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Industry Standards -
Understanding Them to
Avoid Liability Exposures

Review: 1.) Negligence

- Negligence under the law is generally defined as the failure to use ordinary care; that is, failing to do what a person of ordinary prudence would have done under the same or similar circumstances.
- Essentially we are looking to determine whether an operator, educator or land administrator could or should have recognized an unreasonable risk and then did nothing to warn the participant or to reduce or eliminate the unreasonable risk.
- To examine negligence in behavior or conduct, look for 2 things: was the risk foreseeable and was the risk unreasonable

Review: 2.) Legal Elements of Negligence Claim

- Duty – this is where standards come in to play. Standards of care that are used in the industry or published or enunciated can and will be used to establish the duty that an operator owes to an injured person
- Breach – and consequently then, the standard may be used in an evidentiary sense to establish whether the duty of care was actually breached.
- Causation
- Damages

Review: 3.) Proving Negligence – “Standards of Care”

- A “standard of care” will be used to measure the competence of the operator/guide/etc.
- If the so-called professional’s conduct falls below such a standard he/she/it may be held liable for injuries or damages resulting from such conduct.
- The “standard of care” can be determined in a number of ways, but the most common way is from “standards of practice” developed and perhaps published by organizations.

Defining the “Standards of Care”

- Standards are defined as the action or conduct established by most of the “industry” or “profession” locally, regionally and nationally.
- In court expert witnesses may well take opposite points of view and attempt to sway the judge or jury as to what actually is the standard of care.

Standards of Practice - General

- Standards of practice published by professional organizations are commonly referred to as standards, guidelines, recommendations or position statements.
- Organizations publish or enunciate “standards” to provide benchmarks of desirable practices.
- Because these published or enunciated standards can be entered into evidence in a trial or claim proceeding to determine the standard of care or **duty** that the operator or educator owes to the injured person, it is critical for recreation entities to know what standards are being published or enunciated.

Types of Standards

- Occupational Standards – competencies necessary for someone to effectively perform in the occupation
- Training Standards – these very often build on occupational standards and derive from them
- Operational standards – used to evaluate operational practices, for the public to evaluate quality, for insurance company evaluations

Standards - Good for Industry or Bad?

- Published or expressed standards of practice can serve as a shield (minimize liability associated with negligence) for operators that adhere to them.
- They can also serve as a sword (increase liability associated with negligence) for entities that do not adhere to them or who can not articulate why they are deviating from known standards.

Standards vs. Guidelines - Any Difference?

- Certain professional organizations have distinguished 'standards' from 'guidelines.'
- Standards are generally thought of as requirements that represent the standard of care.
- Guidelines are generally thought of as recommendations that are not intended to be standards or give rise to legal duties.

Standards and the Law

- Published standards often reflect the law – but not always.
- Recreation entities must carefully consider both applicable laws and known standards in the industry when developing risk management plans.

Changing Legal Tides: Standards or What is “Reasonable” Will Shift

- Remember – legally speaking – you only have to do what is “reasonable” to satisfy your duty – you don’t have to take extraordinary measures.

However – what used to be extraordinary may become de riguer or ordinary/reasonable over time.

Standards as They Apply to Risk Management

1. Identifying and Selecting Applicable Standards of Practice
2. Developing Risk Management Strategies That Reflect Standards
3. Implementing Your Risk Management Plans
4. Evaluating Your Risk Management Plans



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