CIVIL DEFENSE: Tort liability of volunteer participants in Civil Defense program.

November 14, 1953

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Honorable A. S. McDaniel
Director
Civil Defense Agency
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated August 19, 1953, which reads, in part, as follows:

> "I would appreciate it very much if you would give me an opinion in regard to tort liability for volunteer participants in the Missouri Civil Defense program."

The Civil Defense law of Missouri is found in Senate Bill No. 406, passed by the 67th General Assembly. It is identical with Sections 44.010 through 44.140, RSMo, 1951 Supp.

The original bill, as introduced in the 66th General Assembly, was drafted from the bill proposed by the Council of State Governments. In the original bill, as introduced on the floor of the Senate, there was the following provision:

> "Neither the state nor any city, town or village of the state, nor, except in cases of willful misconduct or gross negligence, the employees, agents or representatives of the state or any city, town or village thereof, nor any volunteer or auxilliary civilian defense worker or member of any agency engaged in any civilian activity, complying with or reasonably attempting to comply with this act, or any order, rule or regulation promulgated pursuant to the provisions of this act, or pursuant to any ordinance relating to black-out or other precautionary measures enacted by any city, town or village of the State, shall be liable

> for the death of or injuries to persons or damage to property, as a result of any such activity."

If this section had remained, there would be no doubt as to the tort liability of volunteers in the Civil Defense program. However, the bill was referred to Committee and when it came out this section, along with others, had been removed. This aspect of the Missouri Civil Defense law was considered in an article written by Dr. Paul G. Steinbicker in Volume 2, No. 2 of the Fall, 1952, issue of the St. Louis University of Law Journal, where, at page 178, he said:

> "It seems clear from these sections of the Missouri law that no immunity is granted <u>any</u> civil defense workers from suit for personal injury or property damage resulting from tests, drills or demonstrations, and that no immunity of any kind is granted civil defense volunteers other than state employees or employees of political subdivisions of the state. This is a very serious gap in the state law which should be filled by adequate statutory amendment as soon as possible."

We have readily available the Civil Defense laws of only three of our sister states, namely Kansas, Illinois and New York. It is significant to note that the above-quoted section from the bill as originally proposed in Missouri was retained in each of those other states. This legislative history can be viewed in one of two ways. Either the Missouri Legislature did not deem it good public policy to limit the liability of volunteer participants in the Civil Defense program or it felt that such a provision was surplusage because their liability would be so limited in the absence of such provision.

To resolve the question of the manner of interpreting the elimination of this section from the original bill and the ultimate question to be resolved herein, it is necessary to determine what the liability of such volunteer participants is in the absence of a specific statute limiting their liability.

The most nearly analogous situation on which we are able to find cases is that of a fireman driving a fire truck to a fire.

Missouri cases on this subject are of no value because we have a statute which specifically exempts ambulances, patrol wagons and fire apparatus owned by a municipality of this state from the provisions of the chapter dealing with the rules of the road, etc., while being operated within the limits of such municipality (Laws of Missouri, 1941, page 446). In the absence of such a statute, however, the law generally seems to be that even though these individuals are in the performance of a highly important public duty they are required to exercise the same degree of care that individuals in private life are.

In Florio et al. v. Mayor and Aldermen of Jersey City, 101 N.J.L. 535, 129 A. 470, l.c. 471, 40 A.L.R. 1353, the court was considering the liability of a driver of a fire truck for negligence in the operation of the truck. The court said:

> "Schmolze, the defendant below, was a servant of the city of Jersey City charged with the performance of a certain public duty or service which was to drive a fire truck through the public streets to go to fires for the protection of property and oftentimes of life. This duty is concededly a highly important and grave function to perform. But it would be a travesty upon both law and justice to hold, that, because of the gravity and importance of the duties cast upon him he has become clothed with the privilege, while in the act of performing such duties, to thrust aside all ordinary prudence in driving along the public streets to the great hazard of life and limb of men, women, and children of all classes and conditions, who may be upon the public highway. He must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed a wrong to the injury of another. The servant of the municipality is required to perform his duty in a proper and careful manner, and when he negligently fails to do so, and in the performance of his duty negligently injures another, his official cloak cannot properly be permitted to shield him against answering for his wrongful act to him who has suffered injury thereby."

See also Ferraro v. Earle, 164 A. 886, Sup. Ct. of Vermont.

In Manwaring v. Geisler, 191 Ky. 532, 230 S.W. 918, l.c. 920, 18 A.L.R. 192, the Kentucky court said:

> "Nor is a peace officer exonerated from liability for an injury inflicted on another while in the discharge of official duties on the ground of public necessity, if the officer failed to exercise reasonable care for the protection of those whom he knew, or by the exercise of reasonable judgment should have expected, to be at the place of the injury, although he may not be criminally liable."

See cases from other jurisdictions holding the same in Rowley v. City of Cedar Rapids, 203 Ia. 1245, 212 N.W. 158.

Therefore, since the only basis for limiting the liability for volunteer participants in the Civil Defense program in the absence of a statute on the subject would be the public necessity of the occasion, and since public necessity has been held not to be sufficient to grant any added protection to firemen driving to a fire, etc., we can only conclude that volunteer participants in the Civil Defense program would have the same liability for negligence and be held to the same standard of care as that of private individuals in the conduct of their everyday affairs. Apparently the Legislature deemed it good policy not to limit this liability and intended for the same rules of negligence to apply to such volunteer participants as are made applicable to private individuals in private life.

Aside from the law of negligence, a further question needs to be determined, i.e., the individual liability, if any, of such volunteers for damage to property in carrying out the lawful orders of some authority constituted by the Civil Defense law to act in time of emergency. For example, what liability, if any, would be imposed upon the individual volunteer participant who, in obedience to an executive order, participated in the destruction of a building in the path of a conflagration in order to prevent its spread.

Section 44.060, Subsection 1, as enacted in Senate Bill No. 406 of the 67th General Assembly, provides for the establishment of mobile support units by local organizations for civil

defense, which are defined as organizations established by the Civil Defense law by any county, city, town or village to perform local civil defense functions. Section 44.060, Subsection 1, reads as follows:

> "Mobile support units formed under this law shall be designed to aid and reinforce local organizations for civil defense in areas affected by an enemy attack. Such units when formed by local organizations for civil defense may be composed entirely of officers and employees of one or more political subdivisions or they may be composed of volunteer civilians who obligate themselves to serve in cases of emergency. Units composed wholly of state officers and employees may be formed by the governor. Each mobile support unit shall have a leader, selected by the local organization for civil defense in the area where created, or by the governor in the case of state employees, who shall be responsible for the organization, administration, training and operation of such mobile support unit. Upon the occurrence of an emergency, such mobile support units may be called to duty by the governor and shall perform their functions in any part of the state or in other states."

It is these mobile support units which may be composed of volunteers. In the exercise of the police power it would not only be the protected right but the duty of such units and the individuals composing them to destroy property if necessary to save human life, to protect public health, to preserve property and to safeguard the public safety. The law generally in this regard is thus stated in 43 C. J., Municipal Corporations, Section 272, page 261:

> "Under the maxim, Salus populi suprema lex, municipal authorities not only may but must in the exercise of police power destroy private property to save human life, to protect public health, to preserve property, and to safeguard the public safety. And this they may do with impunity, in the face of imminent peril, or in the execution of a valid ordinance. The facts constituting

> the emergency must be made to appear before the invasion of private rights can be justified. The property itself, not the occupants, must constitute the nuisance to warrant such summary action. Emergency, it seems, may warrant destruction of contents as well as buildings."

It is further stated that if the destruction is necessary for the above purposes, no compensation can be claimed from anyone. 43 C. J., Municipal Corporations, Section 272, page 262:

> "While a municipal corporation may be liable for any needless damage in the destruction of property, at the common law no recovery can be had against anyone for property so injured or destroyed under the police power. * * *"

Therefore, we believe that no liability would be imposed upon volunteer participants in the Civil Defense program who, in the exercise of due care, cause damage to property under a lawful order issued by some authority constituted under the Civil Defense law to act in time of emergency.

CONCLUSION

It is the opinion of this office that the same rules of negligence are applicable to volunteer participants in the Civil Defense program as are applied to private individuals in the conduct of their daily affairs.

It is the further opinion of this office that no liability would be imposed upon such volunteers who, in the exercise of due care, cause damage to property under a lawful order issued by some authority constituted under the Civil Defense law to act in time of emergency.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Very truly yours,

JOHN M. DALTON
Attorney General

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