



UMC GUIDE RECREATION PARKS & LEISURE

University of Missouri-Columbia Extension Division

Liability of Recreators

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This guide presents recreators information on key liability concepts and how they relate to the recreation field. Legally, recreators are those who have the responsibility for providing recreation opportunities. They can be lay park and recreation board members, city officials, paid professionals, volunteers, part-time or seasonal employees. That *also includes* other park or maintenance personnel. In addition, the guide contains suggestions for reducing the chances of a liability situation occurring and for preparing a defense against a suit.

Currently courts are pushing recreational management into the limelight in response to public demand for accountability. The phenomenon of the law suit, whether for revenge, comfort, or remedy, has been discussed increasingly in national and local media. Whatever the cause, recreators are accountable and are becoming more liable for their behavior in their job situations.

The increase in legal action has paralleled the reduction of the protection once provided to our civil entities by statute and common law.

Until recently, the doctrine of sovereign immunity was deeply ingrained in American jurisprudence. It means that government, in its abstract sense, could not be held liable by individual people when it acts in its capacity as governor, representing all the people. The old argument against lawsuits against government held that people suing government, in effect, were suing themselves. So government had "sovereign immunity." In Missouri the doctrine was observed until 1978. To individuals involved in administering public park and recreation systems, the protection of sovereign immunity existed but made no demands. With the exceptions noted in Missouri Revised Statutes 1978, Volume 4, Section 537.600 the traditional argument of performance of a government function is no longer a sure protection. The judicial process (L. 1978 HB 1650 1) and tort liability have changed that:

SOVEREIGN IMMUNITY

537.600. Sovereign immunity in effect—exceptions—waiver of.—Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negli-

gent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course of their employment.

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Laws relating to liability are drawn from common law. These are not firmly incorporated into statute law. Because application of the facts to the law depends primarily upon the decision of a jury, this guide will present the common law doctrines upon which liability is founded. The recreator is encouraged to consult an attorney for further interpretation of liability as it affects a specific case.

Liability is that condition for which an individual or corporation is answerable and out of which arises a responsibility to perform in specific ways. Since this obligation is enforceable by court action, it is a legal responsibility. There are three types of liability: *criminal*, *contractual*, and *tort*. Of the three, tort liability is by far the most frequent in terms of park and recreation.

Tort liability involves acts that injure a person's body, property, or reputation. Assault and battery, false imprisonment, trespassing, invasion of privacy, defamation, and negligent conduct are examples of acts covered by torts. Negligence is the basis of most tort liability suits in parks and recreation.

A person must be proven negligent to be held legally liable for unintentional injury to others. Negligence is generally considered to be an omission or a commission by an individual to do or not to do something which a "reasonable person" would or would not do under the same or similar circumstances in a situation where a legal duty is owed. The standard of care used to determine negligence is the behavior of a reasonable

and prudent person in the same or similar circumstances.

In the case of the recreator the standard may go beyond the behavior of a reasonable and prudent person to the behavior of a reasonable and prudent professional. By accepting the responsibility to perform the task, whether or not paid, recreators hold themselves as being competent and knowledgeable of the best professional practices. This certainly has grave implications for appointed board members who usually practice with little or no training in the park and recreation field.

DETERMINING NEGLIGENCE

Most legal authorities would probably agree that four general elements are necessary to support a negligence suit. These are:

- A legal duty or obligation to conform to a certain standard of conduct in order to protect others from unreasonable risks.
- An act that breaches the duty by failing to conform to the standard required under the circumstances.
- A reasonably close causal connection between the conduct of the recreator and the resulting injury to another.
- Actual loss or damage to the interests of another.

Remember, all four elements of negligence must be proven for an individual to be held liable.

RIGHTS OF THE INVITEE

The duty of a recreator to protect a visitor from injury depends upon the legal status of the person entering the property or participating in an activity. In a legal action the degree of care required by a recreator is determined by the classification of the visitor at the time of injury. A visitor may be classified as an *invitee*, a *licensee*, or a *trespasser*.

An *invitee* is a visitor invited to use an area or facility for purposes that benefit the recreators or for the mutual benefit of the recreator and the guest. Guests who pay a fee for the use of facilities or participate in an activity are classified as invitees. They are owed the greatest degree of care to prevent injury.

Invitees are legally entitled to expect that the areas and activities be reasonably safe for their reception and participation. The recreator is required to ascertain the existing conditions of the property or activity so that the visitor may be warned of danger. The implication of the duty owed to an invitee should be evident. The recreator must not only warn the invitee about any danger but must also make periodic and thorough inspections of areas and facilities and supervise activities so that necessary repairs and safety provisions can be exercised. Recreators who fail to exercise such care should not expect to have a good defense against the legal action that may arise from the operations of their programs.

RIGHTS OF THE LICENSEE

A *licensee* is an individual who enters an area or participates in an activity with the consent of the recreator. The licensee is distinguished from the invitee in that the licensee's activity does not benefit the recreator. Social guests using areas or participating in activities when no fee is charged are usually considered licensees.

The duty of the recreator to licensees is to refrain from intentional injury and to warn of any known dangers that licensees could not reasonably know or discover themselves. Recreators are not required to inspect their areas to discover unknown dangers nor make the areas safe for the reception of the licensee. However, once a danger is known to the recreator, he or she must take reasonable care to warn the licensee of the danger.

RIGHTS OF THE TRESPASSER

Trespassers are persons who enter an area or facility or participate in an activity for their own purposes without the consent, permission, or invitation of the recreator. In general, the only duty owed a trespasser is to refrain from intentional or excessive injury to them. Recreators are not required to maintain their areas in a safe condition or to give warning to an unknowing trespasser of unsafe conditions. Court cases indicate two exceptions to the non-liability rule to trespassers.

The first exception, much like that of the licensee, is that once a recreator knows of trespassers, reasonable care must be exercised to prevent them from being injured. The second is the concept of "attractive nuisance." It is used to protect children (not defined by Missouri state law) who may be lured onto property as a result of something being unusually attractive to them. When this concept is applied, the recreator is expected to provide the standard of care provided an invitee. The attractive nuisance rule does not apply to natural conditions such as lagoons or cliffs.

Although the attractive nuisance doctrine is recognized in Missouri, it has been very conservatively applied. Only a few cases are on record.

Some recreators believe that by obtaining signed releases from paying guests or by displaying signs that state the invitee uses the facility or participates at his or her own risk, the recreator will not be responsible for the accidents of an invitee. Recreators should be aware that they cannot contract away their legal responsibility. While the above mentioned practices may discourage invitees from filing suits they usually will not provide a defense for legal action.

An important note: duty to invitees is limited to the area of invitation—that area which is open for use by invitees. This area extends from the entrance and safe exit from the area to all parts of the property or facility that are open to invitees or those areas that the invitees might reasonably think are available to them. Clarification of this point follows.

If the individuals are free to use the area or facility, they will be considered invitees, unless the recreator specifically advises visitors that the area of intended use is more narrowly restricted. Then if the invitees go beyond the area specific to their invitation, they may be considered a licensee, if they enter with the recreator's consent; or a trespasser, if they enter without authorization. If individuals are led to believe that a particular area is intended for their use, they are entitled to the protection owed invitees.

With the above considerations in mind, recreators should be aware of ways to reduce the possibility of legal action or to be better prepared to defend themselves if a suit is filed. For example:

1. BE INSURED. Know your status and the status of those whom you work for or who are subordinate to you. Be aware of Missouri's law regarding governmental immunity, indemnification, insurance waiver, and state tort liability or statutes. Know insurance coverage limits and the sources of paying liability damages.

2. HIRE COMPETENT PERSONNEL. Individuals who work for the park and recreation department are an extension and reflection of that department. Therefore, individuals with appropriate qualifications (e.g. degree, experience, and references in park and recreation delivery systems) should be employed.

3. ESTABLISH SAFETY PROCEDURES. Every area, facility, program and service should be operated under specific guidelines in order to maintain the safest environment. Once safety procedures have been introduced, follow up by checking staff and areas to insure compliance.

4. IMPLEMENT AN INSPECTION SYSTEM. On a regular basis, check for damage to areas or facilities caused by negligence, vandalism, wear or natural causes and correct any impairment found. Also check for dangerous practices in programs and make immediate adjustments. A rigorous preventive maintenance and program supervision schedule may prevent injuries.

5. IMPLEMENT FIRST-AID REFRESHER COURSES. Too many individuals are guilty of believing that once they have had a first-aid course they know and have retained it all. There is also the danger of attempting to diagnose and treat injuries beyond one's qualifications. This practice should be vigorously avoided.

6. ESTABLISH SPECIFIC EMERGENCY PROCEDURES. Follow the procedures established for a given area, facility, or program by insuring that staff are aware of whom to call, what number to call, and what information to give.

7. MAINTAIN RECORDS OF DAMAGES AND INJURIES. A reporting system for reference and follow-up is essential. The system should include names, dates, times, locations, types of damage or

injury, and a brief description of resulting action. Forms can be useful to accomplish this.

8. WORK AT PUBLIC RELATIONS. A department that is open to and concerned with its clientele can prevent potential liability suits. Individuals who relate to an area, facility, or program as their own, are less likely to seek compensation than those who feel like outsiders.

9. PROVIDE INSERVICE TRAINING. Alerting staff of potential or likely liability situations can help prevent their occurrence.

10. KNOW THE ATTORNEY REPRESENTING YOUR AGENCY OR ORGANIZATION. Attorneys are the best source of information regarding a liability situation. Depending upon their specific area of expertise, they can also be helpful in planning areas, facilities, and programs in terms of liability avoidance.

11. CONTINUING EDUCATION OF STAFF. It is imperative to insure that all departmental employees obtain the necessary certificates, advanced training and study in areas of their responsibilities. Some formal documentation of their competence in the job is most desirable.

12. REDUCE LIABILITY SITUATIONS. Liability can be reduced if reasonable care is exercised to warn visitors of any existing manmade or natural hazards or unsafe conditions. Boundaries of recreation areas should be well marked and guests should be alerted to them. Rules and regulations pertaining to the use of an area or participation in an activity should be posted to inform visitors of the conduct expected.

SUMMARY

As a recreator it is important to know that you can be sued in the conduct of your job. You must be aware of the legal obligations and implications of your actions or lack of action. For that behavior relates to individuals who enter areas and facilities or participate in programs for which you are directly or indirectly responsible. You must understand and comply with all laws and regulations applicable to the operating procedures of your agency or organization. Your areas, facilities, and programs must be maintained or operated within reasonably safe circumstances. The addition of safety procedures and the elimination of hazards can reduce the occurrence of liability situations. Maintaining an accurate record system can be invaluable if a liability suit is filed. Consultation with an attorney regarding current or potential liability situations that are related to the operation of your agency or organization is most important.

Attempting to prevent liability suits by eliminating activities from your program or not offering new activities can be a mistake. In eliminating activities, ill will probably would be generated from those who had some connection with those programs. This can lead to an unfavorable public relations situation. If concern of a

law suit is the overriding reason for discontinuing some activities and not scheduling new events or programs, you are certainly not fulfilling your obligation to provide variety, challenge, and opportunity for all individuals through recreational activities. A more effective method would be to discuss each existing program or planned program with an attorney, an insurance safety consultant, and supervisory leadership so that ongoing and new programs are within reasonable bounds of fun and safety.