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The State of South Carolina

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The Honorable Jerry N. Govan, Jr.
Member, House of Representatives
P. O. Box 77
Orangeburg, South Carolina 29116

Dear Representative Govan:

You have requested the opinion of this Office concerning the State's potential liability in situations where a third party is exposed to a bloodborne pathogen as a result of having come into contact with contaminated bodily fluids at an accident or crime scene.

I caution that any advice relative to the potential civil liability of the government is, of necessity, very general and subjective, since liability considerations most often depend upon the factual vagaries of each incident. Additionally, potential liability discussions are never fully exhaustive of the myriad of theories of liability that can be crafted. Mindful of these qualifications, I cautiously advise that there are certainly factual situations involving transmission of contaminated bodily fluids that would expose State governmental agencies, and thus the taxpayers, to damage awards.

Whether the government is liable in tort is ordinarily determined by the operation of the Tort Claims Act, S. C. Code Ann. § 15-78-10, et seq. (1992 Cum. Supp.). The general operative scheme of the Tort Claims Act is as follows. The Act first reinstitutes the doctrine of sovereign immunity as a bar to the prosecution of damage claims against the government. Section 15-78-20 (b). The Act next modifies or waives, at least to a limited extent, the bar of sovereign immunity. Section 15-78-40. The Act then crafts several exceptions to this limited waiver of sovereign immunity, and in those instances where one or more of the exceptions apply, sovereign immunity bars the damage action. Section 15-78-60; cf.

Varn v. South Carolina Department of Highways and Public Transportation, ___ S.C. ___, 428 S.E.2d 899 (Ct. App. 1993).

In drafting the Tort Claims Act, the General Assembly proceeded with caution, expressly recognizing the need to protect the financial integrity of public programs and to ensure that limited public monies be used to support the general public needs as opposed to the needs of particular individuals; thus, the General Assembly found "[t]he provisions of [the Act] establishing limitations on and exemptions to the liability of the State . . . must be liberally construed in favor of limiting the liability of the State." Id., Section 15-78-20 (f); see also Section 15-78-20 (a) ["The General Assembly further finds that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities."] Axiomatic, many of the exemptions to the limited waiver of sovereign immunity found at Section 15-78-60 reflect these legislative concerns. The Tort Claims Act provides a statutory backdrop for any discussion of governmental tort liability in South Carolina.

You specifically reference a situation where a shooting occurred outdoors in a neighborhood and the victim's blood lay in the ground where children later played. I note that South Carolina has adopted the common law rules of negligence and in order to prove the State's liability to an injured third party, the plaintiff would have to prove each of the following elements:

1. That the State owed a duty of care to the particular third party;

2. That the State breached that duty; and

3. That the State's negligent acts proximately caused the injury to the third party.

Estate of Cantrell, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990); see also Section 15-78-20 (a) ["Liability for acts or omissions under this chapter [the Tort Claims Act] is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty."].

Whether a duty of care is owed to a third person exposed to a bloodborne pathogen would depend upon the particular circumstances and facts. For example, if the injured person were a public invitee or a business visitor upon State-controlled property, the State would ordinarily owe a duty of reasonable or ordinary care for the third party's safety. Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 356 S.E.2d 123 (1987). In this instance, the State

would also owe an affirmative duty to use reasonable care to discover unreasonable dangerous conditions on its property. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977). If the injured person were a licensee, that is, a person who was a guest upon the State's property by virtue of the State's consent, the State would probably owe no duty to exercise reasonable care to make the premises safe; however, the State would be held to a duty to exercise reasonable care to discover, avoid injury or warn the third party of the condition or dangers of the premises which the State should have reasonably been expected to discover. Frankel v. Kurtz, 239 F. Supp. 713 (D.S.C. 1965). Generally, the State owes no duty to a third party trespasser upon its property. Nettles v. Your Ice Co., 191 S.C. 429, 4 S.E.2d 797 (1939). Nonetheless, if the third party trespasser were a child, depending upon the particular facts, liability could be imposed on the State for harm or injury caused because of an exposed danger on the State's property. Byrd v. Melton, 259 S.C. 271, 191 S.E.2d 515 (1972). Thus, the status of the injured third party and his relationship to the State would determine what, if any, duty of care the State owed to the third party.

Should it be determined that the State, or the government, owed a particular duty of care to the injured person and that the government, through its actions or inactions, breached that duty of care, proximately causing injury to the third party, the court must then determine whether immunity bars the prosecution of the damage action. Again, this is determined, at least in part, by reference to the exemptions contained in Section 15-78-60 of the Tort Claims Act. I reference only three of these exemptions to the waiver of immunity and I have chosen these exemptions because they may factor prominently in any damage claim against the government arising from the hypothetical you have presented. First, the State is not liable for loss resulting from,

> natural conditions of unimproved property of the governmental entity, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for the property within a reasonable time after actual or constructive notice of the defect or condition.

Section 15-78-60 (10); or,

> for loss arising out of a defect or a condition in, on, under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the

> particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

Section 15-78-60 (15); or,

> maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security, or supervision within a reasonable time after actual notice of the defect or condition.

Section 15-78-60 (16). Again, I do not suggest that these exemptions to the limited waiver of sovereign immunity are the only ones that may be applicable; they are simply the ones that readily suggest that they may operate in this instance. As is apparent, these are qualified, rather than absolute, immunities and their operation would depend upon the specific facts. The tentative conclusion here is that, again depending upon the specific facts, the government may be liable for damages in the situation you described.

In your request letter, you reference that the South Carolina Department of Labor has adopted the United States Department of Labor's regulation of occupations exposed to bloodborne pathogens (29 C.F.R. 1910.1030). The State Department of Labor adopted these standards effective March 27, 1992. You suggest that this Regulation operates to protect employees but not necessarily third persons, and I agree with this conclusion. These regulations, of course, should provide some collateral or indirect protection for third parties; but again, it does not appear that these regulations create duties or obligations in favor of third parties.

I also reference S. C. Code Ann. § 44-93-10, et seq. (1992 Cum. Supp.), "The Infectious Waste Management Act." "Infectious waste," as that term is used in the Act, includes "human blood and blood products." Section 44-93-30 (A) (3). This Act appears to have only limited application in those instances where the person responsible for the production of the waste generates or produces only a small amount of waste, or where the infectious waste is produced in a private residence. See Sections 44-93-20 (I) and 44-93-100. I do note that disposal and management of human blood is generally regulated regardless of the quantity of the blood waste produced. Section 44-93-100 (2) (b). Nonetheless, the Infectious Waste Management Act, even if it is determined to be applicable in the situation you discussed, does not expressly provide for private

damage remedies; instead, the Act relies upon public enforcement. See Sections 43-93-50, -140, -150 and -160. Thus, whether the Act creates by implication a right of private action for damages against a generator of infectious waste is one of legislative intent dependent upon whether the legislation was enacted for the special benefit of the injured party. See Citizens for Lee County Inv. v. Lee County, ___ S.C. ___, 416 S.E.2d 641 (1992); Pipin v. Burkhalter, 276 S.C. 483, 279 S.E.2d 603 (1981); Cort v. Ash, 422 U.S. 66 (1975). Even assuming that this Act, in certain instances, would operate to create a private right of action in favor of an injured citizen against the government where the government produced the infectious waste, the government's damage liability would be determined by operation of the Tort Claims Act.

I hope that this general information concerning the government's liability is helpful to you in determining whether additional legislation is necessary. I do not know the extent that third parties are contaminated by blood pathogens transmitted from infectious blood products remaining in an uncleaned area after an accident or crime. These critical facts would probably have to be determined by appropriate legislative fact-finding. The Department of Health and Environmental Control may be able to provide statistical information related to this inquiry.

With best regards, I am

Sincerely yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

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