second-guess [a firefighter's] split-second weighing of choices.' "

This surprising ruling means that first responders and their paid or volunteer agencies may be held liable for failing to adhere to those mandatory NIMS requirements. Although in this case the lawsuit was brought by a firefighter's wife, most states do not prohibit a citizen from suing a fire department. Whether the suit is brought by a firefighter, a firefighter's family member, or an injured civilian, the concern is the same: Failing to follow portions of NIMS can lead to the loss of a lawsuit.

Review of the 130-page NIMS manual (available at: <http://www.fema.gov/emergency/nims/AboutNIMS.shtm>) many directives that impact the fire service and other first responders. Thus, if the failure to follow such mandatory directives results in harm, this could lead to liability.

It is unclear whether the NIMS program drafters intended the word "must" to carry liability for noncompliance, but the New York court viewed the word's use seriously. Following are examples of NIMS directives that presumably require no "split-second weighing of choices": "Accountability. Effective accountability at all jurisdictional levels and within individual functional areas during incident operations is essential. To that end, the following principles must be adhered to:

(1) Check-In. All responders, regardless of agency affiliation, must report in to receive an assignment in accordance with the procedures established by the IC.

(2) Incident Action Plan (IAP). Response operations must be directed and coordinated as outlined in the IAP.

(3) Unity of Command. Each individual involved in incident operations will be assigned to only one supervisor.

(4) Span of Control. Supervisors must be able to adequately supervise and control their subordinates, as well as communicate with and manage all resources under their supervision.

(5) Resource Tracking. Supervisors must record and report resource status changes as they occur." (p. 19, emphasis added)

"Establishment and Transfer of Command. The command function must be clearly established from the beginning of incident operations. The agency with primary jurisdictional authority over

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the incident designates the individual at the scene responsible for establishing command. When command is transferred, the process must include a briefing that captures all essential information for continuing safe and effective operations.” (p. 18)

“Exercises. Incident management organizations and personnel must participate in realistic exercises—including multidisciplinary, multijurisdictional, and multisector interaction—to improve integration and interoperability and optimize resource use during incident operations.” (p. 11)

“Incident Management Communications. Preparedness organizations must ensure that effective communications processes and systems exist to support a complete spectrum of incident management activities.” (p. 55)

OPERATING PROCEDURES AS A BASIS FOR LIABILITY

NIMS is used as a basis for liability because it was an adopted state standard that required no discretion. If an agency is not careful, operating procedures and policies could also serve as standards against which a judge or jury evaluates negligent or reckless conduct.

The law in many states precludes evaluating a first responder’s actions when such actions involve decision making or “judgment calls.” However, some first response agencies have implemented policies under the title Standard Operating Procedures, which give the impression that certain actions are mandatory and not discretionary. Such documents could be introduced into court against the agency to prove that the first responder failed to follow adopted, nondiscretionary procedures.

Many states prohibit the introduction of policies into evidence in a court proceeding when such policies implement a standard of care higher than the recognized standard of care. This exclusionary rule’s purpose encourages, not discourages, agencies from imposing expectations of the best conduct by creating liability for not meeting that conduct. First response agencies will customarily be liable for not adhering to the standard of care if that standard’s breach resulted in injury or death but will not be liable for failing to provide the “best” care.

The question will arise as to what the standard of care may be in any given circumstance. First response agencies increase the risk that their policies are introduced as the “standard of care” by using the term “standard” in the name of the document. Documents such as “Standard of Care” and “Standard Operating Guidelines” create confusion and increase the risk that juries can view these documents as the “standard” against which the first responder must have acted. Therefore, consider the following actions:

- Name the document Best Practice Guidelines. Most states do not permit the introduction of the “best practice” when such practice is stricter than the recognized “standard of care.”
- Insert introductory language in your Best Practice Guidelines, which describes the document’s purpose. An example of such language follows:

This document represents a series of best practices. The document is intended only for the use of this agency and not for any other agency. The document is not intended to be relied on by any other individual, public or private, or agency. The document may not be used in court or in any other forum against the agency or against any individual, other than use by the agency. The imposition of discipline by the agency against any individual under control of this agency is not proof of the failure to comply with the standard of care, but only with this agency’s practices. In many cases, these best practices strive to exceed the standard practice. Adoption of the NFPA [standard], when done, is not a recognition of the standard but an attempt to achieve the best practice. Failure to adopt the NFPA [standard] is not the failure to meet a standard of care but a conscious choice of which practices are the best practice for this agency.

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- Eliminate words such as “must” and “shall” from best practices, and use words such as “should.” Words that indicate there is no discretion might permit that procedure as a “standard.”
- Separate policies from procedures, and keep them in separate manuals or sections of a manual. Determine what items are policies and what are “best practices.” Policies are mandatory in nature. There is no discretion or judgment as to how to follow a procedure. Generally, firefighting issues are all discretionary and should not be policies. Examples of policies include wearing seat belts while in a vehicle, using a spotter to back up a vehicle, avoiding engaging in sexually harassing conduct, and keeping medical information confidential. Breaches of policies usually involve some sort of discipline. Breaches of procedures usually involve retraining or reviews of decisions.
- Review which policies and procedures are actually being enforced. If a policy is not being enforced, either enforce it or change the policy. For example, many departments require emergency vehicles to stop at red lights when responding to an emergency; if operators are only “slowing down” at lights, the policy is not effective. Change the policy to mandate only that conduct required by state law, or enforce the policy as written.

An unenforced policy is a liability that the agency cannot afford to maintain. Again, policies carry discipline. Is the agency ready to discipline for violations of a policy? Are the officers ready to avoid ignoring such violations?

Endnote

1. Donna L. Prince, Individually and as the Parent and the Natural Guardian of Philip Lawrence L., an infant, and as Administratrix of the Estate of Timothy John L., Deceased. v. Mike Waters, As the Fire Control Coordinator of the County of Onondaga, and County of Onondaga, Defendants-Respondents, (CA 07-01233, 2/1/2008).

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