

OUTDOOR LAW: BASIC RISK MANAGEMENT CONCEPTS FOR OUTDOOR PROGRAMS

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Outdoor programs tend to take safety issues seriously and perhaps for this reason usually have low loss experiences. Yet sound risk management requires more than an attitude. It comes from an understanding of the concepts and acting on that understanding.

I. Liability Issues

Liability can arise from marketing representations that lead to detrimental reliance or contract promises or from the manufacture and sale of defective products, but for most providers or sponsors of outdoor programs liability comes from general negligence or premises liability.

A. General Negligence

A claim for negligence requires proof that the defendant (1) owed a duty to the plaintiff, (2) breached that duty and, (3) as a result, (4) plaintiff suffered damages. The initial focus is on whether the sponsor of an outdoor program owed a duty.

A person or entity that is in the business of sponsoring outdoor activities owes a duty of care to its customers but is not always liable for injuries that occur in the course of a program. An important limitation on liability comes from the doctrine of “assumption of risk” or “inherent risk.” In most, if not all, states there is no duty to protect a person from a risk which is inherent in the sport or recreational activity or any liability for injuries resulting from such risks. A risk is “inherent” if it is integral to the

¹ This article describes general legal concepts. The law in a particular state may vary from what is described here. The author serves as counsel for Wilderness Medical Associates, but all views are his only.

activity itself. There is an inherent risk of falling when one engages in rock climbing, a risk of being discharged into turbulent water when whitewater rafting, a risk of being thrown from a horse at a dude ranch or from a bicycle because of a rut in the ground on a bicycle tour, etc. Another form of the inherent risk doctrine relates to injuries caused by co-participants. Co-participants are generally liable only if their conduct is intentional or recklessly outside of the range of conduct inherent in the activity. Again, a risk is inherent if the purpose and enjoyment of a sport or recreational activity would be essentially altered, diminished or frustrated if “inherent risks” were eliminated. Another way to look at the issue, although not accepted in all states, is to say that a person who voluntarily engages in a sport or recreational activity is presumed to understand the normal and obvious risks inherent in the activity and to have assumed responsibility for resulting injuries. Some states require that the plaintiff have subjective knowledge of “inherent risks” while others presume knowledge of such risks.

In many states, there is legislation limiting liability for injuries from certain kinds of activities, such as for skiing. For example, in Maine the Skiers’ and Tramway Passengers Responsibility Act, 32 M.R.S.A. §15217, et seq., requires skiers to assume the “risks inherent in the sport” as defined by the statute, including “weather conditions; existing and changing snow conditions, ...surface or subsurface conditions, such as dirt, grass, bare spots,...and collisions with or falls resulting from ... natural objects; lift towers, lights, signs, etc.

The doctrine of “inherent risks” does not mean that a provider of outdoor programs can ignore inherent risks. In fact it is always difficult to draw the line between where inherent risk ends and a duty of care begins. In reality the line may vary case by

case based on how compelling the facts are. Certainly, a provider of outdoor programs will be held responsible for unreasonably enlarging inherent risks and will have a duty to anticipate and act reasonably to prevent harm from risks that can be addressed without taking away the essence of the activity. To use whitewater rafting as an example, there would be liability for failure to require trippers to wear life preservers or to overload a boat when injury results. And it is clearly prudent and basic to risk management to inform and caution participants of inherent risks before they are undertaken.

Subject to the foregoing, a sponsor or provider of an outdoor program, by the act of soliciting or encouraging participation, assumes a duty of exercising reasonable care to prevent foreseeable injuries to those who do participate. This is an objective standard, comparing the defendant's conduct against the hypothetical, reasonably prudent person. At trial proof of the standard of care usually requires expert testimony to explain industry.

What specifically are these duties? It is hard to give an exhaustive list. A duty can be found in almost any aspect of the planning and carrying out of an outdoor activity if failure to exercise reasonable care results in foreseeable injury to participants. However, some of the recurring duties found in reported cases can be isolated; here are nine to consider..

(i) There is a duty to exercise reasonable care in the staffing of a program, including the hiring, training and supervision of staff. To comply with the duty of care in hiring questions must be asked and inquiries made. The duty would be breached if a trip leader who was hired for a youth program turned out to be a convicted child molester, to use an extreme example. A trip leader must be qualified to lead, with reasonable

experience, skill and judgment, but does not have to be certified by the National Outdoor Leadership School (NOLS), or by Wilderness Medical Associates (WMA) to respond to wilderness injuries. Good risk managers certainly will seek to hire and train staff certified by national programs to the extent that such persons are available and that budgets allow. For example, if your program is leading a youth group on a wilderness expedition, where participants will be hours away from medical centers, it certainly makes good sense to have a leader certified at least as a WMA first responder or the equivalent from other wilderness medical training programs and, where this is not done, at least inform participants and their parents (if minors are involved) that there is no such trained personnel involved.

(ii) There can be a duty to provide reasonable care in screening participants and providing equipment reasonably necessary for the safe conduct of an outdoor activity. One hears the statement that medical screening should be avoided because knowledge of medical conditions of participants only increases the responsibility of the program staff. This is bad advice. If someone who is about to participate in an outdoor activity has a medical condition, including psychological disorders, that presents a greater risk of safety for that person (or to other participants) because of the condition, such as a heart condition, asthma, significant allergies, a bipolar disorder, or the like, the program provider needs to know this in advance so as to seek, where appropriate, a doctor's assurance that the participant can safely participate and has possession and knowledge of use of necessary medications, or to be sure that the program staff is prepared to deal with special needs, failing which the person may have to be refused participation (subject to American With Disabilities Act issues).

(iii) A sponsor or provider of an outdoor activity has a duty to develop an emergency response plan for medical emergencies occurring in the field.² The author is not aware any requirement that CPR be administered if staff is not trained in the technique, or that an automatic external defibrillators be purchased and available for trained use on trips or that epi pens be carried by trip leaders. Lay persons have has a duty to respond to emergencies to the best of their ability with available resources; if a leader is professionally trained, say as an EMT, that person has a duty to use their professional EMT skills in responding to an emergency.

(iv) There is a duty to inform participants of the nature of the outdoor program offered and warn about the risks associated with participation. This allows participants to make an informed decision about then outdoor activity and assess their ability to do so safely. (v) There is a duty to explain safety rules for the program and to provide the necessary equipment to avoid or minimize injury. (vi) There is a duty to provide reasonably safe transportation if the program assumes the responsibility of transportation. (viii) There is a duty to exercise reasonable care in supervising the outdoor activity. The extent of the duty depends on the circumstances. When dealing with minors the staff ratio would obviously be greater than with adults. (ix) There is a duty to exercise reasonable care in planning the itinerary and level of risk of a program activity. Fulfilling this duty exercising basic risk management requires planning by skilled personnel as well as pre-event communication with participants, especially if minors are involved.

If a participant in an outdoor program is injured, chances are that these duties will be examined to see if any contributed to the injury, and if so, liability may well be

² For a more detailed discussion of this subject, see the author's article, "Outdoor Law: Is There a Duty to Provide Wilderness First Aid ?" found at www.brownburkelaw.com.

asserted. Risk management is the process of identifying these duties, documenting how they are being addressed and monitoring how they are being complied with.

B. Premises Liability

The owner or lessee of land or a person having control of premises through permission or a license has a responsibility for those who enter on the property that is defined by the status of the person. The highest duty is owed to persons who are invited on the premises as a social guest or as a business invitee, such as a paying customer. The person who occupies premises owes invitees a duty of providing reasonably safe premises for their use and to warn against foreseeable hazardous conditions. Many states do not distinguish between a duty to an invitee and a licensee who is permitted to come on premises for their own interest, convenience or gratification. However, most states provide that a lower duty is owed to a trespasser. A land occupier only owes a duty to refrain from wantonly or willfully injuring a trespasser.

There are special rules for minors. An occupier of premises owes a duty to children, who are invitees in their own right or when accompanying a parent who is an invitee, to make the premises safe from reasonably foreseeable misuse of the premises by children in light of their known or reasonably foreseeable propensities. There are special rules for trespassing children. The *Restatement of the Law of Torts (Second)* §339 states that a possessor of premises incurs liability to trespassing children for artificial conditions on the land if the place where the condition exists is reasonably known to be a place where children are likely to trespass, the condition is reasonably known to involve an unreasonable risk to children, the children do not appreciate the risk because of their

youth, the utility of maintaining the condition and the burden of eliminating the risk is slight and the possessor fails to exercise reasonable care to eliminate the danger.

Note that there may be dual duties, one owed by the owner of property and the other by a person using the property under a lease or other permission from the owner. The landowner owes a duty to the person who occupies the property and the person who occupies the premises owes a duty to business patrons. Prudent landowners in these circumstances will require the tenant or licensee to indemnify the landowner for any liability arising out of the use of the property by program participants.

Many states have special legislation protecting landowners from liability when for property to be used for recreational purposes. Typically the owner of land used for such purposes are given immunity for claims that the premises were unsafe for entry and use or for failing to warn of hazardous conditions. Such immunity statutes would usually do immunize landowners from claims of willful or malicious failure to guard or warn and may not apply to persons who pay for the use of property.

C. Americans with Disability Act of 1990, 42 U.S.C. Sec. 12101, et seq. (the “ADA”).

Title III of the ADA prohibits discrimination against those with disabilities from full and equal enjoyment of any “place of public accommodation”, which includes a physical place of exercise or recreation. If applicable, the ADA requires programs to be conducted at a place and in a manner that is accessible to persons with disabilities.

Reasonable accommodations must be made to facilitate persons with disabilities, which may require physical or programmatic modifications. Program modifications will not be required if they would fundamentally alter the nature of the program. In the case of PGA Tour v. Casey Martin, 532 U.S. 661 (2001), the Supreme Court held that the PGA Tour

was required to modify its professional tournament rules to allow a disabled golfer to use a golf cart as an exception to the walking requirements applicable to the tournaments.

ADA responsibilities of an outdoor program are complicated and beyond the scope of this article. The key point to remember about the ADA is that a person with a disability should never be excluded from a program without an individual assessment of whether the person can be accommodated to allow equal participation. If, after an individual assessment, the sponsor of an outdoor program concludes that physical or programmatic barriers prevent participation by a person with disability, the program manager should consult with legal counsel to be sure that the ADA will not be violated by exclusion of the person from the program.

D. Who is Liable?

The person who actually engages in negligent conduct is personally liable for his or her negligence even if acting fully within the scope of employment. The organization that employs the person responsible for causing harm to another in the course of employment is also liable under the agency doctrine of *respondeat superior* so long as the wrongful conduct took place while the person was on the job, not off duty or on a “frolic or detour” from employment. Some providers may seek to limit their liability by hiring “independent contractors” to conduct the outdoor activity instead of employees so that the latter’s negligence does not flow up to provider. However, a person’s status as an independent contractor and not an employee may be challenged by an injured party if the provider exercises too much control over the contractor. Also, the provider could be liable for negligently contracting with a negligent contractor.

A person who supervises an employee who engages in negligent conduct can be liable if the conduct could have been prevented by proper supervision. Members of the board of directors can be liable if they adopt or permit policies for the operation of an outdoor program that could foreseeably lead to harm by a participant.

E. To Whom?

In addition to the injured party, a spouse of an injured party also has a claim for loss of consortium resulting from injury, meaning the loss of love, comfort, companionship and the physical relationship of a marriage. A similar claim can be made by a parent because of the injury to a child. These claims may not be extinguished by a release signed by the injured party. So, if as discussed below, a person signs a release of liability for injuries during an outdoor activity, that release will not be binding on the spouse or the parent of the injured party unless they also execute a release.

F. For What?

If there is negligence, the person or entity responsible must pay for medical treatment for physical injuries, psychological treatment for mental injuries, loss of wages, pain and suffering, loss of enjoyment of life, and loss of consortium for spouses and the equivalent for parents of injured persons. For intentional injuries or wantonly reckless conduct, punitive damages may be assessed.

II. Risk Management

Good risk management for outdoor programs can minimize exposure to these liability issues. A risk management program can be broken down into the following four categories:

A. Choosing the Organization

First, any outdoor program should be conducted through an organization. There are three models to examine.

One is a for-profit, limited liability entity, usually a corporation or a limited liability company. Operating through such an entity will protect the owners/organizers from personal exposure from the negligence of others. The person who acts or fails to act in a way that creates liability cannot escape liability for his or her personal conduct just because they are acting as an employee for an organization, but otherwise the liability is limited to the assets of the entity.

A second, preferable choice of an entity is a non-profit and more specifically a charitable organization that qualifies for tax exemption from taxation under Section 501(c) (3) of the Internal Revenue Code. In many states, including Maine, see 14 M.R.S.A. §158-A, case law and legislation create an immunity for a charitable organizations and for a directors, officers or volunteers of a charitable organization, including organizations that are listed although not exempt from taxation under Section 501(c)(3). The immunity is from claims of negligence occurring within the course and scope of the organization's activities. In Maine, for the immunity to apply, the director, officer or volunteer may not be compensated and the exemption is removed to the extent of insurance coverage maintained by a charitable organization. In addition to state law, the federal Volunteer Protection Act of 1997, 42 U.S.C. § 14501, et seq., grants protection to volunteers of a nonprofit organization or governmental body, with some exceptions, regardless of what state law protects.

For youth outing clubs, the best organization to work from may be a school. If the club is recognized as a school activity and the organizers and trip leaders are teachers

acting within the scope of their employment, then the club should be able to benefit from the limited liability (sovereign immunity for discretionary acts) of the school as a governmental entity. Parent volunteers would be able to get the protection of the Volunteer Protection Act of 1997.

The benefit of the non-profit or governmental entity is that the person whose conduct gives rise to an injury may benefit from the immunity if acting within the scope of their duties, unlike the person in a similar position in a for-profit entity.

B. Some Basics for the Organization

Second, good risk management requires a culture of safety and effective communication within the organization. This must come from the top and be actively promoted at all levels of the organization. Therefore communication of this culture must be effective, not just for employees but in how employees communicate with participants. Safety issues should be addressed in internal policies and procedures, in program materials, in mailings to participants or their parents and in conjunction with each activity. People don't sue others who they like and believe are trying to be careful. If a participant in an outdoor program is aware from the outset that the organization sincerely cares about the safety and the well being of each participant and believes that an injury that took place occurred notwithstanding all efforts of the trip leaders to do their best, then chances are that person will not sue.

The organization should assign the task of risk management to a person within the organization whose responsibility should be to monitor risk management practices and periodically arrange for a professional risk management audit from someone outside the organization.

Another basic risk management tool is to maintain protocols for staff responses to injuries. Obviously the first priority must be to assist the injured party to obtain proper treatment. Beyond this, a record should be made of what happened, the conditions under which it happened and the persons who witnessed what happened. The record should be developed by interviewing those with knowledge as soon as possible, taking notes that are later organized into a report. This report should be forwarded to management for immediate transmittal to legal counsel for the organization. If it is made clear from the outset in training that these reports are being prepared at the request of counsel, they may be protected by the work product and/or attorney client privilege from disclosure to the injured party if suit is brought. If there is going to be litigation over the injury, it is critical for the organization's attorney and insurance company have accurate and detailed records of all facts relating to the accident.

Trip leaders and others in charge of an outdoor program should be trained to refrain from making judgments about an accident, either in an accident report or in talking with an injured party or others. Those on the scene are often too close to the situation to make the right assessment. There may be an exaggerated sense of *mea culpa* that may not be justified under the circumstances, but if expressed may have a disastrous impact on subsequent litigation. Keep to the facts; let others make judgment later as necessary.

C. Releases or Participation Agreements

The third risk management tool is the release, sometimes also referred to as a "participation agreement" or an "indemnity agreement." These are common and commonly misunderstood. Contrary to common lore, these agreements, while carefully

screened by the courts for overreaching, are effective and are enforced in most states if properly drafted. There are those that find these agreements, especially those parts of the agreement that release an organization from liability for the negligence of its employees, as offensive. There is some justification for this view, depending on how the agreements are used. Most organizations will take responsibility for injuries that they cause but will use the agreements to protect themselves from time consuming and costly lawsuits that are not the result of negligence. Given the extent and cost of frivolous litigation, this form of protection is justifiable and prudent.

A good agreement will cover three subjects, in the following order:

First the agreement will describe in some detail the “inherent risks” of the activity about to be undertaken together with a statement that the participant voluntarily chooses to participate in these activities and voluntarily assumes the risk of injury from them. This transforms the doctrine of “inherent risk” described above into a contractual undertaking that most states will enforce. The key to the effectiveness of this phase of the agreement is a proper description of the inherent risks. This also serves the function of educating participants about the nature of the activity to be engaged in and can be used as a basis for a safety talk with participants at the outset of activity. Also, consider adding a representation that the signor is physically capable of participating in the activity and his or her medical care provider has approved participation.

Second the agreement releases in advance the sponsor or provider of the program and all of its officers, directors, employees, etc from any liability for damages arising out of the program activities, including negligence. In Maine and in other states, the word “negligence” must be used here so that the signor is properly informed about the scope of

the release. Without specifically referring to negligence, the agreement will have little value. Courts will not enforce a release that goes further to release “gross negligence” or for intentional or wantonly reckless conduct because to do so would contravene public policy.

Third, and what makes these agreements so effective, is an agreement of the participant or other signor to indemnify and hold harmless the provider of the outdoor activity in the event of a suit for damages contrary to the person’s undertaking in the agreement, or for a suit brought on behalf of a spouse or child of the person signing the agreement. If covered in the indemnity clause, the agreement can require the person who signs the agreement to pay for a court judgment as well as the attorneys fees incurred in defense of a suit brought contrary to the agreement. These kinds of indemnities have been enforced , in Maine and in other States, when the injured party brings suit contrary to his agreement not to and certainly should give a person who has signed such an agreement pause before suing a provider of outdoor activities protected by the agreement. Enforcement of an indemnity against a parent for a minor’s claim of liability is much more problematic in terms of public policy.

If the participant is a minor, then the minor should sign the agreement and the minor’s parents should also sign, ideally both of them. Some states do not enforce releases for minors; some states do not enforce them unless both parents sign in addition to the minor. Obviously, the more signatures the better.

It may be prudent for a provider to have two sets of such agreements, one for membership in the organization, such as an outing club, and another for a specific event. The benefit of a two tier system is that the more general release can be relied upon as a

fall back if somehow the more specific release is not signed or there is some other problem with it. The benefit of the event release is that it can be more specifically tailored to the activity being undertaken and therefore more effective for purposes of assuming inherent risks. If the two tier system is used, care should be taken that an attorney compares them to be sure they are consistent.

A word on timing. It is a poor business practice, which could lead to invalidation of a release, if the subject is brought up for the first time at the beginning of the actual outdoor event, more so to the extent of the time and expense of showing up for the program. Last minute presentation of releases can put unfair pressure on the person to sign. These releases, or at a minimum disclosure that there will be a requirement for signing one, should be known in advance of the day of the activity so that the person making a decision about participating will be able to factor in the release.

Finally, an organization should have the agreement reviewed by an attorney and that attorney will want to review the organization's state law. If the organization's state law allows enforcement of these kinds of agreements, the attorney will want to insert a "choice of law" provision that identifies that state law as applying for purpose of reviewing and enforcing the agreement regardless of the site of the injury or the home state of the participant.

D. Insurance

The fourth and most important risk management tool is insurance. A good insurance policy makes up for a lot of sins in the risk management business.

The basic policy to obtain is a General Commercial Liability ("GCL") policy covering, inter alia, "bodily injuries" resulting from "occurrences." This is not as easy

as it sounds because many, if not most, insurance companies cover typical brick and mortar operations and do not take the time or have the interest or incentive to tailor a policy for the specific needs of an outdoor program. The process is complicated by the structure of the insurance industry, where the insured is usually limited to discussions with a broker, who then communicates with a wholesaler of insurance, who then communicates with the insurance company's underwriters. The opportunities for miscommunications and misunderstandings are legion in this process.

When a GCL policy is obtained, read it, or have someone with patience and the skill to do so review what is usually arcane and lengthy policy language. Be sure it covers what the program does. Some insurance companies will allow an insured to define what the covered organization does. Make sure premises liability is not limited to the physical location of the organization's headquarters. The smaller or more unique the program the more difficulty there will be finding an affordable policy that adequately covers the risks involved. Unfortunately, as a result, no insurance may be available or it may be too expensive to buy.

Guides, trip leaders, educators and others working in the outdoor industry and the entities that employ them should have professional liability (sometimes referred to as "errors and omissions") coverage. Typically, GCL policies will exclude coverage for bodily injury resulting from professional negligence. Premiums for these policies can be expensive to the extent that bodily injury is covered.

Other insurance products that should be considered are, obviously, automobile insurance, insurance for loss of a structure and personal property, insurance that will cover claims for sexual molestation (an increasingly common risk in outdoor programs),

employment practices coverage, officers and directors liability insurance, and workers compensation insurance. For a volunteer and others involved in a outdoor program, the availability of an umbrella policy should be explored. Umbrella coverage, usually up to \$1 million can be acquired as an extension to a basic homeowners or auto policy for an additional premium that is often modest. Yet the coverage is extremely broad, making it one of the least known great bargains in the field of insurance.

The key is to find a good agent who is willing to take the time to understand your business, can explain your product needs, and find an underwriter to issue a policy meeting those needs.

Finally, some organizations require participants to show proof of their health insurance as a condition to participation in an outdoor program. The obvious benefit of this requirement is that it may reduce the incentive of injured person from suing the organization when an accident occurs.

III. Conclusion

Accidents will happen and injured parties will sue and no amount of risk management will prevent either from occurring. However, organizations that see the value of risk management and actively integrate it into their operations will be safer and better at what they do.