

The Law Says Yes to Risk (A 20 Year perspective)

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Disclaimer

This presentation is designed to deliver general information only – not to provide opinions regarding specific state law. For such opinions seek the counsel of an attorney familiar with your operation and the laws which apply to it.

Risk in Perspective

“Risk” defined -- “a possibility of harm or loss”. Compare *risicare* (Italian) – “to dare”

And so.....a choice, balancing value against possible loss.

Acceptable Risk

The role of risk.

The search for acceptable risk,
between mission and mayhem.

What we know and do not know (and why
we are at this conference!).

The industry, then and now:

- The “new” organization – surviving the culture clash, pre-emptive and systematic risk management, doing more in more places, still searching for diversity; more regulation/standards. (Amusement drift?)
- The new staff – older, wiser, parents , home owners and career- seeking (with what implications for the organization?).

The industry (continued):

- The new client: more gear, less maturity and judgment. (“We risk too little, rave too much, and rescue too early”.)
- The new technology: search and rescue, and communications (risk homeostasis? a degradation of the experience? Controlling expectations?) Social media.

Our new language:

“Reasonable management of the risks.”

“Preferred (etc) practices” (not “best”)

“Foreseeable”

“Independent contractor”

“Public policy”

“Unconscionable”

“Bargained for”

The new lawyers

- Getting into the picture earlier (two silos), preemptively; assisting in operational quality, exchanging information and allocating legal responsibilities.
- And there are more of us! Our kids are your students!

.....And their laws

- Land manager and other government regulations (including NPS 48!)
- Employment (FLSA), OSHA
- Access to programs (ADA)
- Products liability
- RX drugs in the wilderness

New wine in old bottles:

- Contracts -- papering more relationships, new sensitivity to allocation of duties and liabilities (indemnities).
- Negligence -- new issues re duties of care, including assumption of risks and the inherency of risks. Loss of implied assumption or risks and contributory negligence as defenses.

Most significant – and our focus:

- In some sport and recreation activities, a relaxing of the duty of care of an organization, in recognition of the societal value of vigorous participation in play (and instruction).

This is the doctrine of Primary Assumption of Risks. How does it work?

Negligence revisited:

Negligence as a description of conduct

Negligence as grounds for legal liability :

Duty

Breach

Loss

Causation

No duty? No negligence.

What is the legal duty of care:

The universal duty: to avoid causing unreasonable harm to another.

In special relationships: to protect another from unreasonable harm.

(This is us.)

Duty of care - factors :

- 1) Relationships (trust, control, disparity in knowledge and experience)
- 2) Promises, representations, expectations
- 3) The nature of the risk – foreseeability, severity
- 4) Social utility of punishing/forgiving the conduct (the Public Policy issue)
- 5) Statutes and case law

The duty – commonly stated:

To act as a reasonable person would under the same or similar circumstances.

Note: objectivity, and reasonableness not perfection or “best practices”)

One’s duty to another shifts as the activities and relationships to them change.

Reducing the legal duty of care:

By Agreement: releases (in all but a few states) , expressed assumption of risks

By case law: inherency as a reasonable risk; public policy (Munn v. Hotchkiss).

By statute: immunities, inherent risk statutes, etc.

The Doctrine of Primary Assumption of Risks (PAR)

The inherent risks of a sporting or recreation activity are assumed - no duty of protection is owed.

In a number of states such risks include the negligence of co-participants, instructors and even organizers. The activity is so important that.....

PAR -- New York

“By engaging in a sport or recreation activity a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.” *Fenty v. Seven Meadows Farms et al* 2013 N.Y. App.Div. Lexis 5102.

PAR -- New Jersey

“The common law standard of care that ordinarily applies between individuals involved in recreation is not breached by mere negligence. The duty..... is to avoid.....reckless or intentional conduct.”

*Angland v. Mountain Creek Resort 2013
N.J. Lexis 570.*

PAR -- CA

“Imposing a duty to mitigate the inherent dangers of some activities, including many sports, would alter the nature of the activity and inhibit vigorous participation.”

Cann v. Stefanec 2013 Ca App Lexis 497.

PAR -- CA

- “The risk (in this case) was not beyond that inherent in any top rope climbing. A fall can occur at any time regardless of the negligence of one’s co-participant.”
Regents of U. of CA v. Superior Court,
1999.

Really good!

One might conclude that something is terribly wrong with a society in which the most commonly accepted aspects of play - a traditional source of a community's conviviality and cohesion - spurs litigation. The heightened recklessness standard recognizes a common sense distinction between excessively harmful conduct and the more routine rough and tumble of sports and should not be second guessed (in court). Anglund.

PAR Continued

To what activities does the doctrine apply?

Persons entitled to its protection.

Exceptions to its application: gear, training, etc.

The Participant Agreement

- Its role and elements
- What's new: Parents for minors; Tunkl policy factors, WI and CT; venue and law, e-sign and forgeries; unconscionability, duration, fraud in the inducement, cost recovery, limits on liability, waiver of jury trial, etc.

Words to watch:

- “Including “ (not exclusive)
- The “d”, “n” and “s” words.
- “Sole negligence”
- “Assure, insure, ensure”
- “Every reasonable...all possible...”
- “Staff”

And a few more:

- “Acts of God and other guests”
- “Please”, “always”, “you must”, “do not”, “you should”, “it is our policy” ...
- “Life guard, coach, instructor....”

Today's Challenges:

- Understand the “reasonable” person
- Diversity – for integration or knowledge?
- Impact and access issues
- Incident response - technologies and medical (including rx meds)
- Amusement and mission creep

Conclusion

The relationships among participants, staff, activities and environments will determine the duty of care owed.

The bundle of duties will change as these relationships change.

Understand your duty of care, even as it shifts.

If you adhere to the standard of reasonableness you will survive to work and play another day!