

A LEGAL PRIMER FOR STAFF

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Field staff of an adventure program are on the front line when it comes to the physical and emotional well-being of students. Staff must manage the activity's inherent risks (those which "come with the territory"); and prevent or manage an enlargement of those risks. Taking a group across a river or an avalanche-prone slope could well be an inherent risk of getting from point A to point B. Failing to scout, or crossing in an unreasonable manner enlarges that risk.

This distinction between inherent risks and others which arise and may be created by events in the field – conditions of the environment, or conduct of instructors or participants - is important to a field staff's understanding of legal liability issues.

Risk is an unavoidable – some would say desirable - element of outdoor adventure and other recreation programs. Every program hopes to develop good judgment and techniques for dealing with risk and, of course, the avoidance of enlarging inherent risks. This responsibility falls squarely on the shoulders of the field staff.

A number of programs, in their Release and Assumption of Risk documents, seek the agreement of students that they will not make a claim against the program, even if program staff is negligent. This seems unusual - even offensive - to some. A program does this to reserve to itself the opportunity to determine where the line should be drawn between an injury caused by an inherent risk and one caused by negligence. Many frivolous lawsuits arise out of either a misunderstanding, or an intentional misinterpretation, of where that line should be drawn. Falling off a horse is an inherent risk of riding. A saddle too loosely cinched by a wrangler may or may not be an inherent risk. An error in staff judgment regarding weather, route or the physical or emotional condition of a student, may or may not be an inherent risk. Faced with the need for an immediate decision, in a wilderness setting, including the unpredictable forces of nature and human behavior, a number of options may appear reasonable. With the benefit of hindsight, experts might agree that only one decision was the proper one. Do the inherent risks of an activity include the possibility that staff might make one of those "reasonable", but ultimately wrong, decisions? I think so, but the public might not agree. Continuing to identify inherent risks and informing the public about those risks is one of the most important tasks of a good program.

The area of the law which is most likely to be involved in a student's complaint about events in the field is negligence.

Negligence is the failure to behave reasonably toward another person to whom a duty is owed. To be charged with negligence, an individual or the program (1) must owe a duty of reasonable care to the person claiming an injury or other loss; (2) that duty must have been violated; and (3) damages (a loss), reasonably arising out of that breach of duty, and reasonably foreseeable, must have been suffered.

Staff should assume that a duty is owed to any program participant under its supervision. (The same might not be true of a stranger who comes into the camp or campus.) The question then becomes whether an alleged loss has been caused because staff acted under the circumstances in a way that a reasonable professional would not have acted. This is what is sometimes referred to as the "reasonable person" test. For a professional, it really becomes a "reasonable professional" test. Staff conduct will be judged on the basis of what professionals in the field, similarly situated, would have done under the same circumstances.

In the avalanche and river examples above, the duty of care clearly exists. The issue of "breach of duty" would be answered by an analysis (often made by hired experts) of whether a reasonable professional would have selected that route, or crossed the slope or river as staff chose to cross it. An analysis of the damages would include whether the loss allegedly suffered can be traced to the decisions about crossing. The program would not be liable, for example, if there was an unforeseen and spontaneous loosening of ice or snow from the avalanche slope; or if the slide was caused by some third party.

So, the defenses to a claim of negligence include the absence of a duty, no breach of a duty, no damages, or damages that were not a proximate and reasonably foreseeable result of the breach.

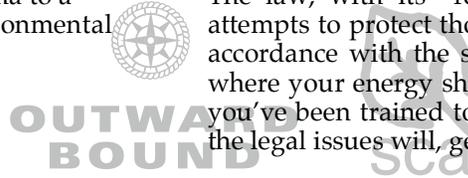
Other defenses might include a claim that what happened was an "inherent risk" of the activity, as described above, or that the injured person executed a valid release or waiver, or expressly assumed the risk that caused the injury.

The claimant may have contributed to the loss by his or her conduct, including voluntarily and knowingly

participating in an activity in which risks had been enlarged, in violation of duties owed to the claimant. In such a case, a judge or jury may be asked to determine the claimant's share of the blame for what finally happened and adjust any monetary award accordingly.

"Simple" negligence – not acting as a reasonable professional would have acted - can be aggravated by conduct which is so extreme in ignoring the probability of harm and the severity of that harm, that it reasonably appears the actor cared nothing about the welfare of the person or persons injured. Such conduct – or failure to act - is "gross negligence". In cases of gross negligence and intentional wrongs, the injured party may be awarded exemplary or punitive damages above those actually suffered, to teach the wrong-doer a lesson. Generally, such acts or omissions cannot be forgiven by a release, or waiver, or an assumption of the risk of such offensive conduct.

Situations in the field which give rise to charges of negligent conduct might include the manner in which emergency protocols are exercised, ill-fitting, inappropriate or defective gear, hiring of incompetent or inexperienced staff, inadequate screening, instruction or supervision of students, releasing students for a small group experience who are not qualified, overlooking abusive behavior which causes emotional trauma to a fellow student, and failure to identify environmental hazards, including weather and terrain.



Other legal issues can arise in the field, such as a staff person's misrepresentations regarding certain conditions: "You can cross this stream in your bare feet; nothing here can hurt you"; "No one has ever been hurt doing this - give it a try"; "We're lost, we'll never get out of this alive". Staff members must understand the impact and legal ramifications of such statements.

Staff is responsible for adequate and true reporting of events in the field, such as a near-miss, reasons for expelling a student, a dangerous condition, and evaluation of a peer. Carelessness or falsehoods in such reporting can lead to problems in determining the truth of certain events and the qualifications of staff. How does the program administration convince a parent that a child was separated for a valid reason, when the reason given on a field report is something else less supportable? How does a program explain a failure to document or report a condition or behavior issue in the field, when harm later arises from that condition.

Qualified staff is vital to a successful program. Staff has important obligations and responsibilities. Staff is the keeper of the program's mission and promises in the field.

It's important to keep all this in perspective, of course. The law, with its "reasonable professional" standard, attempts to protect those who do their work well and in accordance with the standards of the industry. This is where your energy should be directed - to doing the job you've been trained to do, and doing it well. If you do, the legal issues will, generally, take care of themselves.