

Executive Decision Making and Liability for Public Health Officials

January 25, 2018

Co-sponsored by:

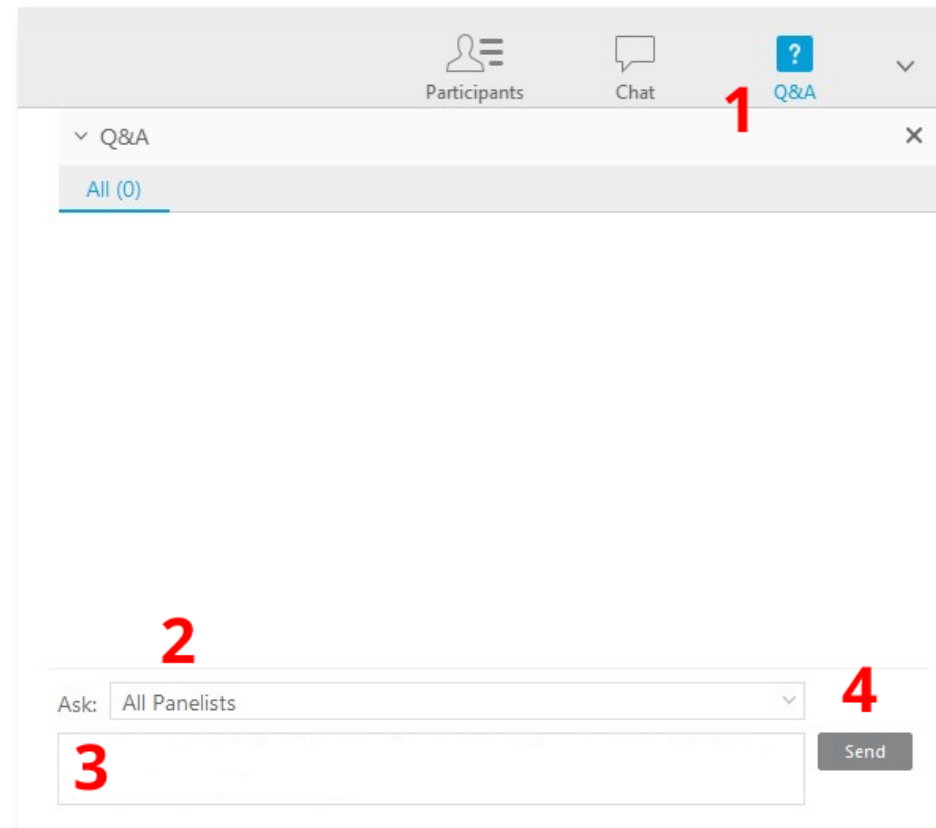


**Partnership for
Public Health Law**



How to Use Webex Q & A

1. Open the Q&A panel
2. Select “All Panelists”
3. Type your question
4. Click “Send”



Moderator



Jason Coates, J.D., Policy Analyst, American Public Health Association

- J.D. George Washington University Law School
- Research interests/areas of expertise:
 - Health systems transformation
 - Children's health environmental health

Presenter



Lance Gable, J.D., Associate Professor of Law at Wayne State University Law School

- J.D., Georgetown University Law Center
- Research interests/areas of expertise:
 - Public health law, ethics and policy
 - International human rights
 - Bioterrorism and emergency preparedness
 - Mental health
 - Research ethics
 - Information privacy

Presenter



Denise Chrysler, JD, Director, The Network for Public Health Law - Mid-States Region Office

- JD degree, University of Michigan Law School
- Research interests/areas of expertise:
 - Data sharing to improve community health
 - Newborn screening samples and research
 - Immunization
 - Bed bugs

Presenter



Matthew Penn, JD, MLIS, Director, Public Health Law Program, Office for State, Tribal, Local, and Territorial Support, Centers for Disease Control and Prevention

- JD, University of South Carolina School of Law
- MLIS, University of South Carolina
- Research interests/areas of expertise
 - Public health systems and governance
 - Data use and release
 - Emergency preparedness
 - Legal epidemiology

Criticized, Fired, Sued, or Prosecuted: Hindsight and Public Health Accountability

Lance Gable

Associate Professor of Law

Wayne State University Law School

1976 Swine Flu



1976 Swine Flu

Continued on Page 9, Column 1

Continued on Page 4, Column 4

Califano Moves to Remove Doctor Who Guided Swine Flu Program

Special to The New York Times

WASHINGTON, Feb. 7—Dr. David J. Sencer, who helped develop the much-troubled swine flu inoculation program, said today that he had been asked to step aside as director of the Center for Disease Control in Atlanta.

The decision was disclosed as an expert panel of consultants recommended that the moratorium on swine flu shots be lifted for persons considered to face a high risk of serious illness.

Dr. Sencer, here for a meeting on the flu program, said he had been informed last Friday that Joseph A. Califano Jr., the Secretary of Health, Education and Welfare, had requested his resignation. However, Dr. Sencer said he had not yet decided how to respond to the request.

Dr. Sencer is a member of the commissioned corps of health officers in the

Public Health Service and could still retain a Government job.

"You can reassign any member of the commissioned corps," a spokesman for Mr. Califano said, adding that Dr. Sencer "isn't being fired."

The Center for Disease Control has been under serious criticism in recent months, not only because of the swine flu problem, but also because of problems encountered investigating the mysterious disease that killed 29 persons who were associated with an American Legion convention in Philadelphia.

An H.E.W. statement today took no account of either disease problem in discussing Dr. Sencer. It said:

"Dr. Sencer has been informed that the

Continued on Page 53, Column 2

Legionnaire's Disease

- Disease first identified after infecting attendees at an American Legion conference in Philadelphia in 1976



Flint Water Crisis



Emergency manager laws and accountability

- Emergency managers have complete control over city financial decisions
- Emergency managers appointed by the governor with no democratic accountability
- No requirement that emergency managers take into account non-financial considerations

Flint timeline

- November 2011 - Flint placed under emergency management
- April 2013 - EM decides to take Flint off DWSD system
- April 2014 - Flint begins to use Flint River as a water source
- October 2014 - Legionnaire's outbreak (30 cases in Genesee County)
- January 2015 – Head of MDHHS notified of Legionnaire's outbreak
- September 2015 – MDHHS get updates on second Legionnaire's outbreak

Flint timeline

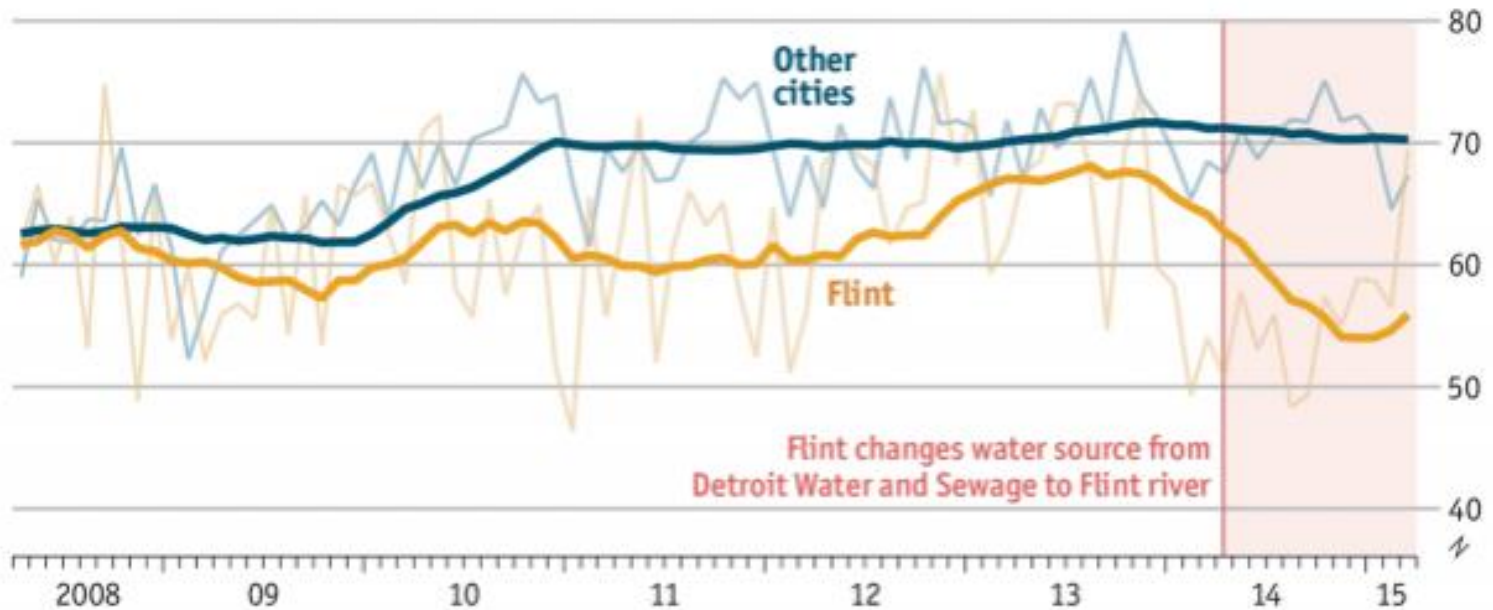
- September 2015 – Dr. Hanna-Atisha published finding of elevated blood lead levels in Flint children
- October 2015 – Genesee County Health Dept. declares emergency
- December 2015 – Robert Skidmore dies from Legionnaire's Disease
- January 2016 – Gov. Snyder declares a State of Emergency in Flint and notifies public of Legionnaire's Disease outbreak

Health consequences

Lead in the water

Michigan, births per 1,000 women
Aged 15-49

— Monthly data multiplied by 12
— 12-month moving average



Source: "The Effect of an Increase in Lead in the Water System on Fertility and Birth Outcomes: The Case of Flint, Michigan" by D. Grossman and D. Slusky

Methods of accountability for public health officials

- Criticism/Feedback
- Sanctions/Firing/Democratic Accountability
- Civil lawsuits
- Criminal prosecution

Criminal accountability

- Criminal charges are rarely brought against public officials
- Criminal charges originate from the state – prosecutors in control of case
- Goal is to punish alleged wrongdoers for their criminal behavior

Criminal v civil accountability

Criminal	Civil
Initiated by state – public law	Initiated by plaintiffs – private law
Must prove mens rea (state of mind to commit crime) and actus reus (act taken to commit crime)	Must prove that duty to plaintiffs was breached by defendants and that harms to plaintiffs causally connected
Standard of proof is beyond a reasonable doubt	Standard of proof is a preponderance of the evidence
Guilty verdict leads to punishment of defendant	Finding of liability leads to damages owed from defendant to plaintiff
Goals of punishment, retribution, justice, deterrence	Goals of compensation, fairness/justice, deterrence
Immunity defenses not usually applicable	Immunity defenses available

Pending criminal cases - Flint

- Criminal charges have been filed against at least 15 people related to Flint water crisis
- Three public health officials have been charged
- Charges include involuntary manslaughter, misconduct in office, conspiracy, lying to a peace officer

Prosecutors' likely arguments

- Officials had a duty to warn public about outbreak
- Officials knew that if no mitigating steps were taken, others would be at risk
- Failure to act was grossly negligent and showed willful disregard for the deadly risk posed
- Failure to warn and efforts to suppress information led to death
- Decision to delay informing public based on political/public relations considerations instead of public health

Defenses' likely arguments

- Exercised best judgment
- Operated in good faith
- No duty to intervene
- No causation with death
- Sets untenable precedent

Implications for public health practice

- Accountability vacuum led to prosecution
- Duty of a public health official to notify the public of threats to health; finding the threshold of duty
- Causation and responsibility for harms that result in mistakes or bad decisions
- Viewing public health failures as criminal acts
- Setting incentives for public health decisions

Implications for public health practice

- Flint prosecutions are likely to be outliers
- Using criminal law to achieve accountability for public health officials is not likely to become common
- Prosecution less likely if other methods of accountability are used
- High cost of prosecuting and defending in civil and criminal case; could use \$ for public health

Public Health Decision-making

Can I? Must I? Should I?

Denise Chrysler, J.D., Director

The Network – Mid-States Region
University of Michigan School of Public Health

January 25, 2018

Using law to protect the public's health

CAN I?

Legal question: Do I have authority?

MUST I?

Legal question: Does law leave me no choice?

SHOULD I?

Policy question: How should I exercise my discretion?

Using law to protect the public's health

CAN I?

Power

MUST I?

Duty

**SHOULD
I?**

Discretion

[for health officials] “I” = “You”

Can I? General Powers

- » **Powers necessary and appropriate to perform their duties**
- » **Promote and safeguard the public health**
- » **Prolong life**
- » **Prevent and control health hazards**
- » **Prevent and control the spread of disease**
- » **Provide expertise and education regarding health**

Can I? Specific Powers and Specific Threats



- Food establishments
- Methamphetamine labs
- Clean indoor air (smoking)
- Body art facilities
- Public swimming pools
- Communicable diseases

Can I? Limitations

Broad & Flexible Powers: Any legal limits?

Police Powers \neq Police State

Jurisdictional

Separation (branches)

Allocation (levels)

Assignment (agencies)

Territorial

Statutory

Pre-emption

Broad & Flexible Powers: Any legal limits?

Government has awesome powers
AND MAJOR **RESPONSIBILITIES**

Constitutional

Liberty

Due Process

Protection Against Search & Seizure

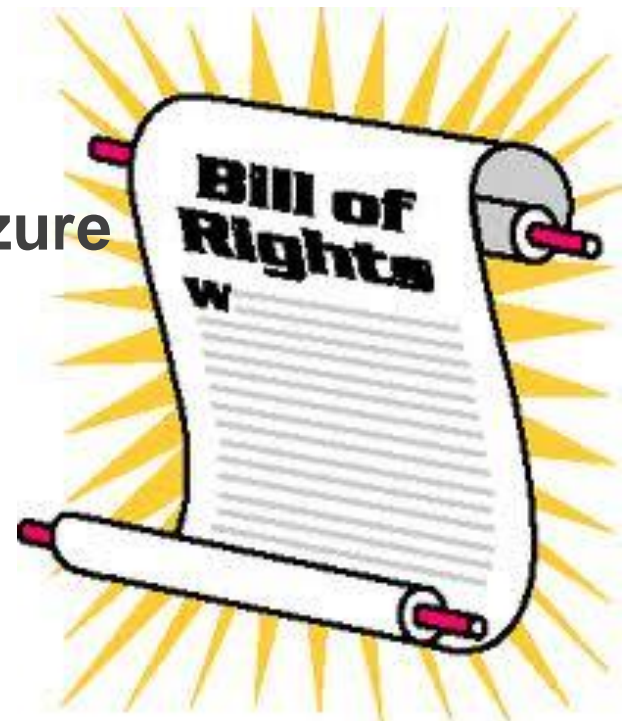
Equal Protection

Right to Privacy

Freedom of Association

Freedom of Religion

Just Compensation



Can I? Limits on limits

Public Good vs. Individual

Quarantine, Isolation, & Immunization

The liberty secured by the Constitution on the United States to every person within its jurisdiction does not import an absolute right to each person to be, at all times and in all circumstances, wholly freed from restraint.

There are manifold restraints to which every person is necessarily subject for the common good.

Jacobson v Massachusetts, 197 US 11 (1905)

Caution

Jacobson vs Massachusetts

Caution, as noted by the Court:

“The police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so **arbitrary and **oppressive** in particular cases as to justify the interference of the courts to prevent wrong and oppression.”**

Must I? Am I mandated to take action?
Am I mandated to take a particular action?

Mandatory functions

» **Mandated by law**

» **Mandated by funding source (\$ with strings)**

Discretionary functions

» **Involves exercise of judgment or discretion**

For mandatory duties, often an agency has a great deal of discretion in determining **how** to fulfill its obligation

What is duty?

- » **Legal duty – obligation created by law (compare to moral duty)**
- » **Right – To have duty, means someone has a right. To whom is the duty owed? How is right enforced?**
- » **Public duty doctrine a/k/a no public duty doctrine**
- » **Govt action vs. govt failure to act or failure to warn**
- » **Exceptions: Special relationship, State-created danger**

Must I?

Mandatory + Discretion

Statutory powers and responsibilities

The Department of Public Health **shall**:

- Promote and safeguard the public health
- Prolong life
- Prevent and control health hazards
- Prevent and control the spread of disease

Must I? All or nothing?

Youngberg v. Romeo

"[I]t is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.... Nor must a State choose between attacking every aspect of a problem or not attacking the problem at all."

457 U.S. at 457 U. S. 317 (1982)

Must I?

Selective Enforcement

- **Generally**, government officials such as police officers, prosecutors, or regulators exercise enforcement discretion, i.e. they have the power to choose whether or how to punish a person who has violated the law.
- **However**, the biased use of enforcement discretion, such as that based on racial prejudice or corruption, is usually considered a legal abuse and a threat to the rule of law.

Based on discretionary power

Should I?

Must be used reasonably, impartially.

Policy considerations:

- » Resources
- » Feasibility
- » Impact
- » Priorities
- » Population health vs. private disputes

Uniformity & consistency

Strength of evidence, strength of legal authority

Public opinion

Politics – relevant?

Doing “nothing” is doing “something” (risk assessment)

**Making
choices
vs. abusing
discretion**

Consider facts, principles, and law

Be able to articulate basis for decision

**Show that you considered/weighed
alternatives**

Does decision make sense?

Is it reasonable?

vs.

Decisions that are “arbitrary” and “capricious”

**Repeat: Doing nothing is doing something –
make sure doing nothing is a conscious
choice**

**Arbitrary - not considered, ignores the facts,
whimsical**

Capricious - impulsive and unpredictable

Making choices vs. abusing discretion

continued

Example of a state statute defining arbitrary and capricious

Fla. Stat. § 120.57 (2009)§ 120.57.

“Additional procedures for particular cases

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.“

(2)***

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;****”

Building support /Reducing exposure

- » **Engagement (community, other govt entities)**
- » **Transparency**
- » **Risk communication**
- » **Documentation – facts known at the time of decision and basis for decision**
 - **Avoid second guessing based on hindsight**
 - **Practical challenges:**

How/where to document? Group decisions, evolving, iterative (not like a doctor making notes in patient's medical record of options considered and basis for choice)

Public Health Decision-Making Tool

Situation - What are the facts? What is the threat?

Consequences - What are the consequences?

Likelihood - What are the chances of occurrence?

Mitigation - How can the threat be addressed?

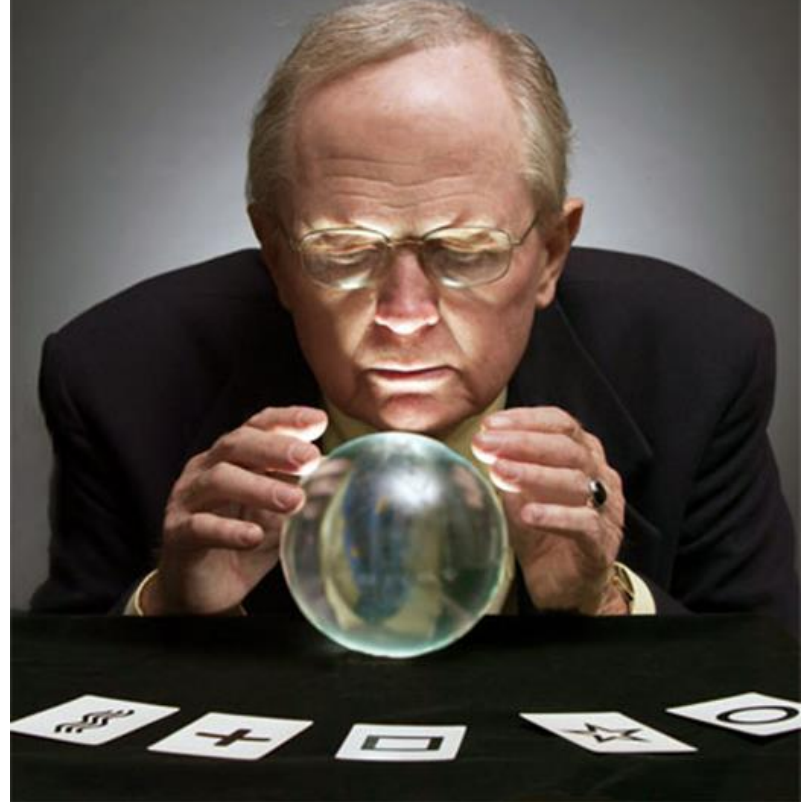
Certainty - Should you take action now? Should you wait?

Communication - What do you communicate to the public and when do you communicate it?

https://www.networkforphl.org/resources_collection/2017/12/15/949/public_health_decision-making_tool

Hindsight is 20/20

It's easy to know the right thing to do after something has happened, but it's hard to predict the future.



... If only it were this easy

When things go south . . .

Responsibility, Liability, Accountability

Civil justice system

Wrong against an individual

Determines “liability” for harm

Individual initiates and controls key aspects

Burden of proof –
preponderance of the evidence

Intention not always required
(e.g. negligence)

Payment of damages

Criminal justice system

Wrong against the state

Determines “guilt or innocence”

Prosecutor initiates and controls key aspects

Burden of proof – beyond a reasonable doubt

Intent to cause harm or reckless disregard

Punishment might include jail

Thank you!

Denise Chrysler, J.D.

dchrysler@networkforphl.org





Public Health, Decisions, Liability, and Immunity

Matthew Penn

Director, Public Health Law Program

Office for State, Tribal, Local and Territorial Support

Centers for Disease Control and Prevention

January 25, 2018

CDC-PHLP Disclaimer



The contents of this presentation have not been formally disseminated by the Centers for Disease Control and Prevention and should not be construed to represent any agency determination or policy.

These materials are for instructional use only and are not intended as a substitute for professional legal or other advice.

Always seek the advice of an attorney or other qualified professional with any questions you may have regarding a legal matter.

Public Health Law Program



- What we do
 - Legal epidemiology
 - Workforce development
 - Partnerships and communications
- Whom we serve
 - CDC programs
 - State, tribal, local, and territorial (STLT) communities
 - **You!**

On Tap:

- What is a claim?
- What is liability?
- What is a tort?
- What is a constitutional claim?
- What defenses are available?



What is a claim?



- A legal statement that someone has injured someone else and that the injured person demands compensation or action

What is liability?

- Liability is legal responsibility.
- Someone is liable when they are found, after a legal process, to be obligated to perform an act, stop a behavior, or pay money damages to an injured party.



- A violation of a duty imposed by law for which a court or other tribunal will provide a remedy or compensation.
- Elements of a tort—
 - Duty
 - Breach
 - Causation
 - Damages



**What is a
tort?**

- Duty
 - An obligation to exercise reasonable care
- Breach
 - Failure of reasonable care
 - Aka, negligence
- Causation
 - Breach-caused damages
- Damages
 - Injury in-fact
 - Cost of making whole



**What do the
elements
mean?**

What is a constitutional claim?

- A constitutional claim is a legal statement that a government official, or someone acting under the color of law, has impinged upon the exercise of someone else's constitutional right.
 - e.g., freedom of speech, freedom to exercise religion, substantive due process rights to life, liberty, and property.
- 42 USC § 1983

How do these things relate to a lawsuit?



- Filing a lawsuit is the way claims are brought against government agencies and officials.
- Lawsuits can be grounded in tort or constitutional claims.
- Sometimes you see those two combined.

What defenses are available?



- Sovereign immunity
- Tort claims acts
- Qualified immunity
- Absolute immunity

Sovereign immunity is a doctrine that precludes a litigant from asserting an otherwise valid claim against a government unless the sovereign consents to the suit.



Sovereign Immunity

But . . . many states have waived sovereign immunity.

So, you can sue the government.

Unless there are exceptions to the waiver . . .



Sovereign Immunity

So, results vary by state . . .



**Sovereign
Immunity**

So, results vary by state . . .

e.g., some states have an exception to the waiver for imposition of quarantine



**Sovereign
Immunity**

State Tort Claims Acts



- States generally have statutory waivers of sovereign immunity allowing tort claims against the state, with certain exceptions, or reenact immunity with limited waivers that apply only to certain types of claims.
- More than 30 states have caps on how much an individual can receive in a state tort claim. The amount of the cap varies from state to state.

State Tort Claims Acts



- Importantly . . .
- Tort claims acts have provisions that require the removal of official and employee names from the lawsuits
- Unless you were reckless or grossly negligent

South Carolina Tort Claims Act

- § 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.
The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

South Carolina Tort Claims Act (continued)

- § 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.
The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, **subject to the limitations upon liability and damages, and exemptions** from liability and damages, contained herein.

South Carolina Tort Claims Act (continued)

- § 15-78-60. Exceptions to waiver of immunity. The governmental entity is not liable for a loss resulting from
 - 1) Legislative, judicial, or quasi-judicial action or inaction
 - 2) Administrative action or inaction of a legislative, judicial, or quasi-judicial nature
 - 3) Execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process
 - 4) Adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies...
- 40 total exceptions to the waiver of immunity in South Carolina

South Carolina Tort Claims Act (continued)

- § 15-78-60. **Exceptions to waiver of immunity. The governmental entity is not liable for a loss resulting from**
 - 1) Legislative, judicial, or quasi-judicial action or inaction
 - 2) Administrative action or inaction of a legislative, judicial, or quasi-judicial nature
 - 3) Execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process
 - 4) **Adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies**
- 40 total exceptions to the waiver of immunity in South Carolina

South Carolina Tort Claims Act (continued)

- § 15-78-70. Liability for act of government employee; requirement that agency or political subdivision be named party defendant; effect of judgment or settlement.
- (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefore, except as expressly provided for in subsection (b).
- (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.
- (c) . . . In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant . . .

South Carolina Tort Claims Act (continued)

- § 15-78-70. Liability for act of government employee; requirement that agency or political subdivision be named party defendant; effect of judgment or settlement.
- (a) **This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity.** An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefore, except as expressly provided for in subsection (b).
- (b) **Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.**
- (c) . . . In the event that the employee is individually named, **the agency or political subdivision for which the employee was acting must be substituted as the party defendant . . .**

Washington State's Tort Claims Act

4.92. Actions and Claims Against State

- 4.92.090-Tortious conduct of state—Liability for damages
- The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.
- Washington has no limit or cap on claims against the state.

Washington State's Tort Claims Act

4.92. Actions and Claims Against State

- 4.92.090-Tortious conduct of state—Liability for damages
- **The state of Washington**, whether acting in its governmental or proprietary capacity, **shall be liable for damages arising out of its tortious conduct** to the same extent as if it were a private person or corporation.
- **Washington has no limit or cap on claims against the state.**

Arkansas

- § 21-9-301. Tort liability—Immunity declared
- (a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.
- (b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

Arkansas

- § 21-9-301. Tort liability—**Immunity declared**
- (a) It is declared to be the public policy of the State of Arkansas that **all counties, municipal corporations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability** and from suit for damages except to the extent that they may be covered by liability insurance.
- (b) **No tort action shall lie against any such political subdivision because of the acts of its agents and employees.**

Arkansas

- § 21-9-202. Jurisdiction of Arkansas State Claims Commission
- (a) The Arkansas State Claims Commission shall have jurisdiction over all claims for indemnification based on a judgment or negotiated settlement in conformity with 21-9-203.
- (b) Proceedings for the recovery of claims and the payment of claims shall be governed by the law governing proceedings before the commission and payment of claims allowed by the commission.

Arkansas

- § 21-9-202. Jurisdiction of Arkansas State Claims Commission
- (a) **The Arkansas State Claims Commission shall have jurisdiction over all claims for indemnification based on a judgment or negotiated settlement in conformity with 21-9-203.**
- (b) Proceedings for the recovery of claims and the payment of claims shall be governed by the law governing proceedings before the commission and payment of claims allowed by the commission.

What is immunity?

- Immunities can block claims from being brought against the individual who has immunity.
- Two types are important for government officials:
 - Absolute Immunity
 - Qualified Immunity



- Absolute immunity is a doctrine that precludes all claims against a government official, regardless of motives or otherwise.
- It is rare.



Absolute Immunity

How do we know if it applies?

- History – what was the state of immunity in 1871?
- Task – it attaches to the behavior, not the person.
- Remedy – generally, it applies only to money damages, not injunctions.



Absolute Immunity

Qualified Immunity



- This protects government officials from lawsuits alleging that they violated plaintiffs' rights.
- Allows suits only when officials violated a “clearly established” statutory or constitutional right.

Qualified Immunity



- When determining whether or not a right was “clearly established,” courts consider whether a hypothetical reasonable official would have known that the conduct violated the plaintiff’s rights.

Qualified Immunity



- “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”
- *Pearson v. Callahan*, 494 F.3d 891, 2008.

Ebola Cases

Hickox v. Christie, 205 F. Supp. 3d 579 (2016).

- Nurse brought civil rights action against governor and state public health officials, alleging that her 80-hour quarantine upon returning to the United States after caring for Ebola patients in Africa violated her rights under the Fourth and Fourteenth Amendments, and asserting state law claims for false imprisonment.
- The Court held defendants had probable cause to place nurse into quarantine, and thus were entitled to qualified immunity from nurse's 42 USC § 1983 claims for violation of the Fourth Amendment.

Matthew Penn, JD, MLIS
Director, Public Health Law Program
Office for State, Tribal, Local and Territorial Support
Centers for Disease Control and Prevention

mpenn@cdc.gov

404-498-0452

www.cdc.gov/phlp

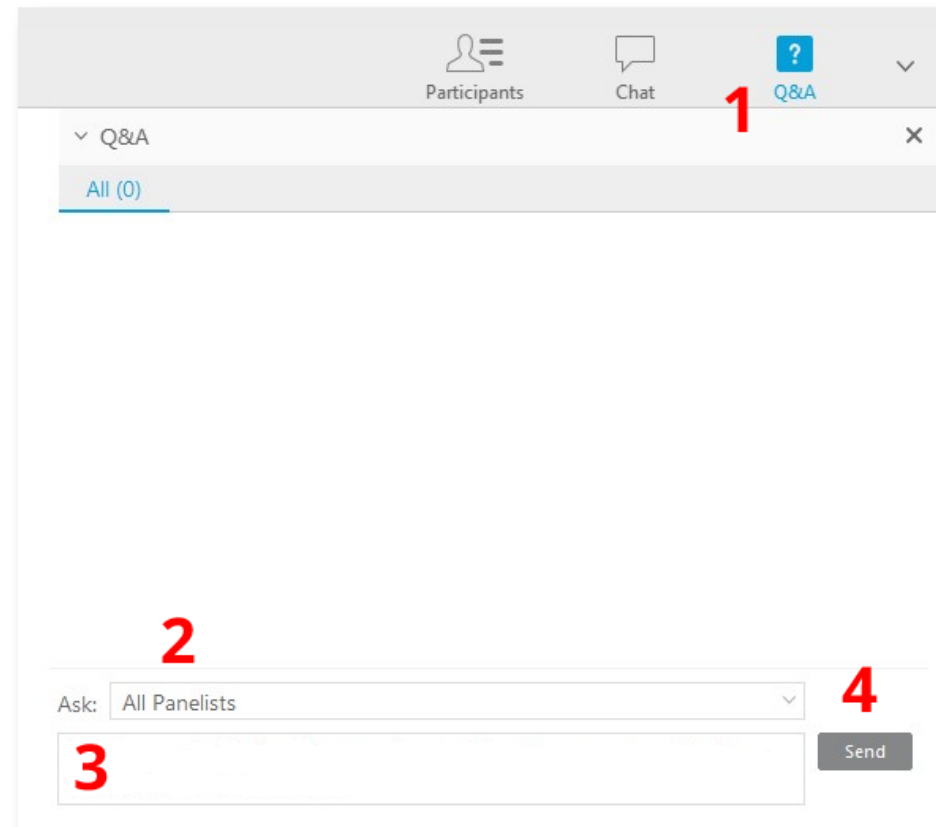
For more information, contact CDC
1-800-CDC-INFO (232-4636)
TTY: 1-888-232-6348 www.cdc.gov

The findings and conclusions in this report are those of the authors and do not necessarily represent the official position of the Centers for Disease Control and Prevention.



How to Use Webex Q & A

1. Open the Q&A panel
2. Select “All Panelists”
3. Type your question
4. Click “Send”



Thank you for attending

For a recording of this webinar and information about future webinars, please visit networkforphl.org/webinars

You may qualify for CLE credit. All webinar attendees will receive an email from ASLME, an approved provider of continuing legal education credits, with information on applying for CLE credit for this webinar.

