

MERE PROGRAM SPONSORSHIP PROMOTING PHYSICAL ACTIVITY
INSUFFICIENT CONTROL TO TRIGGER LIABILITY

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According to the National Center for Disease Control (CDC) Division of Chronic Disease Control and Community Intervention, liability concerns are proving to be a barrier to the implementation and expansion of physical activity promotion programs across the country:

Sedentary lifestyle, and associated obesity are major risk factors for the development of chronic diseases and increased severity of existing chronic diseases. Organizations and communities considering sponsoring physical activity promotion programs (like bike-to-work campaigns, worksite lifestyle programs, etc.)... are often hesitant because of fears related to their possible liability for injuries incurred by participants in such programs...

To address these liability concerns, and help reduce some of the major risk factors associated with the promotion of physical activity programs, CDC has entered into an agreement with the NRPA Division of Public Policy to prepare a report summarizing the body of reported case law illustrating liability claims against individuals and organizations associated with physical activity promotion programs.

In addition, NRPA is to develop a report for CDC use summarizing how a number of representative organizations/communities have successfully dealt with physical activity promotion/facility-related liability risks/barriers in the past. CDC plans to distribute this information to "private/public-sector organizations/communities considering sponsoring, or participating in, physical activity promotion programs and/or providing areas/facilities in/on which physical activity could occur."

Has your organization has had some degree of success in dealing with such perceived liability risks associated with programs and facilities promoting physical activity? If so, and you would like to have this information reviewed for possible inclusion in the NRPA/CDC report, please forward these materials directly to: James C. Kozlowski, Counsel, NRPA Division of Public Policy, 9805 South Park Circle, Fairfax Station, Virginia 22039. FAX (703) 455-9532.

No Control, No Liability

As general rule, negligence liability presupposes that the responsible individual or agency had control over the condition which caused the injury. Conversely, there is no legal duty and subsequent negligence liability where control is lacking. As illustrated by the following description of reported court decisions, mere sponsorship is generally insufficient to establish the requisite degree of control to establish a legal duty and possible liability for injuries incurred by participants in recreational programs and facilities. Accordingly, for most organizations and communities who merely sponsor physical activity promotion programs, the perception or fear of negligence liability tends to be much worse than the reality.

Supervision and Control of Activity?

In the case of *Vogel v. West Mountain Corp.*, 470 N.Y.S.2d 475 (A.D. 3 Dept. 1983), the plaintiff, an experienced recreational skier was injured when she struck a ski tower during a slalom race. In addition to the ski slope operator, Vogel sued the corporate sponsor (Miller) and local sponsor of the race which has been advertised as the "Miller Ski Club Slalom." In her complaint, Vogel argued "Miller was negligent in failing to properly arrange the race course and in failing to warn of the dangers inherent in slalom ski racing." In particular, Vogel maintained that promotional materials indicating Miller's sponsorship of a race "open to all skiers regardless of ability...allayed her apprehension and induced her to enter the race." The specific issue before the court was, therefore, "whether the sponsor of an athletic event, absent control, may be held liable in negligence for an injury to a participant."

As a general principle, the court found that mere sponsorship, absent control, does not render the sponsor of an athletic event legally responsible. According to the court, an important criterion in determining possible liability is "whether the realities of every day experience demonstrate that the party to be made responsible could have prevented the negligent conduct." In particular, the court found a legal duty presupposes that the organization sponsoring physical activity promotion programs "had sufficient control over the event to be in a position to prevent the negligence."

In this case, the court found "Miller was never held out to be in control, but was merely advertised as a 'sponsor'." Specifically, the court found the corporate sponsor had not "actually designed, supervised and controlled the event. Similarly, the court found the organizers of the race had no direct oral or written communication with Miller concerning the racing series. On the contrary, the court found the design of the slope and supervision and control over the race was handled exclusively by employees of the ski slope.

As a practical matter, the court noted that extending "legal liability over a sponsor of an athletic event would prove an undue expansion of the sponsorship relationship." According to the court, the net result of imposing a legal duty and potential negligence liability on mere sponsors would "discourage further participation" in promoting events. In general, the court noted that "a sponsor benefits by the promotion of its product." The court, however, concluded that "financial gain does not of itself give rise to a legal obligation."

Race Sponsor Responsible for Event?

In the case of *Gehling v. St. George's University School of Medicine, Ltd.*, 705 F.Supp. 761 (E.D.N.Y. 1989), plaintiff Rose Gehling brought this negligence action after her son Earl collapsed and died while participating in a "road race" sponsored by defendant St. George's University School of Medicine (SGU). As noted by the federal district court, "there is a distinction between sponsoring an event and being responsible for any actions which take place." Under the circumstances of this case, the court found that "SGU was only a sponsor of the race, not responsible for the conduct thereof."

In this instance medical students of SGU were the sponsors of the race and responsible for its conduct... Although it knew of the race, SGU did not control, monitor or supervise any aspect of the road race. Nor did it owe Gehling a duty to control, monitor or supervise the race. Even if SGU did "sponsor" the race, for liability to attach, SGU

must have had sufficient control over the event to be in a position to prevent negligence. This it did not have.

On the other hand, the court found that SGU had a legal duty to exercise reasonable care and to prevent injury...[a]s the owner and/or occupier of the land on which the race began and ended", to people on its property."

The race was run in part on SGU's property with its knowledge and approval. SGU funded the purchase of T-shirts and trophies, and some of its employees participated in the race. SGU was responsible to exercise the necessary care to see that nothing on its property, at the beginning or the end of the race, could cause an injury to the runners. There was no evidence that the property was dangerous or not in a safe condition. The students who organized the race were responsible to exercise due care under the circumstances during the entire race including the end of the race. SGU was not.

Accordingly, SGU legal duty and possible negligence liability was limited to those aspects of the race which it controlled (the property), not the supervision of the race itself.

Landowner Liability for Picnic Sponsor?

In the case of *Russell v. Bissell & Associates, INC.*, 562 So.2d 1059 (La.App. 1990) plaintiff was injured at a picnic sponsored by his employer, Exxon Corporation. Plaintiff dove from a diving platform and struck his neck on the bottom of a man-made lake. Russell alleged that "Exxon had custody or 'occupied' the premises [Thunderbird Beach] sufficient to incur liability because of the negotiation to use." According to Russell, Exxon had sufficient custody and control of the lake facility "because Exxon provided and installed bases for a softball game, ropes for paddleboat races and a net for a volleyball game the day before the picnic as well as giving away door prizes and providing a clown for the picnic." As noted by the appeals court: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the things which we have in our custody."

The occupier of premises used for athletic events or amusements must maintain the premises in a reasonably safe condition and furnish such equipment or services as is necessary to minimize or prevent injury to others from conditions which probably, or foreseeably may cause damage.

However, under the circumstances of this case, the trial court had found that "Exxon was nothing more than a 'patron' of Thunderbird Beach."

There was no indication that Exxon assumed responsibility for the premises. There was no "exercise of custody and control" over the premises by Exxon. There was no lease between Exxon and Thunderbird. This was not a profit making venture on the part of Exxon. Bissell agreed to provide their regular staff for the food booths, lifeguards and other activities.

Given these facts, the appeals court concluded that "it would be stretching the reasoning of [occupier

liability based upon defendant's custody of the premises]... to allow recovery against the sponsor of a company picnic that only sponsors, and assumes no control over the premises, the manner used, or the supervision and maintenance thereof." In the opinion of the appeals court, "the placement of bases on a softball field, gifts of door prizes or providing a clown to entertain the children falls short of the requisite control to make Exxon an occupier of the premises." The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Exxon.

Right to Control Coaches' Performance?

In the case of *Lasseigne v. American Legion, Nicholson Post #38*, 543 So.2d 1111 (La.App. 1 Cir. 1989), plaintiff was injured "when he was struck on the head by a baseball while at practice for a team participating in the American Legion Junior Baseball Program." The league was organized by defendant American Legion, Nicholson Post # 38. Lasseigne alleged that "by sponsoring and encouraging such practice sessions, Post 38 owed a duty to adequately safeguard and supervise those sessions, and to insure that its employees, agents and assistants were adequately trained." The specific issue before the court was whether "an organizer of team sports owed no duty to child participants or their parents to safeguard that its coaches have minimal qualifications for the safe conduct of the sport." In this particular instance, the court found no legal duty because Post 38 had "no involvement in team practices."

Post 38 has absolutely nothing to do with the selection of coaches or the conduct of team practices. Local private businesses sponsor the individual teams and select the coaches. The coaches are solely responsible for all aspects of practice, including frequency, location and length of each session...

[Individual team coaches] are volunteers who are chosen by the private sponsors of the teams... Post 38 has absolutely no control over the physical details of the coaches or the manner in which the practices are conducted.

As a result, the court found "Post 38 should not be held liable for the actions of the coaches" because defendant had no right to control the details and performance of the coaches.

"Package Deal" - Measure of Control over Activity?

In the case of *Thornhill v. Deka-Di Riding Stables*, 643 N.E.2d 983 (Ind.App. 1994), plaintiff was injured in a horseback riding incident while attending the YMCA's Women's Wellness Weekend. Under the circumstances of this particular case, the court found the YMCA "had a relationship with Deka-Di stables that gave it some measure of control over the trail rides with respect to Camp Crosley campers."

The YMCA had a long-standing arrangement with Deka-Di to bring groups of riders from Camp Crosley to Deka-Di at a discount to the campers. The YMCA advertised horseback riding as an activity offered to Camp Crosley campers and to the Women's Wellness Weekend participants. During camp sessions for children, trail rides were arranged through Deka-Di and the YMCA staff members actively supervised the rides. Thornhill paid the trail ride fee directly to the YMCA along with her registration fee for

the Women's Wellness Weekend. The YMCA then paid Deka-Di for the trail rides by Camp Crosley campers. The YMCA organized the trail ride by reserving ride times with Deka- Di and then having the campers sign up for a ride time at Camp Crosley. YMCA supervisors actively participated in the trail ride and, even if the trail ride was not a part of their duties, Thornhill relied on the supervisors to keep the trail ride safe as she had relied on them to keep all the camp activities safe.

Additionally, the YMCA acknowledged its involvement in the trail ride when it filled out an "Irregularity Report" and an "Accident Report Form" for its files. The YMCA forms indicated that Thornhill was participating in an activity at the time of the incident and that a staff person was present. In essence, the YMCA was selling the Women's Wellness Weekend as a package deal that included horseback riding arranged by the YMCA through Deka-Di stables and the YMCA had a relationship to Deka-Di that gave the YMCA some measure of control over the manner in which the trail ride was conducted.

As a result, the court found the YMCA had incurred a legal duty to provide Thornhill with a reasonably safe trail ride.