STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

November 21, 2018

Opinion No. 18-47

Automated External Defibrillators

Question 1

What is the meaning of the term "expected defibrillator users" in Title 68, Chapter 140, Part 4 of the Tennessee Code?

Opinion 1

For purposes of Title 68, Chapter 140, Part 4 of the Tennessee Code, "expected defibrillator users" are those persons that an acquirer of an automated external defibrillator designates to give emergency care.

Question 2

Does Tennessee law require that a person have automated external defibrillator training before using one?

Opinion 2

Tennessee law does not prohibit an untrained person from using an automated external defibrillator; however, an acquirer of an automated external defibrillator that allows an untrained person to use its defibrillator may not avail itself of the limitation on liability afforded under Tenn. Code Ann. § 68-140-406.

Question 3

Does the "Good Samaritan Law" apply to an untrained person who uses an automated external defibrillator?

Opinion 3

Yes. The "Good Samaritan Law," codified at Tenn. Code Ann. § 63-6-218, applies to an untrained person who uses an automated external defibrillator under the circumstances set forth in that statute.

Question 4

Could a business be held liable if it allows an untrained employee to use an automated external defibrillator that is publicly displayed by the business?

Opinion 4

Yes. The merits of any such action would depend on all the facts and circumstances of the particular case.

Question 5

Could a business be held liable if an untrained third person—i.e., a person not employed by the business—uses an automated external defibrillator that is publicly displayed by the business?

Opinion 5

It is possible that the business could be held liable, but the viability of any such claim will depend on all the facts and circumstances of any given case.

Question 6

Could a business be held liable if it provides information as to the location of an automated external defibrillator on its premises, thereby facilitating the use of its automated external defibrillator by untrained third persons?

Opinion 6

It is possible that the business could be held liable, but the viability of any such claim will depend on all the facts and circumstances of any given case.

ANALYSIS

An automated external defibrillator (AED) is a lightweight, portable device that delivers an electric shock through the chest to the heart. An AED is an important tool to address sudden cardiac arrest. The AED's shock can stop an irregular heartbeat and restore a normal heart rhythm. Defibrillation must occur quickly, though. A victim's chance of survival decreases by seven to ten percent for every minute that a normal heart beat is not restored.[1]

Because early defibrillation is such an important determinant for victims of cardiac arrest, the American Heart Association began a national public health initiative in the mid-1990s to

[1] https://www.heart.org/-/media/data-import/downloadables/pe-abh-what-is-an-automated-external-defibrillator-ucm_300340.pdf;; http://www.heart.org/en/health-topics/cardiac-arrest/about-cardiac-arrest

educate the public and lawmakers about the need to promote cardiopulmonary resuscitation (CPR) and the early use of AEDs by trained lay responders. Between 1995 and 2000, all fifty States passed laws and regulations concerning lay rescuer AED programs.[2]

Tennessee's AED Law and "Expected Defibrillator Users"

Tennessee's initial AED legislation was passed in 1998 with the general goal of encouraging the acquisition of AEDs so that they would be readily available to the public. 1998 Tenn. Pub. Acts ch. 963 (Preamble). The fledgling legislation placed only three requirements on an entity that acquired an AED: "expected defibrillator users" must take a course in defibrillator use and CPR from the American Heart Association or a nationally-recognized-equivalent course; the defibrillator must be maintained and tested in accordance with the manufacturer's guidelines; and any person using the AED must activate the emergency medical services system as soon as possible. *Id*. at § 4(1).

The General Assembly did not define the term "expected defibrillator users" in the 1998 Act or in later legislation.[3] Based on the context, however, it appears that the General Assembly intended the term to refer to persons designated by the acquirer of an AED to use the AED to render emergency care. *See* La. Rev. Stat. Ann. § 40:1137.3(b) (defining "expected defibrillator user" to mean "any person designated by the possessor [of the AED] to render emergency care").

Limitations on Liability for AED Use Under the Good Samaritan Law and the AED Act

Legislators debated, but did not adopt as part of the 1998 AED legislation, a provision limiting the legal liability of "AED acquirers" who complied with the Act's three requirements. The General Assembly, though, did amend Tennessee's "Good Samaritan Law" to apply to the use of an AED.

The Good Samaritan Law generally provides that a person who, in good faith and under certain specified circumstances, "renders emergency care" or assists in "rendering emergency care" shall not be liable for civil damages resulting from any act or omission by that person, except for damages resulting from that person's gross negligence. *See* Tenn. Code Ann. § 63-6-218. In 1998 and 1999, the General Assembly amended the Good Samaritan Law to expressly include within its protections the "*use of an automated external defibrillator*" in rendering emergency care." 1998 Tenn. Pub. Acts ch. 963, § 5; 1999 Tenn. Pub. Acts ch. 488, § 2.

In 1999, the General Assembly amended the AED Act to specify more requirements for AED acquirers and to afford immunity from certain negligence claims to AED acquirers who meet

[2] https://www.ahajournals.org/doi/abs/10.1161/circulationaha.106.172289

[3] The term appears to be drawn from model state legislation proposed by the American Heart Association. *See generally* Karen F. Petersen, 17 J. Contemp. Health L. & Pol'y 275, 320 (2000). Several States use the term in their laws governing the use of AEDs. *See, e.g.*, Ala. Code § 6-5-332.3; Ariz. Rev. Stat. § 36-2261; Colo. Rev. Stat. Ann. § 13-21-108.1; Ga. Code Ann. § 31-11-53.2; Idaho Code § 5-337; Ky. Rev. Stat. Ann. § 311.667; La. Rev. Stat. Ann. § 40:1137.3; Mo. Ann. Stat. § 190.092; Ohio Rev. Code Ann. § 3701.85; 42 Pa. Cons. Stat. Ann. § 8331.2; Wash. Rev. Code Ann. § 70.54.310.

all the requirements. *See* 1999 Tenn. Pub. Acts ch. 488, §§ 3 to 7 (codified at Tenn. Code Ann. §§ 68-140-404 to -408). The AED acquirer must now satisfy statutory prerequisites relating to training of "expected defibrillator users," maintenance and testing of AEDs, coordination with emergency medical service personnel, reporting requirements, record keeping, and general AED program development. Tenn. Code Ann. § 68-140-404. Specifically, "to use or allow the use" of its AED, an AED acquirer must establish a written plan that designates, among other things, the individuals who are authorized to operate the AED, Tenn. Code Ann. § 68-140-404(1)(B), and the designated individuals must comply with the CPR and AED training requirements established by the Department of Health, Tenn. Code Ann. §§ 68-140-404(3), -405(4), -408.

If these statutory prerequisites are met by the AED acquirer *and* followed by the individuals using the AED, the AED acquirer is not subject to civil liability for personal injury that results from an act or omission that does not amount to willful or wanton misconduct or gross negligence. *See* Tenn. Code Ann. § 68-140-406.[4] However, since training requirements must be established and since expected AED users must comply with those training requirements, an AED acquirer who allows an untrained person to use its AED, will not have met the prerequisites, and, therefore, will not be protected by the limitation on liability afforded under Tenn. Code Ann. § 68-140-406.

But, even when an AED acquirer is not protected by the § 68-140-406 limitation on liability, it may nevertheless still not be amenable to suit under the statute. That is because the statute does not expressly provide for a "private right of action"[5] against an AED acquirer for its failure to comply with the statute's training provisions. And unless a statute contains "express language creating or conferring" a private right of action, no private right of action exists, and courts will generally not construe a statute to impliedly create a private right of action. Tenn. Code Ann. § 1-3-119(a) and (b).[6] Thus, since Tenn. Code Ann. § 68-140-406 does not expressly create a private right of action, a potential private litigant is unlikely to have a cause action under the Act against an AED acquirer, even if the acquirer is not immune under the statute.

Liability of AED Acquirer Arising from Use of AED by Untrained Employee Under Common Law

Although there is no private right of action available under the statute, an AED acquirer could be subject to a common law negligence action for the use of its AED by an untrained employee. Whether such a common law tort action could be maintained in any given case will depend on the particular facts and circumstances of that case. The AED acquirer who faces such a claim would be entitled to assert any defenses—as may be warranted by the particular facts and circumstances—that are legally cognizable in such tort actions.

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[4] The immunity afforded under this section applies only "to situations involving emergency use of an AED and in no case shall it apply where there is a duty to provide care. Nor shall it apply where a doctor has prescribed use of an AED for a patient's use in the patient's private home." *See* Tenn. Code Ann. § 68-140-409.

[5] A private right of action is "the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." *Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 433 (Tenn. 2017).

[6] Tenn. Code Ann. § 1-3-119(c) contains exceptions to this general rule.

Liability of AED Acquirer for Use of AED by Untrained Third Persons Under Common Law

The remaining two questions concern the potential liability of a business if an untrained third person uses its AED. The business could be held liable if it is determined to have a duty to protect its patrons or employees from harm caused by a third person using its AED. Whether such a duty exists in any given case will depend on the particular facts and circumstances involved. *In general*, one does not have an affirmative duty to protect others from the harm of third persons. *Biscan v. Brown*, 160 S.W.3d 462, 478-79 (Tenn. 2005). *See Satterfield v. Breeding Insulation Co*., 266 S.W.3d 347, 355 (Tenn. 2008). But those who stand in a special relationship to others do have a duty to protect those persons from *foreseeable* risks. *Giggers*, 277 S.W.3d at 364-365 (Tenn. 2009); *Downs*, 263 S.W.3d at 819; Restatement (Second) of Torts § 315 (1965). "'[F]oreseeability is the test of negligence.'" *Giggers*, 277 S.W.3d at 365 (quoting *Downs*, 263 S.W.3d at 820). Thus, when a risk of injury is not generally foreseeable, no duty arises. *Id*.; *Satterfield*, 266 S.W.3d at 366.

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