

A REASONABLE PERSPECTIVE ON RECREATIONAL INJURY LIABILITY

James C. Kozlowski, J.D., Ph.D.
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Driving an automobile is probably the most dangerous activity in our daily lives. Certainly, automobiles pose a much greater risk of personal injury liability than any recreation facility or program. Yet, very few of us are overly concerned about personal injury liability when we jump into our personal automobiles. Further, I doubt if very many of us carry sufficient insurance coverage to cover a major, let alone a catastrophic, automobile accident. Despite the inherent risks associated with operating an automobile, we continue to drive without being overly concerned about potential liability for personal injuries or property damage. When it comes to automobiles, we seem to accept the fact that, within certain limits, life is a risky business.

Similarly, when recreational injury liability is viewed in the proper perspective, it is not the picture of doom and gloom portrayed in the newspapers and other popular media. Oftentimes, lawyers and the legal system are used as a convenient excuse for not providing certain recreational opportunities. Constantly, I hear the refrain from recreation administrators that "the lawyers won't let us do it." As one recreation administrator told me, "the legal tail should not wag the agency dog." I agree. Lawyers should provide administrators with the pertinent law related information, but it is the administrators, not the lawyers, who should make the ultimate decisions regarding the delivery of leisure services.

Potential recreational injury liability should be just one area of concern for administrators. Public relations, political realities, economic constraints also deserve equal consideration in the decisionmaking process. In fact, many legal issues start out as public relations problems. Absent catastrophic injury, individuals generally do not sue people who they know, like and respect. As a result, many lawsuits can be avoided through a strong public relations program which generates individual and community support for your agency and its programs.

The purpose of the *Recreation and Parks Law Reporter* (RPLR), which began publication in 1984, was to provide the Recreation field with recently reported decisions from the various state and federal courts involving recreational injury liability. These reports give a totally different, more balanced, perspective than that which one would ordinarily receive from the popular news media. For example, it would be very unlikely for a newspaper headline to read "Man Loses Five Million Dollar Lawsuit." Recently, I have been contacted by several newspaper and magazine reporters for my views on the "liability crisis" in Recreation and Parks. However, when I reject the crisis mentality assumed by the media and try to put the issue in its proper perspective, these reporters seem disappointed. Sensationalism, not reasonableness, makes good news copy. It is the "Man Bites Dog" story which gets headlines, rather than the more commonplace, and therefore less newsworthy, "Dog Bites Man" situation.

As indicated by the judicial opinions presented in RPLR, the defense wins the majority of these lawsuits. In those cases lost by the defense, the agency defendant usually did something obviously wrong. With the benefit of perfect 20/20 hindsight, the RPLR reader has little sympathy for such unreasonable conduct on the part of defendants.

At the outset of my presentations on recreational injury liability, I usually ask for a show of hands as to how many recreation and park agencies are currently being sued. In most instances, only a few hands are raised. This would seem to indicate that the perception of liability is much worse than the reality. When I inquire further, it appears that recreation and park professionals are outraged by the lawsuit itself. It is viewed as a personal affront to their individual and professional integrity. The fact that the suit may have been settled, or even successfully defended, is oftentimes lost amid denunciations of lawyers and the legal system.

When a case is settled, there is no admission of liability on the part of the defendant. It simply reflects a business decision on the part of an insurer or the agency with the advice of counsel to forego the cost of litigation and the possibility of an adverse judgment. Such decisions to cut potential losses may have short term economic benefits, but in my opinion it sends the wrong message to the plaintiffs' bar, i.e. defendants in recreational injury lawsuits would rather settle than litigate with little regard for the legal merits of the claim.

AGENCY INDEMNIFICATION FOR INDIVIDUALS?

In discussing recreational injury liability, a distinction must be made between personal and agency liability. For the most part, recreational injury case law focuses on agency defendants, rather than individuals. The legal interests of the individual employee defendant are not necessarily identical to that of the agency defendant. For example, common law or statutory immunity, available to a public agency as a defense to recreational injury liability, may not extend to the individual.

Generally, an individual is liable for his own torts. In most instances, an agency would also be liable for torts of its agents or employees committed within the scope of their authority. A tort is a civil wrong (as opposed to a criminal wrong) outside of contract in which the defendant injures the plaintiff. In the great majority of instances, recreational injury liability involves the tort of negligence. Negligence is unreasonable conduct under the circumstances which causes injury. Other torts which may be familiar are: assault, battery, libel, slander, etc.

I am oftentimes asked, "Can I be sued?" You can always be sued. This, however, is not the real issue. If sued, will you be liable? That is the question which needs to be discussed. A review of recreational injury case law can not predict with certainty the results of future lawsuits. On the other hand, the principles discussed in these decisions can make potential defendants better moving targets in the event of a lawsuit.

In addition to the liability issue, recreation and park professionals must determine whether their agencies will indemnify its agents or employees named as individual defendants in a lawsuit? In other words, will your agency "jump into your shoes" if you are named in a lawsuit, providing for your defense and paying any damages in the event of an adverse judgment against you? I have yet to hear of any recreation and park professional losing their personal assets as a result of a lawsuit. In most instances, suits are brought against administrators in their official capacity. However, individuals may also be sued in their individual or personal capacity in the event that the alleged tort was committed outside the scope of your official authority.

In some jurisdictions, it is at the discretion of the agency as to whether it will indemnify its agents or employees for torts committed within the scope of their authority. For example, state law in one jurisdiction requires public agencies to indemnify their agents for amounts up to \$300,000; payment for amounts in excess of this figure are at the discretion of the agency. Many recreation and park professionals simply assume that they do not have to worry about potential liability because they are "covered" by their agency. As indicated by the above example, this may or may not be the case. Agency indemnification of the individual can not be assumed. State law and agency policy will define the availability and limits of indemnification within a given jurisdiction.

Remember, an attorney is the representative of his client. As an agent of his client, the attorney can only answer to one master. In the case of an attorney representing a public agency, the client is the city or some other public entity; it is not the individual administrator or employee. There may be some situations where your interests and that of your agency employer part company in the defense of a lawsuit. In these rare instances, the individual will want to have his own legal counsel.

For example, you are involved in an automobile accident with your personal vehicle during your lunch hour. On your lunch hour, you had decided to pick up some needed supplies for the office. You could have waited for the supplies to be delivered in accordance with agency policies, but your picking them up on your lunch hour would expedite matters. Under the applicable state law, your public employer is required to indemnify you for torts committed within the scope of your employment. Following the accident, you are sued by the other driver for negligence. Your insurer has settled up to the limits of your policy. Now, the other driver is suing you for additional damages. Your agency refuses to indemnify you, claiming the alleged negligence occurred off the premises, on your own personal time, in your personal vehicle, while engaged in a task outside the scope of your employment.

It is in these unlikely situations, that the individual may want to have his own professional liability insurance. This insurance coverage until fairly recently was available at a fairly nominal rate. Rates were nominal because, in the great majority of instances, the exposure of the individual liability for recreational injuries is rather limited. The real target of such lawsuits is the agency. However, like other types of insurance coverage, it may have fallen victim to the so called "insurance crisis." If available, this type of coverage would ensure that the legal interests of the individual are protected with or without indemnification by the agency.

Having raised the insurance crisis, let me make one brief comment. I feel that it would be a mistake to equate the perceived insurance crisis with an increased incidence of recreational injury liability. The high cost or unavailability of insurance has little or nothing to do with the likelihood of recreational injury liability. Other economic factors within the insurance industry itself, rather than the number of recreational injury claims, is generally blamed for skyrocketing premiums and the unavailability of insurance in some areas. In my opinion, it would, therefore, be unwise to seek a major overhaul of the tort liability system based upon the relative unavailability of insurance. With minor fine tuning in some jurisdictions, existing legal principles work rather well in determining recreational injury liability.

THE REASONABLENESS APPROACH

Law is based upon the concept of reasonableness. If existing legal principles prove to be harsh or unreasonable, the law will change over time to meet the changing needs and attitudes of society. As one of my professors told us as we entered law school, "the law is fifty-percent common sense and fifty-percent footwork." Consequently, good common sense invariably makes good legal sense.

Your best defense is "due care." Due care is defined as that care which is due under the circumstances. In other words, do it right, or don't do it at all. This approach makes good common sense and good legal sense. The field of Recreation and Parks, not the lawyers, will define that degree of care which is due under various circumstances to avoid recreational injury liability. With the assistance of expert testimony drawn from your peers in the field of Recreation and Parks, the jury will determine whether reasonable care was exercised in a given situation.

In our everyday lives as well as our professional lives, we must all adhere to the reasonableness standard. As a result, we must ask ourselves, "what would the reasonable person do, or not do, under the circumstances? For example, a reasonable person would look both ways before crossing a busy street. This reasonableness standard, however, becomes a bit more demanding when the circumstances require a measure of understanding beyond that of the ordinary layman. As a result, the reasonable recreation and parks administrator, through specialized education and experience, is expected to know more about the inherent risks in recreational facilities and programs than the ordinary layman.

Liability for negligence will be imposed for creating an unreasonable hazard, not reasonable hazards. Life is risky. Consequently, there are reasonable hazards ordinarily associated with recreational activities which will not impose liability on the provider of such services. For example, the sport of skiing poses a reasonable hazard associated with falls. Falling down is an inherent part of skiing. Every skier eventually falls down. In each fall, there is the risk of injury.

As a result, there will be no negligence liability for the operator of the ski slope unless he has created an unreasonable hazard, enhancing the likelihood of a serious injury. In one case, a ski operator created such an unreasonable risk of injuring by allowing the base of a light standard set in concrete to remain on the slope. This defect on the premises greatly enhanced the risk of serious injury well beyond the reasonable risk of falling inherent in skiing.

In providing recreational facilities and programs, an agency is not the insurer of safety. An insurer would compensate injured parties without regard for fault. In most instances, recreational injury liability is based upon fault, i.e. a failure to act reasonably under the circumstances. Therefore, recreation and park agencies will be liable for injuries resulting from a failure to provide reasonably safe facilities and programs. In determining recreational liability, the law applies a reasonableness standard. Under the reasonableness standard, the foreseeable risk of serious injury is balanced against the corresponding burden of precaution necessary to alleviate that risk.

The most important element under the reasonableness standard is the concept of foreseeability. Foreseeability is not a mere possibility. Anything is possible. On the contrary, foreseeability is a probability. Based upon your actual knowledge or the common understanding of people similarly situated in your field, this injury causing situation has happened before and, therefore, is likely to happen again unless something is done to alleviate the hazard. This is common sense. Once an individual has been injured in a given situation, it increases the likelihood of similar injuries unless certain precautions are taken. To address the foreseeability issue, simply ask yourself where can and do people get hurt in my recreational facilities and programs? Then, do something about it!

In the area of household pets, a principle referred to as the "first bite rule" nicely illustrates this concept of foreseeability. You are not on notice that your cuddly canine has vicious propensities until it actually bites someone. So the first bite is unforeseeable and, therefore, free of liability. However, once your dog bites someone, you are then on notice that your pet poses a foreseeable risk of serious injury to others. Once the foreseeable risk of serious injury is established by the first bite, the owner must take a corresponding burden of precaution under the reasonableness standard to avoid liability for any subsequent incidents.

The same analysis applies in the area of recreational injury liability. When an injury occurs, the first question is whether this type of injury has occurred before in your recreational facility or program. If the answer is yes, then the issue is what precautions did you take after the first incident to avoid its reoccurrence.

Consequently, you do not have to be "Chicken Little" running around wondering and worrying if the sky is going to fall. Although it may be possible, it certainly is not probable. Similarly, there is an infinite number of possible situations where people can get hurt in your recreational facilities and programs. You do not have to worry about every conceivable possibility, only the probabilities.

Unlike the possibilities, the probabilities of injury are limited in number. Further, the probability of injury is not equal across all of your recreational facilities, programs, and operations. Because of the nature of activity or the number and age of the participants, some areas are definitely more dangerous than others. The degree of danger may also vary with the season, day of the week, or time of day.

Simply address the foreseeable hazards, rather than worrying about every conceivable mishap. Where have people been hurt in the past? The answer to this question will provide an indication of where people are likely to be injured in the future (i.e. foreseeability) if you do not take the necessary burden of precaution. Acting upon such knowledge will greatly reduce the likelihood of recreational injury liability.

On numerous occasions, individuals have described situations for me which they feel are hazardous in their recreation and park operations. Given the myriad of possibilities which could have been described, these recreation and park professionals pick one particular situation which they find most disturbing. Sometimes these situations are described as "an accident waiting to happen." Once you are aware of such a situation, the common sense approach would tell you to

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do something about it, fix it or get rid of it. Good legal sense would favor the same course of action.