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UNDERSTANDING YOUR LEGAL DUTY OF CARE

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The subject of this presentation is an organization's legal duty of care—the legal obligation to protect another person from harm.

The focus is one's *legal* duty of care—a point along a spectrum that includes ethical, moral, religious and other duties.

And our subject is one's legal duty *of care*. Other legal duties may be owed of course—including duties imposed by contract and by a variety of criminal and other statutes.

An analysis of the legal duty of care is at the core of a suit for negligence. For a suit for negligence to succeed, the following elements must be present: 1) a duty of care, 2) a breach of that duty, and 3) a loss caused by the breach. If no legal duty of care is owed, the suit for negligence will fail.

Legal duties of care arise from relationships (close or remote, present or prospective) and expectations—situations where a duty of care might be anticipated by a reasonable person, and harm is foreseeable if protection is not provided.

Duties of care can be established also by statutory law (issuing from state legislatures) and by case law (court decisions).

The applicable duty of care is determined in large part by the characteristics of the people involved in an activity, the nature of the activity, and the relationships among the people and the activity.

You should assume that you owe a duty of care to a person in your charge—a client or student, for example. That duty will take on different forms over the course of the relationship, as circumstances change.

One's legal duty is to protect another from unreasonable harm. Harm may in fact be *reasonable*. Inherent risks and risks that cannot be reasonably foreseen represent *reasonable* harm, and a person is not entitled to protection from those risks.

The legal duty of care is popularly described as follows: "to act as a reasonable person would under the same or similar circumstances, except when a statute or common law requires a different degree of care."

Note that the test is reasonableness—not perfection. Understand, too, that this "reasonable person" is a fiction. The fictional person's fictional views of a wrong will be determined by a (real) judge or jury. The test of compliance is objective—how one acted, not what one intended.

While the rubric—"what would a reasonable person have done (or not done)"—is considered by some to be an

adequate guide to negligence, legislators, judges and juries, by statutes and court decisions, have articulated certain duties of care with more particularity—defining what may be reasonable in certain circumstances.

Some Examples:

A) The law generally finds a heightened duty of care when there is a significant *disparity between actors with respect to knowledge, physical or mental competency, or experience*. A professional, for example, will be judged by what a reasonable *professional*—not merely a reasonable *person*—would have done. And consider minors. The term "in loco parentis," sometimes used to describe the duty owed to a minor in one's custody or control, means literally that one is to deal with that child as a reasonable parent would. This is considered by some courts to require application of the "highest duty of care."

A "high degree of care" standard may reflect what a cautious person would do. The "highest" degree of care might reflect what an *extremely* cautious person would do. A judge decides what duty is owed and the jury decides, as a fact question, whether the duty was met or breached.

B) A high or higher duty of care might apply to persons who are significantly *controlled* by or are otherwise *dependent* on another. Such a duty is imposed on common carriers, which are, for many, a necessity, put a passive "rider" in a position of utter reliance on the operator and are available to the general public. Consider these elements of "no control" or "utter dependence" with respect to rafting, zip lines, and giant swings.

Special rules of care exist with respect to manufacturers, sellers and renters of products, pertaining to design, manufacturing defects, and warnings. Special rules pertain to persons who own or control premises and expect persons to come to those places for business or recreation. The legal duty of care owed by such persons usually is to exercise reasonable care in protecting others from dangers of which the owner is aware or should be aware. Open and obvious dangers may not be included.

Statutes exist (Recreation Use Statutes) that forgive a landowner's negligence if she allows others to use her land for recreation, without a fee.

C) Statutes may identify, categorically or specifically, the *inherent risks* of a recreation activity, and declare that a service provider cannot be liable for losses that arise from those risks.

D) In the area of *active sports and recreation*, courts of a number of states have ruled that the simple negligence of a co-participant, sponsor or leader is forgiven. To hold otherwise would chill the active participation, the courts agree. This immunity does not extend to reckless or intentionally harmful conduct. This concept is sometimes referred to as Primary Assumption of Risk.

Importantly for our industry, the same rule may be applied in an *instructional context*. To hold an instructor liable for carelessness in pushing the envelope would chill the experience and compromise the learning opportunity. The duty usually is described as one of not increasing the inherent risks of the teaching or learning activity. The more intimate and protective the relationship is or is expected to be, the higher the duty of care. An instructor is, in any event, responsible for properly sequencing the student into the activity, staff must be properly trained, gear must be suitable, and coercion is never tolerated.

States deal differently with the tension between an obligation of special care due to minors, particularly in custodial situations—a camp or school, for example—and the immunity from claims of negligence granted to instructors and coaches.

E) A general catch-all, if a court wants to find duty, but can't identify another peg to hang it on, is the notion of a "special relationship." One may find this in college and university cases. The student is too old for an "in loco" argument; the school is about education, not custody. And yet, something is going on here that creates certain expectations.

Other factors may create or influence a legal duty of care, including:

- An *agreement, promise or representation* of a certain level of supervision, outcome or performance.
- An organization's internal *standards and "policies,"* and, to a lesser extent, industry practices and standards.
- A *voluntary undertaking* to do something one is not obligated to do—rescue, for example, or directing someone to a trailhead. If you undertake to do it, you'd best do it reasonably.
- Recreation Use and Recreation Liability statutes, and others, may set standards of performance in certain skills (outfitting, paddling, equine). Other statutes provide immunities for government agents, volunteers and charitable organizations. The violation of a law designed for the protection of the person harmed can be deemed negligence per se—greatly facilitating a case for liability.

A legal duty of ordinary care can be eliminated by any of the following:

- One may, in advance, waive or release a claim of simple negligence (that reasonable care was not provided). Be aware of the limits of coverage—releases of negligence are prohibited in a few states as a matter of policy; and usually a parent may not release a minor's claim in advance. Releases are not favored by the courts but they will be honored if properly drawn and executed.
- A risk of harm may be expressly assumed, in which case the service provider has no obligation to protect the client from that risk. The risk must be clearly understood and agreed to.
- And as we have seen, one has no duty to protect another from the inherent risks of an activity—those which are such an integral part of an activity that, to eliminate them, would significantly change the character of the activity.

One's legal duty of care will shift as circumstances and relationships change. Learn the laws of the jurisdictions in which your program operates so you can be sensitive to liability issues that might arise and advise your staff accordingly. Adhere to the standard of "reasonable under the circumstances" and your organization will live to play and teach another day.

Charles (Reb) Gregg is a practicing attorney in Houston, Texas, specializing in outdoor recreation matters and general litigation. He is an active speaker and author in the field of managing the risks of legal liability. He serves as general counsel to The Association for Challenge Course Technology and serves as counsel to numerous other education and adventure programs, including camps, schools, and others. Reb is a member of the Wilderness Risk Managers Committee and the Accreditation Committee of the Association for Experiential Education. He serves on the board of SCA, and is president of The Friends of Big Bend National Park. He can be reached at (713) 982-8415 or rgregg@gregglaw.net.

WRMC 2008 Conference Proceedings



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