

THE ELUSIVE REASONABLE PERSON

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Introduction

Each issue of the Outdoor Education and Recreation Law Quarterly will contain a feature article with special focus. In this issue, we focus on duties of care. Individuals who believe they have suffered a private wrong can bring a lawsuit based upon a "tort" (a tort is a civil or private wrong). In many cases, this tort is "negligence." In a negligence case, what is the duty of care owed by those providing recreational opportunities? How is it measured? When is that duty breached (violated)? As the following discussion illustrates, the answers are not always clear.

Negligence under the law is generally defined as the failure to use ordinary care; that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances. A person (plaintiff) bringing a legal claim for negligence against another (defendant) must prove: the defendant owed the plaintiff a duty of care under the circumstances, the defendant breached that duty, the defendant's "breach" was the legal cause of the plaintiff's injury, and, this breach resulted in damage to the plaintiff.

The judge determines whether the defendant owes a duty of care in a particular set of circumstances. A variety of factors may come into play in influencing the judge's determination. If the judge finds that a duty exists, a fact-finder (judge or jury) determines whether the defendant has breached that duty, and whether the defendant's breach caused the injury to the plaintiff. Outdoor leaders vary in their experience, knowledge, skills, and credentials. In a given negligence case, are all such leaders judged in the same manner? Who is this "reasonably prudent person" to whom outdoor leaders will be compared, this fictional person acting in the "same or similar circumstances?"

The plaintiff's counsel will predictably argue that the defendant must meet a high standard of care. The defendant's counsel will want to keep the required standard of care low. Is there flexibility in that standard? Will a leader's superior (or inferior) knowledge enter into the "reasonable person" analysis?

Many legal commentators on the subject say that the fact-finder (usually the jury) should take into consideration any special skill, knowledge, education, experience, or training of the defendant, when determining whether he or she acted as a reasonably prudent person would have in

the "same or similar circumstances." Commentators suggest that this is not changing the standard of care, but simply changing the reasonably prudent person to whom defendant is compared—that person becomes someone with specialized knowledge and experience.

Specifically, the court may instruct the jury that it is entitled to take into account, in considering the definition of negligence, pertinent attributes of the person accused of wrongdoing, including, for example, that he or she is one of the country's leading mountaineers, regularly instructs persons in proper procedures and risk management, or is certified by a nationally recognized organization. The jury, then, might measure the defendant's conduct by a standard different than that considered for a scout leader, for example. The ordinary prudent person has become a more highly skilled and experienced, perhaps more professional, leader.

In a jury trial, both the plaintiff's and the defendant's counsel work with the judge to develop instructions for the jury. These instructions are submitted to the jury before they deliberate to reach a verdict. It is not unusual in a negligence case to find (in those instructions to the jury) a definition of negligence, referring to an ordinary prudent physician, attorney, or architect. And, recognizing that there are specialty areas within certain professions, the question or definition might go further and refer to an ordinary prudent attorney specializing in the practice of estate planning, or to a physician specializing in abdominal surgery. We have not seen a definition that identifies leadership in the outdoors as a discrete profession, but professional status for such individuals could certainly be argued.

Does this concept cut both ways? For example, could a volunteer leader, apprentice, or inexperienced leader claim that he or she should be compared to a reasonably prudent person with limited experience and skills—that is, a lower standard of care? Probably not. It has been argued convincingly that anyone who offers to lead or instruct another in an outdoor recreational activity is implicitly representing that he or she is capable of doing so. In fact, legal commentators generally agree that there is a minimum duty applied to any such person, whatever his or her skill, education, knowledge, experience, or training. Such a person would most likely be held to the standards or practices in the industry existing at the time

of the injury. The conduct of the leader (or guide, instructor, etc.) would likely be compared to that of a reasonably prudent leader performing/instructing/leading the particular activity. In other words, the leader would be required to exercise the care expected of someone “in the same or similar circumstances” teaching or leading those activities. That “care” might extend to the type of equipment used, the way the equipment was used, or the techniques used to engage in or teach an activity, etc. If the leader’s conduct fell below those standards or practices, he or she could be considered negligent.

Generally, in determining whether the leader has breached a duty of care, the court or jury may consider, among other things, expert testimony, statutes, and evidence of standards or practices in the industry. Experts may testify about the standards or practices (if any exist) in the industry. They may look to other programs for examples of “reasonable” conduct, or look to other evidence of reasonable behavior. State or Federal licensing or statutory requirements may be reviewed for compliance. Did the leader’s organization have relevant internal policies or procedures—and were those followed? The court or jury determination can be very fact specific and dependent upon the circumstances of the case and the law in the particular jurisdiction. (Ultimately, even if the leader is found to have breached a duty, that breach must be proven to be the cause of the plaintiff’s injuries.)

Importantly, an individual can, by words or conduct, expand their duty of care, or create a duty where one did not exist. For example, the outdoor leader (or his/her organization) may have made oral or written representations about the nature or quality of an activity, performance, or condition. Have they assured participants’ safety? Are the leaders advertised or otherwise described as “professional” instructors or “the best in the country”? Can the organization truly back up its representations? These factors can influence the duty determination.

The careful organization will accurately describe its leaders’ abilities or experience, the inherent risks of the activities, and the responsibilities of the participants. An organization’s internal protocols can be developed in such a way that instructors/leaders can and do, with some flexibility, follow them under appropriate circumstances. An organization’s instructors can and should be trained to understand the basic practices in the industry for teaching or supervising the particular skills, activities, or populations with which they work.

Hypothetical: A local club teaches a beginner rock-climbing class. A volunteer teaches the class. A partici-

pant is injured during an outdoor belaying exercise. The participant’s parent or spouse sues the instructor and the club, claiming that the volunteer instructor was negligent in instructing and supervising the participants on rock-climbing techniques, and that this negligence caused the participant’s injury. In determining whether the volunteer instructor breached a duty, a jury could consider what a reasonably prudent person who teaches rock-climbing skills would have done under similar circumstances. The plaintiff may present expert testimony on the practices in the industry for teaching and supervising those skills. Would this volunteer be held to the standard of an outdoor “professional”? Counsel for the injured child might argue yes, but probably could not present evidence of special qualifications or experience. Ultimately, in urging that the defendant breached a duty, the plaintiff (through his expert and otherwise) would be expected to urge that the volunteer should have followed general practices in the industry for teaching and supervising these climbing skill, but failed to do so.

Would it make a difference if, instead, the volunteer leader was an experienced climber? It certainly could.

This is a complex and fluid area of the law, and we will look for guidance from the courts as we examine cases from around the country, noting that different courts and juries handle the concepts of “duty” and “breach of duty” in various ways.

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