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Parks and Recreation Liability Concepts

Introduction

Each year in the United States, there are at least five thousand litigations against public departments or other providers of recreational services.[1] With this in mind, this article will discuss some of the concepts of parks and recreation liability, especially malpractice liability and negligence. Keep in mind that this document is not a substitute for legal advice and does not represent a statement of law. It is merely an attempt to provide simplified descriptions and explanations of the legal exposures faced by those who provide recreational services.

Malpractice

One dictionary definition of *malpractice* is "Improper or unethical conduct by the holder of an official or professional position." These questions then arise: "Are recreationists (providers of recreational services) professionals?" and "Can they be guilty of malpractice?" In many jurisdictions, the answer to both questions is "Yes." Recreationists may be viewed as professionals, similar to doctors, lawyers, and teachers. That being the case, they are exposed to the possibility of being guilty of malpractice. As a result, recreationists may need to consider obtaining professional liability coverage.

Negligence

Malpractice not withstanding, the most common basis for lawsuits against recreationists, or the organizations for which they work, is *negligence*. Negligence is defined as "conduct that falls below that which would be expected of the *reasonably prudent person* under the circumstances". Because circumstances can be extremely varied, the definition of the "reasonably prudent person" is purposefully vague.

Proving Negligence

To prove a case for negligence, four conditions must be met. First, there must be *a duty owed*. That duty may be to act or not to act. For recreationists, the duty translates into the requirement to provide a standard of care. Recreationists are generally held to a higher standard of care than the average person. This standard of care is directly associated with the level of required supervision. For example, younger participants or older participants may require a higher degree of care. Likewise, the riskier the activity, the more critical is the required level of supervision.

The second condition for negligence is *the breach of the duty owed*. For providers of recreational services, this usually means exposing the participants to immoderate risk. Recreationists have a duty to prevent participant exposure to unnecessary or unreasonable risk. Anything less than providing optimum instruction and safe equipment and the risk level becomes unacceptable.

The third requirement for negligence is *proximate cause*. The breach of the duty owed must be the proximate cause of the injury suffered. Proximate cause is defined as "the existence of a natural or probable consequence which a reasonable person would expect to result from a given action or failure to act." From the recreationist's view point, it is the attendant development of a sequence of action between the recreationist's negligent behavior and the injury to the participant or spectator. Proximate cause is *not--emphatically not*--satisfied by the *"but for"* test that one may be tempted to apply.

For example, if an instructor had not implied that a certain section would not be on the exam, you wouldn't have overlooked it and thus failed. Any intervening causal element, such as your not having studied the section, breaks the chain necessary for proximate causation. If not so, you could look to your parents, reasoning that if you hadn't been born, you wouldn't have failed. The major question is whether or not the injury or accident could have occurred or could have been prevented if the recreationist had been properly performing supervisory duties.

The last element necessary for negligence is *real injury*. Negligence without injury (or damages) is not actionable. This means actual harm or real and evident injury; injury that leaves the injured party with permanent damage, impairment or disability.

Foreseeability

One of the tests for determining what the reasonably prudent individual would be expected to do, is the concept of *foreseeability.* A comparison is made between the performance of the party involved in the litigation and the expected actions of the reasonably prudent person. If a reasonable peer could have foreseen the accident and consequent injury, then he or she would have acted in a way designed to prevent the situation from taking place. The actions of the recreationist are examined in order to observe or discover the similarities or discrepancies between the "reasonable person" and the litigant. The point is clarified by these examples:

- Wouldn't the reasonable and prudent person be able to foresee the possibility of participant horseplay causing an injury in the absence of an instructor or other competent supervisor?
- Wouldn't the reasonable crafts instructor be able to foresee the possibility of injury to a student who uses a dangerous solvent without proper instruction on its safe handling?
- Wouldn't the reasonable and prudent woodworking instructor be able to foresee the potential for injury to a participant who uses a table saw without the proper blade guard in place, without proper instruction, without proper personal protective equipment, or without proper machine maintenance?

Responsibilities To Participants

With regard to the duty owed, the courts have consistently held that providers of recreational services have several duties to perform for those who are placed in their charge or care. These include

- provision of adequate supervision
- provision of appropriate instruction
- provision of proper maintenance of buildings, grounds, and equipment

The provision of adequate supervision is closely associated with the concept of the "required standard of care". Certain variables, such as the age of the participants, the activities involved, and the circumstances surrounding the level of risk of the activities, have a direct bearing on the required standard of care. The age of the participants can affect the outcome of litigation, especially when between five and seven years of age. In such cases, the courts have held that the counselors, instructors, and other agency supervisory personnel stand *in loco parentis*, or act as parental surrogates. Therefore, the recreationist is expected to exercise the same standard of care that a parent would exercise.

Many lawsuits involving providers of recreational services involve the concept of improper instruction. In situations where the participants are learning new skills or are handling potentially dangerous materials, the issue of whether or not the provided instruction was adequate becomes critical. Once a participant is injured, the question of whether or not appropriate instruction was given on how to perform the task or use the materials will be asked. Again, the variables of age, learning ability, and degree of risk will bear on what level of instruction is appropriate.

Although the recreationist may not be directly responsible for the maintenance of the buildings, grounds, and equipment, he or she is obliged to inspect these areas to assure that unnecessary hazards are removed or eliminated and that proper warnings are in place. Such things as filling in chuckholes in the outfield of a baseball diamond, providing barriers around a pitfall, and posting proper warning signs would be expected. In addition, the provider must also inspect and maintain all equipment.

Any program of inspection and maintenance requires proper documentation. It should also be noted that a formal inspection and maintenance program will outline required standards, such as a certain number of inspections per month, or procedures for correcting deficiencies. This becomes a two-edged sword, in that although the program will not only alert the provider to deficiencies, it also requires, that once the deficiency is exposed, corrective action must take place. To know of a deficiency and not attempt to correct it is not something the reasonably prudent person would do; thus negligence attaches.

Special Concerns With Signage

Likewise, proper signage can sometimes create as many problems as it mitigates. Once aware of a hazard that is not a repair or maintenance item, many providers attempt to alleviate the liability exposure by placing one or more warning signs. Keep in mind that signs do nothing to reduce or eliminate the hazard. They simply attempt to alter participants' behavior to avoid the hazard. Several issues arise.

First, placing a sign assumes that the person whose behavior is to be affected can read and understand it. What if the person is a small child? What if the person is blind? What if the person does not read English?

Second, once the sign is installed, it must be regularly inspected and maintained. To do less is to permit a known hazard to exist without proper warnings. Questions in court might include: Was the sign still there? Was the sign obstructed? Was the sign obvious, and did it properly convey the degree of hazard and how to avoid it?

Third, the limit of the hazard must be clearly defined. Will the participant understand where that limit is? For example, suppose a beach community places signs along its beach warning against diving into the surf because of hidden rocks. A bather notices the signs and follows them to where they end at the border of the community's property. Assuming that the danger no longer exists, he dives into the surf and breaks his neck on a hidden rock. Because of its very existence, the sign itself now becomes an issue.

Lastly, the court will review other possible controls for the hazard that could have been employed, and will weigh the cost/benefit relationship between them and compare this to the degree of risk. A determination will be made as to whether or not signage was the appropriate control. In many cases, signage will do little to relieve the provider of liability.

Age And Negligence

Courts in most jurisdictions have held that, under the law, persons under the age of seven years cannot be considered negligent. (This is the so called "rule of seven.") Therefore, no matter how vicious the conduct, children from birth to seven years cannot be held negligent. So, if little five-year old Jackie picks up a rock an smashes little Jimmy on the head, causing brain damage, Jackie is held to be too young to understand the seriousness of his actions, and therefore, cannot be negligent. Because of this, providers who are charged with supervising children in this age group are held to a higher standard of care than those who deal with older participants.

When addressing issues concerning children between eight years and fourteen years, the law presumes they are not negligent. Although the presumption may be argued, the burden of proof, to show that the child actually knew better than to behave in the manner that caused the injury, rests with the recreationist.

In issues concerning children between fifteen and eighteen years, the law holds these children to be possibly negligent. The burden of proof shifts from the recreationist to the youthful offender. However, although older children are held to a higher standard of conduct than younger children, it is still not as high as the standards that apply to adults.

Defenses For Negligence

So what happens when the provider of recreational services is sued and has to go to court? Fortunately, there are legal defenses for charges of negligence. The more common defenses include contributory negligence, comparative negligence, *vis major*, immunity, assumption of risk, trespass, and waiver.

Contributory Negligence

The doctrine of contributory negligence states that, to some extent, individuals are responsible for their own safety. Therefore, if they act in an unreasonable manner, unnecessarily exposing themselves to injury, they have contributed to their own condition. In jurisdictions where contributory negligence applies, if the plaintiff contributes even as little as one percent to his or her own injury, they recover nothing.

Comparative Negligence

It should be noted that children under the age of seven cannot be found to have contributed to their own injury. Additionally, children between the ages of eight and fourteen must be proven to have acted in such a way as to bring about their own injury. Because of the fact that, under the doctrine of contributory negligence, if the plaintiff only minimally contributed to their own injury they would recover nothing, some jurisdictions have modified the doctrine to that of *comparative negligence*.

Under this doctrine, the damages are divided between the parties according to their percentage of negligence. For example, assume that the total damages for an incurred injury were $100,000. If the defendant were found to be 75% negligent and the plaintiff were judged to have been 25% negligent, under the comparative negligence doctrine the plaintiff could only recover $75,000 (75% of $100,000).

Vis Major

The *vis major* doctrine says that the injury was the result of an act of God. If the injury were caused by an act of God or an uncontrolled natural force, then it was completely unforeseeable and there can be no negligence. For example, if, on a bright sunny day, a lightning bolt strikes a little league baseball player in the outfield and kills him, it was a completely unforeseen event, an act of God, and no negligence attaches. In this case, the operative term is *unforeseen*. If the baseball coach saw storm clouds forming for some time and did not suspend the game before the accident took place, this would not be considered an act of God. The reasonably prudent person would have foreseen the potential for accident and would have taken appropriate action to avoid it.

Immunity

Immunity refers to statutes in some state or community jurisdictions whereby the providers of recreational services enjoy immunity from liability, based on the fact that they are a governmental entity. In such jurisdictions, lawsuits may be brought against individuals. However, in most jurisdictions, governmental immunity is rapidly eroding or has been entirely eliminated. One unique type of government immunity is that of *public use laws*. Public use laws are designed to preserve the natural, pristine setting of recreational areas for the enjoyment of the public, without the encumbrances of potential lawsuits. Essentially, these laws say that as long as the areas are preserved in their natural state, no improvements are made, and no fees are charged, then the users may enjoy them at their own risk and the public entity undertakes no liability for injuries.

Assumption Of Risk

The *assumption of risk* defense states that a person may enter into a relationship with another, knowing there is a risk of danger to himself. Individuals who participate in body contact sports or games, or who use or come in contact with hazardous materials or dangerous equipment, knowingly assume a certain risk of injury. For providers of recreational services to use this to be a defense, they must have provided appropriate instruction and the best possible equipment. Children cannot assume risks unless they are aware of them, so the courts place the additional burden of assuring that the participants are informed of the possibility of injury, regardless of instruction or equipment.

Trespass

Trespass is being at a given location without invitation or right to be there. It is a clear violation of the right of protection from interference with one's person or infringement on one's property through unauthorized presence.[2] Trespass would be cited in defense of a negligence suit by indicating that injured parties had no right to be where they were because they were trespassing, and that was the reason they were injured. However, even if the person is trespassing, the property owner has a duty to not present the trespasser with hidden hazards. A known hazard, such as a deep well that is not easily seen, must be warned against or protected in some manner. Also, trespass cannot be a defense for an *attractive nuisance*.

Attractive Nuisance

For the *attractive nuisance* to negate the defense for trespass, four criteria must be met. First, there must be a probability of trespass by children or youths. Second, due to their immaturity, they must be unaware of the danger. Third, the attractive nuisance must be clearly and closely associated with its potential for harm. Fourth, the high risk for harm must be known by the person responsible.[3]

Waiver

A *waiver* is an instrument wherein an individual, usually a performer (participant), agrees not to seek redress in the event of injury sustained while participating. If an adult or competent person enters into the waiver freely, and presumably reads and understands the stipulations of the agreement, then the courts will usually hold that it is binding. However, when dealing with minors, waivers have limited effect.

References

1. Jay S. Shivers, *Recreational Safety, the Standard of Care*. (Cranbury, NJ: Associated University Presses, 1986.)
2. Ibid.
3. Ibid

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