

**ORAL ARGUMENT — 10/09/97**  
**96-1095**  
**GROSS V. INNES**

TOOLEY: I am here representing two firefighter paramedics: Sam Moore and Dennis Gross, who worked for the City of Farmers Branch. This is an interlocutory appeal taken from the denial of a motion for summary judgment brought on behalf of these firefighters based on their qualified immunity. The City is also a party to the case, but is not a party to this appeal.

Briefly, this case arises from a very tragic incident in which Mr. Innes suffered an asthma attack, the paramedics responded to the 911 call, they attempted to revive him, were unable to do so, he went into a seizure, ultimately he passed away a week or two later. Suit was brought alleging negligence by the paramedics in what in essence is a medical malpractice case. We filed a motion for summary judgment asserting the qualified immunity of the paramedics as public officials, that was denied by the TC. We appealed that in an interlocutory appeal to the Dallas CA, they upheld the denial. So we are here.

GONZALEZ: What is the basis of our jurisdiction?

TOOLEY: Two basis: interlocutory appeal under the statute (Civ. Prac. & Remedies Code) that allows interlocutory appeal; secondly, there is a conflict...

GONZALEZ: That only allows interlocutory appeals to the CA?

TOOLEY: That's true. Secondly, there is a conflict in the CA's on the application of qualified immunity. Some CAs have applied the traditional 3 elements of qualified immunity: scope of authority; discretionary act and good faith. Other CAs based upon this court's opinion in the Kassen case, and that's what this case is about, is whether Kassen extends to paramedics. That's the issue here.

ABBOTT: The courts though who have applied the 3 prong test?

TOOLEY: The Casas court in San Antonio.

ABBOTT: Right the Casas court did so before the SC issued Kassen correct?

TOOLEY: That's true.

ABBOTT: And so arguably then they didn't have the opportunity to consider the SC formulation in Kassen?

TOOLEY: They did not. They did have the opportunity to consider the uniquely governmental test, that the other pre Kassen paramedic case Pak v. City of Irving considered. Pak applied a fourth element to qualified immunity which was the test that was rejected in Kassen. Kassen replaced that element with a new test. So the issue is, do paramedics qualified immunity is it analyzed under the traditional 3 element? Traditionally the qualified elements are: \_\_\_\_\_, good faith, and discretionary acts. Kassen added a 4<sup>th</sup> element. Kassen as you know involved doctors and nurses. Kassen added a 4<sup>th</sup> element of we're going to look at once we've found scope of authority in the governmental employment, once we've found there was discretion, we are going to add another level of analysis. We are going to determine whether the discretion was medical in nature or governmental in nature.

This 4<sup>th</sup> element was applied by the Dallas court in the Pak case. There they applied a uniquely governmental test. They ruled that if the discretion is uniquely governmental - immunity applies. If it's not, there is no immunity. Kassen rejected that test instead using a governmental verses medical a more gray test and enunciated 7 factors in the footnote.

ABBOTT: Why should an ER nurse have to comply with the medical verses governmental discretion issue, but an EMS technician not have to comply?

TOOLEY: To start with because Kassen says she should. Kassen is a doctor and a nurse.

ABBOTT: But Kassen obviously doesn't say anything about EMS technicians?

TOOLEY; No Kassen referred to medical professionals, medical personnel. And Kassen as we've outlined, and I don't have a whole lot to add with what's in my brief in this argument, Kassen talked about doctors and nurses, talked about the exercise of independent medical judgment.

ABBOTT: But what independent medical judgment in decision-making can nurses do? Nurses typically have to follow doctor's orders when it comes to applying medical treatment; do you agree with that?

TOOLEY: Yes, I do. Nurses, however, are licensed medical professionals under 25 Tex. Admin. Code, §151.2. Licensed medical professionals includes doctors, nurses, PA's, social workers. All professionals who have been subjective to this 4<sup>th</sup> element.

ABBOTT: And officers in this case were licensed also were they not?

TOOLEY: They were licensed paramedics, but they are not within the definition of licensed health professionals as are nurses, doctors and social workers under that administrative code. Nurses are allowed to delegate certain acts. They are allowed to exercise judgment. There are licensing statutes and I am searching for that now.

HECHT: What if an emergency medical technician were operating under the direct instructions of an oversight of a position? Say he called in and said, "What should I do about this?" The doctor said, "Well do this, do this, do this," and he messes that up? Would that remove him from official immunity?

TOOLEY: If he is negligent?

HECHT: Yes. In other words, can there be some medical actions that an EMT person could be liable for?

TOOLEY: Certainly. If they take an action which is beyond the scope of their authority, if they take an action which is not in good faith, if they take an action which is ministerial, rather than discretionary.

HECHT: But under the four point test, you're just focusing on the 4<sup>th</sup> point, an an EMT person in your view be acting in a medical way the same way we described it in Kassen?

TOOLEY: No, they can not. Because EMT's by statute and by \_\_\_\_\_ cannot exercise independent medical judgment. The statutes which govern the practice of medicine specifically state and the statutes and the \_\_\_\_\_ which govern the delegation of authority to paramedics specifically state that that delegation cannot involve the independent exercise of medical discretion.

ABBOTT: What happens when an EMT technician shows up on a scene of an accident and can't figure out what is wrong with a critically injured person? Don't they have to go through their own differential diagnosis about exactly what kind of emergency care to render to the victim?

TOOLEY; EMT's are trained. They are not allowed to diagnosis. That's a practice of medicine. That involves independent judgment.

ABBOTT: I'm not talking about making some long-term diagnosis. But they have to quickly figure out what is wrong medically with this person so they don't just pick them up. For instance, as a classic example: if you come upon someone who is injured in the road, you are going to have to first of all determine whether or not there is a potential problem with a spinal cord injury. If so, they are going to put them on a board. If not, they won't worry about strapping them down to a board, they will treat them differently. That is making some type of medical decision is it not?

TOOLEY: No, that is following the instructions of protocol. EMT's are strictly governed by what's called protocols. By law, they cannot function except under the direct orders of a physician. Those direct orders come in two forms...

ABBOTT: Then why would their acts not be ministerial according to your argument?

TOOLEY: Because there is some discretion involved. For example: If I put a band-aid on a kid at a camp out, I 've got to exercise some discretion as to where I put the band-aid, how I put it on. But that's not an exercise of independent medical judgment. That's not the practice of medicine under the statute. EMT's are trained to observe symptoms, communicate those symptoms to physicians, and follow what the physicians tell them, either on the radio or in their written protocols.

ABBOTT: Tell me how nurses practice medicine?

TOOLEY: Nurses are allowed under the statutes, and we have this in our brief, to delegate certain tasks in their judgment. They are allowed to develop plans of care. They are allowed to make nursing assessments. Nurses are allowed to make diagnosis. Nurses are specifically charged to alter or adjust the care plan of a patient if they detect something is wrong. Paramedics have none of that discretion. Paramedics cannot delegate anything. Paramedics are specifically precluded by statute from the exercise of independent medical judgment or from the exercise of independent medical discretion. And it is that very type of discretion that Kassen is aimed.

Kassen properly and followed the majority of the jurisdictions around the country when it said, "We will not grant qualified immunity to a situation that involves the exercise of medical discretion." The majority follows that. The majority of the country however also does not engage in that 4<sup>th</sup> level of analysis when the qualified immunity of a paramedic is at issue. In recognition of the fact that paramedics are precluded by law, precluded by the doctors' orders, precluded by their own training from engaging in the very type of discretion, of independent judgment to which Kassen is intended to apply.

The discussion of Kassen talks about medical professionals. However, they also more narrowly talk about medical professionals, health care providers, and doctors and nurses. Kassen discusses the discretion, the duty of care that's imposed upon a medical professional. EMTs and paramedics by law cannot do that. They are not licensed health care professionals under the statute. They cannot exercise that kind of judgment. The regulations in administrative code allow a physician to delegate administrative, technical or clinical tasks which do not involve the exercise of independent medical judgment. Those very words are in the Dept. of Health Regulations and they appear over and over again.

Nurses do perform patient assessment, and this is found in 22 Administrative Code, §217.10. In it's in our brief. They perform patient assessments, they make diagnosis, they develop a plan of care, they evaluate a patient's response to care, and they clarify any order or treatment regiment that the nurse has reason to believe is inaccurate, not efficient, or contraindicated. Nurse may also delegate certain tasks if appropriate in the nurse's judgment. That's found in 22 Admin. Code, §218. Paramedics and EMTs have no such authority. EMTs are basically the recipients of first aid training, they are trained to observe symptoms, report those to a doctor, follow the doctor's instructions. Sometimes the instructions come in the form of a checklist. An EMT has a book with him. If he sees a certain symptom, he follows the directions in that book - strictly. He cannot

deviate from that book absent a physician telling him that. The Administrative Rigs, the Medical Practices Act and their training make that entirely clear.

ENOCH: An EMT is trained to stabilize the injured party before treatment begins. They do exercise some medical judgment depending on the scene and the injuries that exist at the time, and they have the authority to stabilize the condition, and the stabilization is really within their judgment, based on their training when they come upon it, and if they are overwhelmed, if there are two there at a scene, but there are 3 people in life threatening conditions, they have the authority to gather some volunteers to assist. So they do have some authority to do that. The emergency people on the ground at the scene function not too differently than emergency personnel at a hospital who receive a body that's in...

TOONEY: The difference is the emergency people in a hospital are in a hospital. They are not out on the side of the street. They are licensed health care...

ENOCH: They could be in a government hospital just like they can be in a government vehicle.

TOONEY: And EMT's do stabilize people. But they do it strictly following the doctor's orders. They don't have the discretion to deviate from those protocols.

HECHT: Do you know if there are other emergency people like police officers or firemen who do the same thing, the same sort of first aid thing that an EMT might do if an EMT is not available?

TOONEY: And EMTs that's all they are - are firemen who have some medical training, who have the EMT certificate. Just like police officers a lot of those are EMT qualified.

HECHT: Do you know if it's common for police officers to act in that same way if there is not an EMT available, or is it not?

TOONEY: I do know that as a matter of fact from personal experience. A police officer arrives on the scene, part of his scope of employment is to give medical aid. That's part of the public safety function. And it gets into the public policy argument we have for why Kassen should stop at the hospital door. This DPS officer back there, she went through basic training. As I recall they get some first aid training. I think the state may give them some CPR. Part of her duties is providing public safety.

OWEN: Does the private sector supply any EMT services? Can you look to the private sector?

TOONEY: In the same manner as some jails contract with private people to provide jailers, some cities contract with private entities to provide EMTs under the auspices of the local government, generally a county. However, public safety emergency medical services, that is a government function. There is not a pride of counterpart like there are private doctors, private hospitals who are

private counterparts to the public aspect. There are no private EMTs. There are private companies who contract with government agencies to provide that service. But there is no purely private EMTs in existence that I am aware of unless it's somebody working in a plant or something like that.

ENOCH: But historically, wasn't there originally private organizations that tried to provide ambulance emergency services?

TOONEY: Historically, ambulance services in Texas were provided by funeral homes, and those were provided under contract with county government.

ENOCH: Over time municipalities, counties took over this emergency service if private entities couldn't afford it or whatever to go over the emergency service, and it just so happens in the historical context that they move these services within other emergency services like the fire department. So just by happenstance firemen now are the EMTs.

TOONEY: I don't agree. Emergency medical services initially were simply guys working for a funeral home. Because they happened to have an ambulance they would respond to ambulance calls. But they did it under contract with the county. The county reimbursed them for that. They didn't do it on their own. They didn't charge privately for that service. That was still a public service. That ultimately evolved into the provision of more sophisticated, more effective emergency service as opposed to originally it was just a taxi service. You go pick somebody up and take them to the hospital when they call for help. They recognize we have police officers, we have firefighters out there who already have medical training, who if Kassen is to be extended to paramedics, it will also be extended to the police officer who stops and tries to help somebody. It would extend to this DPS officer if one of us falls out in here and she has to give CPR, I submit she would lose her qualified immunity if Kassen applies to a paramedic.

HECHT: Which did happen once actually.

TOONEY: Historically, the public safety and the provision of emergency medical services has been an exclusively governmental function. It has evolved into being provided by police and firemen. DFW airport for example, all of their police officers are cross-trained as firemen, cross-trained as EMTs. So that's part of their job. Their police officers are also charged with the responsibility for all aspects of public safety including emergency medical care. However, they are specifically by statute and by law prohibited from exercising independent medical judgment, which license health care professionals exercise, and that's the type of judgment to which Kassen applies.

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RESPONDENT

LAWYER: When Ms. Innes called 911, she didn't know whether or not a private ambulance service was going to come or whether the City of Farmers Branch was going to provide an

ambulance service. She didn't know whether or not the City of Farmers Branch may have had a contract with some private ambulance service to provide 911 EMT services. What she did was call 911, and the petitioners in this case came to her house.

Now Ms. Innes shouldn't be placed in a position of an individual who can remain uncompensated simply because it was the petitioners in this case who arrived at the scene of the accident, and not a private ambulance service who arrived at the scene of the accident. If it was a private ambulance service then she could have picked up the yellow pages and flicked through ambulances and there's a whole list in the Dallas yellow pages of private ambulance services who provide EMT services, and if she had called one of those services, they would have had a standard of care. And that standard of care should be no different than the standard of care that should be applied to the petitioners in this case. They shouldn't be treated any differently than a private ambulance service would be treated if they were rendering EMT services to an individual. That's the exact rationale that the court held in Kassen, and the majority of this court held in Kassen when looking to determine whether or not this governmental versus medical discretion of care should be applied in that particular case. And throughout the Kassen opinion, the court referenced government employed medical personnel. There was no distinction based on the type of independent medical judgment that the petitioners refer to in this case or whether or not the medical personnel had some type of a license by the State to provide certain types of medical services.

OWEN: Do we draw the line at ambulance drivers? What do we do about firemen who arrive at the scene with their hats and coats on to fight a fire and render emergency medical aid on the scene of the fire? What duty do they have? What governs them?

LAWYER: I think that as long as the firemen have a responsibility to perform some type of emergency services, and there's a major distinction between the type of emergency services such as CPR that may be rendered by a fireman, and the emergency services that are rendered by an EMT paramedic. EMT paramedics are licensed to engage in more extensive...

OWEN: What if this guy is an EMT paramedic and he's a fireman?

LAWYER: Well I think the firemen who is there, in this particular case these were paramedics who came to the scene to render first aid. They also happened to work for the fire department. If these individuals are trained as EMT paramedics, and that is what they do, they are medical professionals who have been hired by the City of Farmers Branch to provide sophisticated emergency medical treatment to individuals who are injured at the scene of an accident.

HECHT: The question is what standard would apply if they weren't? What's the answer to that question?

LAWYER: Well I think if they are licensed and if they are performing medical services...

HECHT: Listen to me. The question is, if they are not EMTs, if they are just firemen or police officers, what standard would apply to them if they were rendering similar kind of first aid?

LAWYER: The same standard because they are rendering medical aid. They are performing services which require medical discretion. And if firemen are going to engage in those types of practices, they need to do it with the same standard of care that anyone else is. But if the fire department is not going to train its personnel to perform those kinds of services, then they shouldn't perform them. But if they are being trained to perform them and they are going to the scene of an accident and performing them, they shouldn't be allowed to kill people because they didn't do it right.

OWEN: So I guess we ought to adopt a policy that...what you're asking, I think, is to say that public policy doesn't train ambulance drivers. If they are going to provide that service they just be a taxi. And you're giving a disincentive to provide emergency care at the scene of the emergency if I understand what you're saying?

LAWYER: No, I don't think it's a disincentive. The public pays for and in fact they are billed for emergency medical services. If the government is going to provide those services, just at it provides many other services like public hospitals where we have doctors and nurses, and if we're licensing doctors and nurses to perform those services, the same rationale would apply. Well then maybe people just shouldn't perform services in a hospital or other services because they might be exposed to liability. But I don't think we can look at it from that analysis. We need to look at it from the analysis that this is a service, the government pays paramedics, the public pays for them, and in fact they are billed for the services after the services are rendered. They are licensed by the state to provide emergency medical services, and in fact, EMT paramedics is the highest level of paramedics governed and licensed by the state.

OWEN: Why shouldn't we apply the same rationale to a firemen who goes and fights a fire? We are billed for it one way or another. What if they are negligent in putting out the fire and our property is destroyed. Why shouldn't we apply that same rationale because the governments supply it and we are paying for it?

LAWYER: The principle of official immunity and the whole theory of official immunity is to protect government officials who are performing certain types of governmental functions. In the case of medical service providers, I think there is a special relationship once that particular paramedic or doctor or nurse or psychiatrist has a special relationship with a patient as opposed to a building that they are putting out, that special relationship requires some standard of care. And we cannot provide that if you engage in this special relationship, if you provide services, if you are performing what you've been hired to do and what you've been trained to do, you are rendering services to a specific person. You are trying to help that particular person and just as a doctor has a standard of care and a nurse has a standard of care when they are providing treatment to individual patients, that should be no different than any other medical care provider providing individual specialized services to a

particular patient. And the whole theory of governmental immunity simply does not provide and the majority of states in fact have recognized that there is this distinction between the implementation of public policies and the carrying out...

OWEN: How do the majority of states treat EMT providers?

LAWYER: Well in fact, the only state which is Michigan, which the petitioners cite you in their brief, and which this court rejected the Michigan approach in the Kassen case, which held no distinction between medical and governmental discretion. However, the majority of states have held that with respect to medical discretion...

OWEN: No, I am asking specifically on emergency paramedics.

LAWYER: There are very few cases which have decided the issue with respect to paramedics. And in those cases, and in fact, I don't know of any other than in Michigan, and there are some other states which have adopted statutes which protect paramedics under certain circumstances and some of those are the cases that the petitioners cited are distinguishable. Because the legislature exacted in those states and decided to limit the exposure of paramedics. Well the legislature in this state hasn't done that and that is something that this court should leave to the legislature to do. However, taking into consideration the common law official immunity, and excluding those cases in which the courts have looked at some type of a legislative enactment to limit the liability of paramedics, when looking at why we have official immunity, the reasons that we have official immunity are not there to protect paramedics and other medical care providers who are providing medical services and engaging in medical discretion.

OWEN: Are there any cases that hold your way?

LAWYER: Yes, there are. And in fact many of the cases that were cited by this court in Kassen in adopting that the standard we applied in kassen many of those cases were cited in the Kassen case.

OWEN: But that didn't deal with paramedics specifically did it?

LAWYER: They did not deal with...

OWEN: That's my question: Are there any case law around the country that deal with paramedics and what do they say one way or the other?

LAWYER: Yes, there is a case in Florida. In that particular case, prior to that the SC of Florida has adopted a characterization of different types of governmental acts, and in those 4 categories of governmental acts the State of Florida has characterized the rendition of professional and medical services provide for the health and the safety of the public into a category 4. And following that 4,

the CA in Florida held that paramedics fell into that category 4, because they were rendering medical aid for the health and welfare of the public. And in that particular, the court held that paramedics are not immuned.

Now the Florida court has done something differently than this court has done, because it has characterized different acts of governmental activity and determine whether or not immunity would apply depending on which category the particular act fell in.

But there are no cases other than the case in Michigan, which dealt specifically with paramedics in which there was not an official immunity statute which specifically held that paramedics were not engaging in some type of medical discretion. And this court specifically rejected the Michigan approach in Kassen in determining that the courts need to look at the governmental verses medical discretion test.

PHILLIPS: Do you concede that this court has jurisdiction in this case...

LAWYER: No, I don't believe this court has jurisdiction because I think the CA specifically followed this court's holding in Kassen, and therefore, the court has no jurisdiction in this case.

HECHT: In your view, do you think actions of EMTs for which they would have immunity, such as for example: in your case, if the EMTs had decided to take a person to a hospital within the city, such as Stedman Hospital rather than perhaps a close hospital such as Medical City because it was city policy to take them to a hospital within the city if possible, would there be immunity for that?

LAWYER: Yes, I think so, and I think the distinction in that particular case like in the Casis v. Gillen case was that the claims of negligence were not in the actual performance of the paramedic's rendition of medical treatment, but was in the decision by the paramedics not to take the plaintiff in that particular case to the closest hospital. Where the evidence in that case showed that the reason that the paramedics didn't take the patient to the closest hospital is because there weren't enough beds. And the fact that there weren't enough beds was based on the lack of funds and that was certainly a governmental function. In this particular case, however, there is no evidence whatsoever, and there was no evidence before the TC, that any particular governmental function colored any of the decisions made by the petitioners in this case, which we claim were negligent. In fact, all of the claimed acts of negligence relate solely to the manner in which or the lack thereof that the petitioners in this case rendered medical aid to Mr. Innes. There was no evidence whatsoever that there was any governmental concern which had any role whatsoever in the defendant's decision not to do certain things that we claim they should have done.

I definitely agree that if governmental concerns did play some role and there was evidence that governmental concerns played a role in the decisions which we claim are negligent, then there may be immunity in that case. And I think that's the very circumstance that the majority

of this court recognized in Kassen and in those instances where there is a combination of governmental and medical concerns that the balancing test needs to be applied. And even in this particular case, even if we were to apply that particular balancing test, the balance would weigh in favor of the Innes' in this particular case.

HECHT: What about this circumstance: If a police officer was called to a scene and recognized that probably something medically should be done, but realizing that we had just written in Gross v. Innes that he might have liability for that, he decides maybe I better just wait, and during that waiting period something happens; would he have immunity for that decision or not?

LAWYER: I think in that particular situation we are dealing with a police officer. A police officer is not a government employed medical provider. If the police officer had some responsibility in that particular case and some training, and I don't know what the circumstances of the training of police officers and what particular cities require that those police officers do, but if for example that police officer was supposed to provide CPR, or some type of medical assistance, which the failure to provide that ended up killing someone, then I think in that particular scenario may call for a different result. But we need to look to as the court referenced in Kassen government employed medical personnel, which is exactly what the petitioners in this case were. They were government employed medical personnel. They were certified EMT paramedics. That was the only reason that they were at the Innes household that day is because they are paramedics and because they are medical care providers. And the only reason they were there is to provide proper medical treatment to Mr. Innes. And the claims in this case allege that due to those paramedics' failure to provide the appropriate medical treatment, Mr. Innes died. And public policy should not allow the Innes family to go uncompensated merely because the petitioners in this case happen to work for the City of Farmers Branch.

The City of Farmers Branch in one of the public policy arguments raised by the petitioners in this case is that these paramedics should not be individually responsible for their negligent acts. The fact remains that under the City Charter of the City of Farmers Branch, the city was required to purchase liability insurance for these paramedics, and in fact, did purchase liability insurance for these particular paramedics. And so, they are not to the extent that there is liability insurance coverage individually responsible for these acts. And in fact, regardless of how this court holds, the City is still going to need to maintain liability insurance for these paramedics to cover them in certain circumstances where they still might be liable.

There is not going to be this stream of lawsuits. In fact, if we look at the number of lawsuits over the last 10 years that have been filed against paramedics in the State of Texas, you can probably count it on one hand. It just is not something that is going to affect the rendition of medical services. Paramedics should operate no differently if they were exposed to liability than if they weren't exposed to liability for the same reason that no medical care provider should act any differently depending on whether or not they may or may not be liable. In fact, the threat of liability may encourage them to provide better service. And for those reasons, we believe that the court

should affirm the TC's ruling and should find in this particular case that under Kassen that these paramedics were medical care providers and they should not be immuned from liability in this particular instance.

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#### REBUTTAL

TOONEY: EMTs and paramedics are firefighters. They get in this case \$150,000 to ride that ambulance instead of ride that fire truck. Many of the firefighters on the fire truck are EMT qualified. They want that extra money. If these men are exposed to med mal cases for doing their job on the side of the road, they are going to say, "Thanks but no thanks, I will get back on the ladder truck."

If I may redress a couple of decades. Do we really want, and police officers and firefighters all receive medical training under the State required training to get their basic, do we really want...

ABBOTT: For practical purposes is that true? In other words, if they think well if I get sued there's insurance to cover me so I don't have to worry about it. Are they all going to be running from serving as EMTs? The second part of the question, we all know that doctors and nurses are liable, we don't see them running for the exists because of the fact that they can be held liable for treating patients. So what's your response to these two questions?

LAWYER: Paramedics I think are covered by insurance. Some are, some aren't. There's no duty necessarily absent an individual city to cover. There's no duty by a city to provide EMS services. No duty to provide a fire department.

ABBOTT: Let's look at this case in particular. In this case, the paramedics are covered by insurance. With that in mind, does your argument still have any validity that if we were to rule against paramedics in this case, they are going to be running to go back and jump on the fire truck?

LAWYER: I think so. These guys don't like to go through this. Nobody likes to go through this. Nobody likes to put forth their best efforts to save people, and go through the disappointment which is going to happen when you've had somebody die in your arms. This happens to these guys in the field. And then on top of that to be dragged through a lawsuit. They don't want to go through that. I wouldn't want to go through that. I didn't want to go through that. Do we want our police officers who've had medical training when they come on an accident scene to be subject to medical malpractice actions.

ABBOTT: Applying the language of Kassen though shouldn't police officers who provide medical training be carved out because as Kassen says, We hold that governmental employee medical personnel are not immuned from liability. And I don't consider a police officer to be a

government employee medical personnel person.

LAWYER: I don't consider a police officer to be a medical personnel. I don't consider firefighter to be a medical personnel. I don't consider a firefighter who happens to be assigned to an ambulance who is restricted under the statutes from exercising medical judgment to be a medical personnel as that term is used in Kassen. Medical personnel was the broadest phrase, the broadest term used in Kassen. Kassen also used health care providers. Kassen also discussed the doctor and nurse that was before the court in that case. Kassen talked about these people in terms of the independent judgment, the independent discretion that they exercised. These people in terms of doctors and nurses can go to the private sector and make a lot of money, a lot more than any \$150 per month these guys make. A lot of people don't make that much.

ENOCH: You're not really arguing that these EMTs are not particular any better at providing medical services than just a fireman responding to a fire, that's not your argument is it?

TOONEY: They are trained to provide specific medical services at the direction of a doctor to do specific physical tasks. Basically band aids and drugs.

ENOCH: Let's talk about drugs. And you're not arguing that what they do sometimes is pretty sophisticated medical service?

TOONEY: Compared to my ability to do it, yes sir, it is. Compared to a doctor and nurse, no it's not.

ENOCH: It is really sophisticated to what a policeman responding to a traffic accident could do on the scene?

TOONEY: That depends on whether the policeman is EMT qualified.

ENOCH: Let's assume that the policeman is an EMT. He's not in one of those big trucks.

TOONEY: He doesn't have the equipment these guys have. Probably.

ENOCH: These guys were hired to man these trucks, to respond to emergency proceedings with the knowledge going there, that they may be called upon to provide pretty sophisticated medical services?

TOONEY: At the direction of a physician.

ENOCH: Why couldn't a line be drawn between personnel who are hired to man this kind of service, even though they are employed by the fire department, why couldn't that be an accurate line to draw for medical personnel hired to provide medical services as opposed to a fireman who shows

up on a scene and incidentally provides medical service, or a policeman who shows on the scene and incidentally provides medical services?

TOONEY: If I'm a fireman, and I show up on a scene where there's an ambulance and two of my other firefighters who are paramedics on the ambulance, I have EMT qualifications, I can jump in and help out, I don't know how that line affects that. If I am a policeman, and I have my EMT certificate, and there's a lot of them out there, and I am on the scene of a catastrophe, there's a lot of people hurt, you've got 2 paramedics and 6 hurt people laying on the ground, I'm going to pitch in there and help. I have had the training to operate their equipment. That line doesn't exclude me. If I am a baliff in a courtroom and I have had CPR training as a part of my duties, and I jump in and give CPR to one of us who falls out here, that's pretty sophisticated in my mind. I don't know where you draw the line. Once you go beyond that hospital door, I don't know where you draw the line. I think logically it's almost got to be there. And other states have recognized this: Delaware, Michigan, Georgia, Illinois, Tennessee, California, that's in our brief, it's in the International Association of Firefighters amicus brief before the court. They have discussed and I have discussed I think very thoroughly states which apply this 4<sup>th</sup> analysis, apply it to doctors, psychiatrists, licensed medical people.