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Law-Related Issues for Park and Recreation Managers

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Law-Related Issues for Park and Recreation Managers

Introduction

by Lowell V. Sturgill

Gone are the days when managers could leave the law to lawyers and police officers. In today's litigious society, injuries sustained by visitors to recreation areas may well result in civil lawsuits under a variety of tort themes against both government bodies as well as individual employees and managers. For this reason, the modern park and recreation manager must familiarize himself with topics such as personal liability not only to fulfill his public duties, but also to protect himself against potential individual liability.

Tort Claims are Increasing in Great Numbers

It should be of great concern to every park and recreation manager that their considered and deliberate actions may save the taxpayers millions of dollars annually through proper attention to the safety and protection of employees and visitors. According to the National Center for State Courts in Williamsburg, Virginia, more than 13 million civil actions were filed in the United States for 1978 alone, which is the last year in which a national total was available at this writing. In the Federal sector, the Administrative Office of the United States Courts has stated that more than 144,000 civil cases were filed in the Federal Courts in 1978, and that their number has increased to be in excess of 255,000 in 1983. This is an increase of 75 percent in 5 years.

Judgments of six and seven figures are becoming increasingly commonplace. As persons become more aware of these settlements, they become more interested in filing claims they may possibly win. Claims are filed over such matters as a sliding board, which should have been repaired or removed, which led to a child's toe being cut off; an alleged encouragement to cross a street because of sidewalk placement in an area in which there was no crosswalk which allegedly resulted in a pedestrian being struck by a car; a failure to install a "wet paint" sign on a recently painted park bench which ruined an expensive suit; and a lady who slipped on an acorn in a park area and tore her pantyhose. Disputes that used to be settled by communication are now settled by stacks of legal documents.

As it should be, people are also becoming more aware of their legal rights. The media have played a great part in educating individuals in legal matters. Newspapers report settlements in jury trials ranging from several hundreds of thousands to millions of dollars. Television currently offers a very popular program dealing with litigants in small claims matters in which the court cites points of law in support of its decisions. The program advises its viewers not to take the law into their own hands, but to "take it to court." And this is what has been occurring—people are taking it to court in an unprecedented manner. To those whose business it is to process these claims, it seems at times that everyone is a potential plaintiff looking for a prospective defendant.

Governmental entities are becoming an increasingly popular target for damage and injury claims. As visitation to recreational areas has increased greatly with the availability of leisure time, so have the claims and suits which result from injuries sustained by the public.

Unfortunately, not everyone who visits a park or recreational area leaves with only pleasant memories and pretty pictures. A large number of these persons will suffer injuries or property damage and seek a source other than themselves to be responsible for their damages. One such visitor in National Capital Parks (Washington, D.C. metropolitan area) sustained a broken ankle in a fall. When asked for details on what caused her to fall, she responded, "it wasn't my fault, so it must have been the Government's."

Persons engaging in recreational activities sometimes do not exercise as much caution as they normally would. Some persons expect to be protected from their own negligence. A defective piece of sidewalk should be obvious—unless the visitor is so overwhelmed by exhibits or the scenic view that they are not looking where they are walking. Still other visitors consider recreational areas to be a sort of Fantasyland where no evils exist and nothing can cause them harm.

Trend Toward More Dangerous Recreational Activities

Park managers should become keenly aware of the potential for liability within their areas of jurisdiction. Recreational activity is no

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Hang glider in the wilderness. Sports enthusiasts are seeking an ever-expanding source for satisfying needs for thrill and personal achievement.

longer limited to playgrounds, campgrounds, hiking, swimming, or fishing. Today's sophisticated park visitor engages in snowmobiling, hang gliding, jet-skiing, mountain climbing, and four-wheel-drive recreational vehicles. Relaxation for some park visitors now involves thrill-seeking and risk-taking, particularly among young adult males, some of whom engage in hazardous activity to gain attention. These types of recreational activities not only involve danger to the participants, but also to other visitors who do not engage in them. Management should cooperate with law enforcement personnel to assure proper enforcement of regulations for the safety of all visitors.

Good Maintenance Can Prevent Torts

Many actions or decisions routinely made, particularly regarding park operations, involve some potential for liability. Nowhere is this more evident than in park maintenance activities. Dead limbs fall from shady trees and damage property or severely injure persons. Nicely designed, spaced, block walkways are aesthetically pleasing in an area where everyone wears tennis shoes, but in an urban area they become a trap for a woman's high heels. Fence posts are removed from the ground, and the holes are left unfilled. Trees are removed from an area to establish a ballfield, a picnic spot, or trails, and a forgotten stump is left to become a tripping hazard. A wooden guardrail at an overlook begins to rot and gives way under the weight of a tired visitor leaning against it. Playground equipment is left unchecked until a rusty chain breaks and causes a severe back injury. All of these situations occur frequently, all are a good basis for civil action, and all were totally preventable.

A manager cannot be everywhere or see everything. Management must encourage and insist on more awareness by its supervisors and employees to remain constantly alert to potential hazards and make corrections as rapidly as possible.

Good Recordkeeping Can Save Dollars

The importance of good recordkeeping cannot be overemphasized. With the liberal statute of limitations for filing civil actions in most parts of the country, it is important that inspections of buildings and facilities be made frequently and be well documented. Similarly, maintenance operations to correct deficiencies should also be well logged and the records of repairs kept for evidence in court actions. Too often, maintenance personnel will make repairs which are never logged and nothing is available for documentation when the need arises.

In the same light, prompt and thorough reporting of all incidents should be made. Too many reports include the who, what, where, and when of an injury, but omit the most important fact of all—*why*. Injuries are usually documented, but causation is left unstated. In defending a civil action, documented information on any proximate causes is highly important. It can save many months of legal work if liability is obvious, or it can cost the Government entity thousands of dollars if the cause of the injury is unknown.

Safety Messages in Park Brochures Help

Some areas, because of natural environment or historical significance, can never be made completely free of hazards. In some parks, the conditions which present the greatest hazards are the most attractive to the visitor. In areas of this type, management should assure that park brochures and visitor centers include information alerting the public to specific hazardous conditions which they might encounter. Warning signs should also be posted at appropriate locations where caution should be exercised.

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Hikers, horseback riders, and hang gliders in a hazardous conflict of activities at a precipitous cliff.

Richard Powell, NPS

Hazardous tree in visitor use area points up the need for an active identification and removal program.

Good Design and Contract Supervision Can Help

In planning for new facilities, the design may overshadow the possibility of built-in hazards. Managers should encourage plan review by appropriate safety personnel to assure compliance with applicable codes. Additionally, maintenance and security personnel should participate in plan review to assure that the facility can be easily maintained and the design is functional without creating hazards which might have been overlooked by the designers.

Although contracts and permits generally contain hold-harmless clauses and require insurance coverage, there is still a potential for civil action that can arise from inadequate supervision of a contractor or a knowledge of unsafe work practices. Managers should verify compliance with applicable codes and insurance requirements, and assure that any construction site which is accessible to visitors is adequately protected by physical barricades and warnings.

Know the Liability Laws Applicable to Your State

Liability for negligence actions varies greatly from state to state. In some areas, liability is diminished by statutes which allow a lesser duty of care by the landowner to individuals on premises where no fee is charged for usage of the land. In other states, a person must be completely free of any contributory negligence in order to recover for damages. In still other states, the wrongdoings of both parties are taken into consideration and a negligent person can still recover for damages if his or her actions are judged to be less negligent than those of the defendant. Park personnel should become acquainted with the law in their localities and discuss potential areas of liability with their legal advisors.

A Lack of Concern Can Be Costly

This issue of TRENDS will present a wide variety of articles pertaining to subjects directly affecting today's park manager. The articles have been written to educate and inform you on topics which may affect management of your park or site. The subject matter covers areas in which each of you has some involvement—from landowner liability to personal liability for management decisions you make.

It has become all too common that managers believe it is someone else's responsibility to be concerned with liability. Too many managers fail to realize that a lack of concern for safety and law related issues has a direct relationship to the potential for a civil action.

While it will never be possible to completely eliminate every possible source of liability, we must all develop an awareness of the seriousness of the problem and take appropriate action to minimize the exposure by making our recreational areas a safer place to visit.

Lowell V. Sturgill is Associate Regional Director, Operations, for the National Park Service's National Capital Region.

Standards, Liabilities and the Park and Recreation Manager

by Richard L. Wilburn

The Basic Management Issue

Today's manager of a park or recreation area must be concerned about the same basic factors as managers of any other organization in terms of mission achievement. The mission of the park and recreation manager is to protect the resource and provide recreational, educational, scientific, and perhaps other uses of the resource. The manager is judged by how efficiently and effectively use is made of people, materials, equipment, and funds, while maintaining a concern for protecting the environment in realizing organizational goals. The manager must also be proficient in applying basic management functions and concepts, i.e., planning, organizing, staffing, implementing programs, and controlling, while maintaining high quality and reducing liabilities. Failure to adequately address these factors will result in inefficiency, loss of funds and materials, poor public relations, poor employee morale, and poor mission attainment.

It has been shown that maintaining high quality, avoiding liabilities and insuring a safe recreation or work environment are closely related to setting and following proper standards and procedures. A quality product results from always using the right materials, assembled in the proper manner, in accordance with standards and procedures known to produce the desired end product. These standards and procedures are usually developed following studies, tests, "trial and error," or other means of determining the best way to achieve these goals. Liabilities frequently result when managers fail to comply with consensus or mandated standards, e.g., safety and health codes. An objective for the plaintiff's attorney, in a claim against a government agency, would be to show that the manager knew of, or should have known of, an applicable code or a standard relative to his/her client's injury. It would be the attorney's objective to show that the failure to comply with the code was a proximate cause of the injury.

Develop a Documented Safety Program

One means of improving the management of hazardous conditions and reduce litigation is to develop an in-depth documented safety and health program that establishes standards and procedures. The program should be general enough to cover all anticipated problems and define correct procedures to control them, but it must also be specific to the needs of the local area for which it is written.

The primary loss-producing conditions or activities should be specifically identified for both employees and the visiting public. For each of these sources of loss, an action program should be established to address this specific loss-producing (and potential litigation) source, and to reduce the incidence of accidents.

The program must have input from all affected employees under the general coordination of a trained safety officer. Care must be taken to insure that all pertinent standards and codes are addressed as indicated by the nature and intended use of the area. Some of these codes include the Office of Safety and Health Administration (OSHA), as applicable, public health, environmental protection, highway safety and National Fire Protection Association codes. Employees should develop their own standards and procedures in activity areas where no code exists, and conform to them to insure that the desired end results are realized.

The use of a hazard analysis is one good means of identifying both potential hazards and appropriate means of reducing the risk to the lowest possible level while getting the job done properly. Managers should gladly accept this approach to reducing risks because it has the important side benefits of improving efficiency, reducing costs, increasing professionalism and assisting in mission attainment. This approach may not totally eliminate the hazard, but it does reduce it to a recognized and controllable factor.

For example, a rescue from the side of a 2,000-foot cliff using ropes and technical climbing gear will be hazardous at best, but the risk is reduced to an acceptable level by using the right equipment, following professional procedures and working as a team for the benefit of all.

The following are brief discussions of some pertinent issues managers should consider in developing and evaluating their programs.

Richard L. Wilburn, NPS

Defective railing at overlook above precipitous cliff. Standards for location and maintenance are poor.

A Need for Standards

Managers should be aware that successful safety and health programs are closely related to the adoption of appropriate standards, and should insure that all activities are conducted in compliance with them. People cannot perform properly unless they understand what is expected from the activity and of them. The key is to perform in a correct, professional manner commensurate with the activity.

Professional athletic organizations have recognized this for years in the detailed operation of preseason training camps oriented to conditioning, developing and practicing "individual" and "team" skills. Other managers could profit from initiating their own "spring training camps" to insure that all employees are properly prepared for their season.

Supervisors should be held accountable, in some significant way, to insure that employees perform in accordance with proper standards and procedures.

A Growing Demand for Professionalism

Managing potential safety litigation problems in a park and recreation area is largely contingent upon the identification of potential hazards—both natural and man-made. One cannot solve a problem until it has been identified and placed in its proper perspective. The identification of hazards is a complex and demanding function that requires experienced and trained personnel. It is no longer possible to be aware of only the major and obvious conditions; i.e., a steep cliff or a twisting mountain road. Today's safety professional must be conversant with environmental hazards of a complex and diverse nature ranging from environmental health to industrial safety, highway and traffic safety to playgrounds and trails.

Recommendations made by a staff safety officer may represent the thin line between accepting losses or improving efficiency, between improving visitor safety or continuing exposure to life-threatening hazards, and between meeting accepted standards or exposure to unnecessary liability. This is no position for an amateur. Concerned managers should insist on professional advice from competent safety staff officers.

It is essential that qualified inspectors identify the hazards existent in the area and develop some reasonable and prudent action plan. Also, in consultation with management, inspectors must make needed corrections before an unwanted incident occurs. The goal must be the prevention of losses as opposed to responding to already developed crises. Proper analysis of the identified hazards will isolate those that present the greatest risk so that maximum effort can be placed where it will do the most good. This is applying International Loss Control Institute President Frank Bird's "Principle of the Critical Few" in which we recognize that a few hazards have the potential for causing a large portion of the losses—if left uncorrected.

It is also important to insure that all plans for new construction or for rehabilitation of existing facilities be reviewed, by a qualified safety officer, to insure compliance with applicable standards. It is far less expensive and disruptive to do the job right the first time than to have to re-do the work if discrepancies are found. Once the facility has been completed in accordance with the appropriate codes, an active and aggressive cyclic maintenance program is essential to control liabilities as well as other costs.

Deteriorated structures and/or equipment and erosion-worn trails create a multitude of hazards to visitors that frequently lead to claims against the agency. The potential losses from claims may far exceed the costs of proper design or maintenance. Standards should be applied in accordance with the activity and intended use of the facility. In some instances where management does not wish to impose some standard related to

Richard L. Wilburn, NPS

Visitors effect risky means of crossing a mountain stream in absence of bridge.

the integrity of the structure, the nature or use of the facility must be modified to insure the public's safety.

For example, it may be undesirable to make a structural change in an historical building to comply with the Life Safety Codes. In such instances the use of the building should be changed, e.g., do not allow visitors into hazardous areas or allow only controlled tour groups.

Waivers are of little value in cases where visitors are allowed to use known hazardous areas. A signed waiver is only binding on the signatories—not their survivors who may file a claim. The primary value of a signed waiver may serve as a record that warning was given.

Public Factor and Hazard Management

Proper consideration must be given to the background and attitudes of the public using park and recreation facilities. A crucial error is often made by evaluating the facility in terms of employee experience and knowledge. The typical visitor, especially in the more remote natural park areas, does not possess the experience or knowledge needed to recognize the real dangers posed by cold, rapidly running mountain streams. Nor do these urban-oriented visitors recognize that the animals are wild (not Yogi Bear or Gentle Ben), that natural features like a volcanic hot spring are real (not a Hollywood set), and that chances taken in the park may result in real injury.

We have observed young people standing on a large rock above a pool in which there were submerged boulders of which they had been warned. These young men waited for an audience to gather at a nearby overlook before diving into the water with loud shouts. Is the need for attention the basis for such acts? The park and recreation manager must develop an active comprehensive program centered around trained professionals who can identify hazards inherent in the environment but which may not be obvious to the urban visitor. Such hazards should be controlled through adequate design of facilities and visitor overlooks; proper maintenance of structures, roads and trails, etc.; or by effective barriers to preclude exposure.

Perhaps the best form of visitor protection is proper education. True safety can be described as having a full understanding of the hazard and of the possible consequences of unwarranted exposure. Signs used to provide warnings must identify the specific hazard of concern. Simple "danger" or "trail closed" signs are too general and will not suffice as a warning in many courts. The specific hazard, e.g., submerged rocks, falling rocks, or steep cliff must be clearly identified.

We must all step up our public education programs through personal contacts, public talks, brochures, proper signs, and a host of other means of reaching the potential visitor. The use of public service messages on radio and television is especially effective for local areas where a large number of the park users can be reached.

Uniformity With Neighboring Agencies

Persons tend to develop patterns of use and habits of reaction based on their past experiences. It may be confusing and frustrating to many of these visitors who find different and contradictory procedures and patterns when they travel to unfamiliar areas. This is probably more critical when the differences are found in the way information on regulations, activities, and identification of the various uses of park facilities are accomplished.

Signs of different colors or using different symbols may be misinterpreted or misunderstood. The adoption of standardized traffic control devices, e.g., road stripping, regulatory and informative signing, and control of work crews is perhaps the most important. Vehicle operators who are traveling at highway speeds on interstate

routes that use the standards adopted in the manual on Uniform Traffic Control Devices of the U.S. Department of Transportation can be dangerously confused when entering a park area using different standards. It is bad enough that the roads may become narrow and winding. There is little sense in compounding the problem by improper road stripping or the manner in which signs and/or flag persons are placed around construction sites. Uniformity in the use of common standards and procedures is important to the public to insure an understanding of regulations and of local information.

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Visitor feeding a ground squirrel. Was adequate warning given about hazards of rabies or plague?

National Park Service

Confusing directions—too many signs with conflicting information.

Summary

Visitors to park and recreation areas are much more aware of their right to file a claim in incidents in which they believe the land owner is negligent. The manager of a park and recreation area must become involved in an active program to identify and control the conditions that may pose a hazard to the visiting public. If the hazard cannot be controlled by design or engineering, the visitor must be protected by proper barriers and/or information of the nature of the hazard.

One means of accomplishing the desired results is to devise a documented safety program. The program should identify potential hazards, proper authorities, adequate standards, and procedures for employees and visitors. The most effective programs are developed by a competent safety officer who is conversant with the application of modern safety and health concepts and practices.

Richard L. Wilburn is Chief, Branch of Safety Management for the National Park Service.

Landfeatures, Locality, and Liability in Park Injury Cases

by Janna S. Rankin

Little Jerry Smith screams. His mother rushes over; she finds him lying beside a wooden walkway in Glacier National Park, clutching his leg.

"What happened, Jerry?"

"Board broke. I fell.' . . .

Janna S. Rankin

Exploration of abandoned mines with hidden hazards results in many injuries.

The Law and Visitor Safety

Whenever someone has been injured during a recreational activity or in a park setting, there are four basic issues which must be decided in favor of the plaintiff in order for the plaintiff to obtain a judgment. Professor E. Wayne Thode put them in the form of a question in a 1977 Article of the *Utah Law Review:*

(1) Is there a factual connection between plaintiff's injury and the defendant? (2) Does the legal system's protection extend to the interest that plaintiff seeks to vindicate; and if some protection is afforded, what standards of care does the legal system impose on the defendant? (3) Was that standard of care breached by the defendant? (4) What are the damages?

Although under the Federal Tort Claims Act (FTCA) and some state statutes modeled on the FTCA, a judge makes factual determinations without a jury; questions of fact are generally determined by a jury and usually take two related forms. First, what actually happened; second, was the injury caused by acts of the defendant? The pure factual questions, using our Glacier Park situation, might include: Was there a broken board? How long had the board been broken? Did Jerry really fall from the walkway? The answers may turn on the court sorting out evidence, resolving conflicting testimony, determining who is telling the truth.

The causal issues are often much more difficult. If the defendant had repaired the broken board, for example, would the accident have been prevented? Could the presence of a warning sign have deterred the recreation participants who were injured?

The second issue addresses whether the plaintiffs' asserted interests are entitled to legal protection against the defendant's conduct. In a few instances, the appropriate level of visitor safety has been established by the legislative body. Congress, the state legislature, or the local governing body has set forth in the agency mandate the obligations and responsibilities of the agency.

More often, however, the regulations relating to visitor safety flow from the chief executive officer and his/her staff in the form of regulations and policies. These regulations have the force of law and are generally given a great deal of respect by the courts. One underlying rationale for this deference is that the courts should not be involved in trying to substitute their judgment for that of the professional managers.

The Federal Tort Claims Act was passed in 1946 and mandated that the United States would be held liable for negligent acts of its employees in each state "in the same manner and to the same extent as a private individual under like circumstances." Despite this broad statement which appears to waive immunity from liability, the Act contains a number of exceptions, the most important of which the "discretionary function" exception has given rise to numerous and conflicting judicial arguments and decisions. These are addressed in detail in van der Smissen's article in this issue.

For our purposes, liability in

federal and state recreation cases may often turn on whether the active altering of a site by park officials, or by contrast, the decision to leave a "natural" site untouched, is deemed by the court to be a conscious discretionary or policy determination, or simply one of carelessness and omission.

In addition to the "discretionary function" issues, many cases today turn on the applicability of "Recreational Landowners Liability Acts," a fairly recent development in tort law. Almost every state has enacted some variation of this statute which encourages landowners to open land for recreational uses by limiting their potential tort liability. As noted above, since federal liability under the FTCA is based on state law, federal courts have had to interpret and apply these statutes in federal parks and recreation injury cases. (Landowner liability is the subject of the article by Langdon in this issue of TRENDS.) We should simply note that although these statutes vary widely, they will tend to limit liability where there has been free access for recreational visitors to uninspected, unaltered recreational areas.

The Dilemma

In discussing the specific liability consequences of either altering or preserving natural sites, we should bear in mind that visitor safety is not the only, or even always the most significant consideration. The problem—like many facing the stewards of public recreation lands—involves delicate balancing of interests, policy, politics, and even philosophy. The dilemma, at a deeper level, engages our professionals in a number of issues which are beyond the scope of this article including the "right" of an individual recreationist to encounter risk in the leisure pursuits of his/her choice, the ethics of building handrails, boardwalks, and other visitor safety features in public recreation areas, and the commitment of park and recreation professionals to preserve meaningful opportunities for human fulfillment through the preservation of the integrity of the biotic community.

The Cases

Having brushed quickly past the general aspects of the law and the philosophical problems relating to the proper role of the policy-setters with regard to visitor safety, we should examine some specific instances to see if we can discern a common thread, or a series of threads woven together, which would give us a clue as to the appearance of the final fabric of tort liability in natural areas and the contrasting colors of artificial or man-altered area liability.

To carry the analogy a little further, the reader should be aware that as we unravel individual cases we are focusing on only a portion of the decision. Rarely is there a single strand upon which the case stands or falls. Much more often a case will involve and the court will examine many of the aspects: whether the hazardous condition was created by the agency or is natural; whether the recreationist contributed to his/her own injury; the degree to which the injury was foreseeable; the ease of warning the visitor, putting up signs, inspecting, or controlling the danger; the applicability of the various exceptions to the FTCA; and finally, the courts' perceptions of the appropriate role of the parks.

Did the agency "create the hazard"?

Some cases turn on the nature of the hazardous condition which specifically caused the accident, and they tend to be resolved against the agency when it is a non-natural hazardous condition which, in one way or another, was created or maintained by the agency. For example, in a lawsuit against a New Jersey county park system, Richard Diodato, a softball game participant, was injured when he threw himself into the river in an effort to catch a high fly ball. He hit a submerged 55-gallon barrel which the park system used for litter and which vandals had tossed into the river.

In defending the park commission the attorneys argued that this was a natural area, basically unimproved, and therefore the county should be exempted from liability under the provisions of the State's landowners' liability act. The plaintiff argued that Cooper River Park was created from what had been tidal swamp lands—a W.P.A. project had dredged, cleared land, bulldozed, and dammed—and that this man-altered quality established the improved character of the premises.

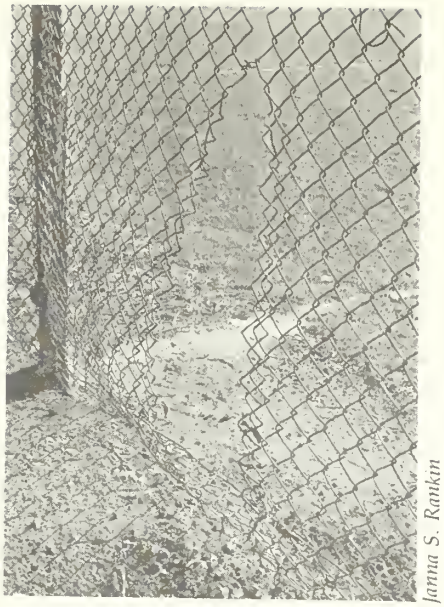
In making their determination the Diodato court based their conclusion on a more narrow reading of "natural." Judge Coruzzi wrote

that it was not the man-made quality of the park, the proximity to urban areas, or even the improvements (which he saw as "merely conveniences . . . incident to the recreational use of the park as part of the true outdoors"), but rather that the specific condition which caused the injury—the trash barrel in the river—was not natural but rather clearly artificial and therefore the provisions of the exclusion to the Tort Claims Act did not protect the Commission. In related dictum the court said: "It is clear that had Diodato been injured as a result of striking the river bed, the immunity of the act would apply."

Another case which, curiously enough, also involved the use of 55-gallon drums for litter barrels, was *Carlson v. State*. Here the State of Alaska had developed a roadside rest area with a number of trash barrels. Around October 1 each year the State terminated the trash pick-ups. This allowed the trash to accumulate which in turn attracted bears. Julie Carlson was attacked and mauled by a bear when she approached her pick-up truck which was parked near the overflowing litter barrels.

The theory of negligence relied upon by the Carlsons was that the "State *created a dangerous situation*, that it knew the situation was dangerous, and that it failed either to correct the situation or to warn people of the danger."

The "creation of the hazard" argument succeeded in the Carlson case because the court found that while the initial decision to maintain highways in winter was a policy determination (and therefore



Janna S. Rankin

Regular inspection of artificial conditions is often critical.

shielded by the discretionary function exception), the subsequent decisions on how that policy was to be carried out were operational and therefore the State had a duty to act with reasonable care.

In one of the more controversial bear management cases, a similar argument by the plaintiffs' attorneys was unsuccessful. In September, 1970, the Superintendent of Yellowstone National Park hosted a meeting to develop a management plan for the grizzly bear population of Yellowstone. All the experts present at this meeting agreed that the garbage dumps where the bears had been feeding for a number of years had to be closed. There was no consensus, however, about the most appropriate way to accomplish this.

Drs. Frank and John Craighead recommended either phasing out the dumps or replacing the garbage with another food source during the transition period. They expressed concern that the abrupt closing of the dumps would cause a change in the movement and habits of the grizzly bears, and that this would increase the likelihood of grizzly-human contacts. The members of the National Sciences Advisory Committee and the Chief Research Biologist at Yellowstone recommended an immediate closing of the dumps so the new generations of cubs would not have an opportunity to become accustomed to human food. The Superintendent adopted this latter recommendation and by 1971 the last park dump was closed.

In the summer of 1972 Harry Walker and a friend were camping in an unauthorized campsite in the Old Faithful Geyser area of the park. Here Walker was attacked by a bear and was killed. One of the arguments of the attorneys representing the Walker heirs was that the government had, in effect, created an unreasonable danger by abruptly closing the garbage dumps. Unlike the court in the Carlson case, the 9th Circuit found that the decisions of the Park Service employees were within the protection of the discretionary function rule in that the decision to close the garbage dumps was made at the planning level; therefore there was no liability.

In the Walker case, although the original hazard was "created" by the agency (allowing the bears to feed at garbage dumps for the entertainment of park visitors), the courts allowed the agency to use discretion in determining how to eliminate the danger.

The court adopted a similar rationale in a BLM case focusing on an abandoned mine. The BLM lands in the Southwest are replete with old mine shafts, deserted dwellings, wrecked cars . . the detritus of abandoned dreams. On one occasion four college students were driving through Nevada when they spotted an abandoned mine opening from the highway.

They explored this A-frame structure on public property and found it deserted and in poor condition. From the mouth of the mine they could see the remains of another mine which they also explored. When they were crawling down the horizontal shaft of the second mine the boy in the lead, Douglas Gard, slipped and fell into a vertical shaft. The impact caused him to become quadriplegic, and he brought an action against the government claiming that the BLM was negligent in not protecting the public from this dangerous mine —a non-natural condition.

As in the Walker case, the court did not base their determination on whether or not the hazard was natural or created by humans, but rather upon whether the agency was statutorily protected from liability. Here they said that the Nevada Recreational Landowners Statute applied to the federal government as well as to private individuals who allowed the use of their property for sightseeing or other recreational purposes; therefore, no liability.

There are a number of cases, however, where the failure to correct a hazardous man-made condition, particularly in an urban park setting, has given rise to liability for the agency. Urban parks are generally not protected by state recreational landowner liability laws. (See the Langdon article in this issue for a more complete analysis of the extent, rationale, and limitations of landowner liability statutes.)

For example, where a ten-year-old boy crawled through a hole in a playground fence and was injured by a train on adjacent railroad tracks, it was held that even though there was no proof of prior accidents, worn paths leading to both sides of the fence openings should have alerted the recreation supervisors to the need for precautionary repairs. In this case both the man-made character of the hazard and the foreseeability of the accident caused the court to rule against the agency.

In another municipal case, *Wamser v. City of St. Petersburg,* a swimmer who had been attacked by a shark at a city-operated beach brought an action. In deciding that the city was not liable the court points out that the beach area was a natural setting, the hazard was not agency-created, and the accident was not foreseeable since no shark attacks had ever occurred at the beach before.

What was the "character of the area"?

Many of the cases involving liability with either natural or altered recreation facilities turn on the nature of the physical setting or environment. For example, one recent case involved a 15-year-old girl who was seriously injured when she went "tubing" with a church group in Olympia National Park. While others in the group stayed in the beginners' ski area, marked "Snow Play Area," Lisa Jones and her friend went to another area on Hurricane Ridge. The lawsuit against the National Park Service was heard in District Court where the judge wrote:

. . . there was no failure to post warnings of any artificial latent condition because the conditions were natural. There had been no change in the property and the snow and ice which accumulated there were a natural accumulation which occur over the winter's time.

The natural cirque was not created by the National Park Service and, in this case, the Service had deliberately chosen not to erect "No Snow Play" signs since that might imply that recreationists might go into any area which was not signed. On appeal the Ninth Circuit affirmed the judgment of the District Court and found in favor of the National Park Service.

Whether the park is located in an urban area or in a rural area may also influence the outcome of the litigation. Andrew Husovsky was driving through Rock Creek Park in the District of Columbia on a quiet, sunny day on his way to his classes at Georgetown University. He was driving past land maintained by the National Park Service when a ten-ton portion of a tulip poplar tree fell on him inflicting severe injuries.

In deciding that the Government was liable, the court considred the character of the land and said:

We do not think it is unreasonable to require the . . . [N.P.S.] with respect to its urban parklands *bordering public roadways . . . [to carefully] inspect enormous, overhanging trees . . .*

The judge went further to say that "a seldom traveled roadway in a national forest in a rural area would require fewer inspections and a different type of maintenance than would a heavily traveled thoroughfare in an urban area."

In an earlier Yellowstone National Park case a park visitor was

Fawnda Morris

Unaltered natural conditions are virtually never factors in liability—even if the site of high risk activities.

killed when a badly decayed tree fell on his tent in a designated campground. In finding the National Park Service liable, the court emphasized both the fact that the visitor was in an authorized campground and the ease with which the Service could have inspected and removed the hazard.

With regard to completely natural backcountry or wilderness recreational areas, one legal scholar who has researched this facet of tort law extensively reports a "virtual absence of reported cases" of successful litigation against public agencies arising from backcountry recreation activities including mountaineering, whitewater river activities, rappelling, and other challenging forms of recreation that take place in *unaltered* natural environments and are not dependent on heavily mechanized equipment.

Was the injury foreseeable?

If there is a new or unusual hazard, and particularly a dangerous situation which is understood by the resource managers but is not readily apparent to the recreation visitor, then the agency is more likely to be liable if they fail to warn the visitor.

One example of this is the case in which William Claypool was attacked by a bear in a national park. Prior to setting up their tent Mr. and Mrs. Claypool had specifically followed the instructions of the brochure which said: "Consult the men in uniform—they are at your service." The park ranger told them that hundreds of people slept out every night, that they had never had anyone attacked by a bear without provocation, and that bears would not come around unless campers had food.

The reason the National Park Service lost this case was what the ranger failed to tell the Claypools: there had been an unprovoked raid in which a bear attacked and injured several campers as they slept in this campground only three nights before. The court said the danger to which Claypool was exposed was "a concealed one" and one about which the rangers had special knowledge.

We should point out that this is an older case, but that similar results could be expected if park personnel fail to warn visitors or give false reassurances regarding hazardous conditions. A ranger recently assured a mobility-impaired friend of the author that he would have "no problem" negotiating a trail in Yosemite. In fact, two friends had to carry this recreation participant up a steep mile-long grade to get back to his vehicle.

How easy would it have been to put up warning signs?

In many of the cases the courts will examine the ease with which the hazardous condition could have been eliminated or warning signs could have been erected. In *Hulet v. U.S.* the plaintiffs argued that some sort of "protective roof or canopy" be built from the trailhead to the mouth of the cave at Timpanogos Cave National Monument, a distance of approximately a mile and a half, to protect visitors from the potentially dangerous falling rocks. The court reviewed the economic and practical feasibility of constructing protective barriers and wrote:

> *To hold that ordinary care required such protection along the entire length of the trail would be tantamount to holding the government an insurer of the public safety. The law does not impose such an extraordinary duty . . .*

On the other hand, the court did suggest that the warning signs should be more effective in conveying the danger of falling rocks.

In a recent case in which a water skier was injured when his ski struck the river bottom, the lawsuit claimed the government should be held responsible because the dam-controlled water levels on the Colorado River fluctuated. Again the court took into account the discretionary character of the operation of Parker Dam, the feasibility of issuing warnings each time the water level changed

(sometimes more than once each day), but said that a system of one-time warnings would not be administratively burdensome. The court suggested that signs should be posted which informed the public that "the Government is causing the water level to fluctuate without notice, and that the public should beware of dangers that might be caused thereby."

The movement of the courts to separate the right of the government to exercise discretion in making management decisions from the duty of the government to warn about the hazards created or exacerbated by these decisions is a trend which is of major significance for park and recreation administrators.

Several years ago, for example, the NPS made a determination to leave the thermal activity area near Clear Water Springs in Yellowstone undeveloped. The Smith family, vacationing in the park, pulled off the road onto a paved turnout and followed a worn path leading from the turnout to the meadow. When they reached the area of thermal activity, Cameron, a 14-year-old boy, fell through the thin crust and was severely burned. The Smiths argued that the Service should have erected guardrails and boardwalks as well as warning visitors about the dangers of thermal pools. The court said:

We cannot agree. A policy decision to designate certain areas as "undeveloped" ones may reasonably entail the omission of boardwalks, trails or footpaths and signs marking such ways. However, it does not follow that the Government, as a landowner, is absolved of all duty under state law to erect . . . signs cautioning about conditions which have been left undisturbed as a policy matter.

The degree to which the hazard is readily apparent may also enter into the decision. In *Stephens v. U.S.* the court said that it was an appropriate exercise of the discretionary authority of the Corps of Engineers to decide to leave six-inch stumps on the bottom of Lake Shelbyville, but that the Government had a subsequent responsibility to warn recreation visitors of this hidden hazard.

In a number of the cases which find the agency liable because of a failure to warn, the courts have done some rudimentary economic balancing. That is to say, they have agreed that the agency does not have to make the expenditures necessary to completely insure the safety of the visitor, but at the same time they have suggested that the cost and administrative burden of erecting warning signs may be minimal when compared to the gravity of injuries suffered by visitors.

What is the courts' perception of the role of the parks?

One of the areas where it would appear that we could influence the future outcome of park injury litigation falls into the realm between public relations and professionalization in the handling of park injuries. Enlightened judges can be proponents who support the goals and objectives of our field, particularly when the facts before them indicate that the front-line personnel have followed proper procedures.

A recent Yellowstone case best illustrates this point. Elizabeth Henretig was vacationing in Yellowstone with her husband. After they went to a visitor information center at the Norris Geyser Basin they were directed down a pathway to Echinus Geyser which was about to erupt. They joined other visitors and a ranger at Echinus, and after the activity was over Mrs. Henretig asked the ranger if there were other areas of interest nearby. She was directed to a trail leading up a hillside and around behind Echinus. She walked about thirty feet up this trail when she suddenly slipped, twisted her ankle beneath her, and slid down the slope. The injury required orthopedic surgery and lengthy hospitalization.

The Henretigs sued the NPS, contending negligence in failing to properly maintain the trail. Attorneys for the plaintiff argued that the trail was too steep, that it was covered with loose gravel, that the Service should have provided boardwalks, handrails, and warning signs.

In examining the facts of the case the court relied heavily upon the testimony of park rangers with regard to such technical matters as the appropriateness of boardwalks in some areas and inappropriateness in others. They also reviewed the actions of the rangers who handled the incident and found them beyond reproach.

While the opinion was decided on the basis of the discretionary function exception (no liability for the NPS because the decision of

whether to build protective devices was discretionary), the judge took the opportunity to air his opinions regarding the appropriate role of the parks.

To place boardwalks and handrails on every segment of the path would be prohibitively expensive; and all of these measures [regrading to make the trails less steep, paving, signing, and constructing safety devices] would detract from that which draws visitors to our parks—the opportunity to observe scenic wonders and the beauty of nature, unspoiled insofar as possible by the touch of man.

Similarly, in an earlier case, the District Court Judge wrote:

It cannot be over-emphasized that to a very great extent the value and attraction of national parks is their natural and untamed state.

Guidelines

In synthesizing these cases in a search for guidelines a bright park administrator might ask: "Doesn't it follow that if we're going to be held responsible for hazards created by the vandals, for litter barrels thrown into the water, for holes cut in the fences, for loose or missing rails on the overlook, and if we're *not* going to be held liable when we choose not to build protective devices, that we'd be better off if we just 'went natural' . . . if we just tore out all of the roads, rails, and paths and left people on their own?"

Clearly, the courts won't let us off the hook that easily. The decisions which we have capsulized make a clear distinction between the agency responsibilities vis-a-vis safety in the more traditional urban parklands and in the moderately-developed regional or national parks. Agency responsibility in the true wilderness has not been defined by the courts because the issue has never been heard on appeal.

The question might then arise: "If we are improving an area, don't we have a responsibility to make it as safe as is humanly possible?" Or, on the other hand, "Must we always be 'state of the art' in safety?" A federal district court faced this issue recently in a case where a young man was killed as the result of an auto accident on a road in a Corps-designed recreation area. The parents argued that the design of the road was poor. The court said:

The Corps could have designed a seventy miles-per-hour divided highway with banked curves, but instead exercised its discretion to design a twenty miles-per-hour highway through this recreational, playground and camping area and the claim of negligence in this regard is barred . . ."

With regard to the presence or absence of warning signs it would appear that the courts will require an agency to warn a visitor if there is a significant man-made hazard, if the potentially dangerous condition is adjacent to a well-travelled area, if the hazard is hidden or known only to those in authority, if it is an area where there is an express invitation to visitors, or if signing the location would be effective and not expensive.

All managers should recognize that the best defense for any personal injury litigation is always the absence of negligence. Meeting recognized professional standards of conduct, conforming to applicable safety codes, and handling each incident appropriately are all indicia of reasonable prudence. We should also bear in mind that the agency is not the absolute insurer of participant safety; we are not required by the law to control the actions of all park visitors at all times.

Despite the oft-repeated myths about grossly negligent and foolhardy visitors recovering vast sums of money, the cases do not generally verify this attitude. The more dangerous and irresponsible the visitor's behavior, the less likely he or she is to recover a substantial amount—and the more likely to have to bear all or a large portion of the cost of his or her own injuries. The story of the mother who smeared ice cream on her child's face to attract a bear for a picture, and then recovered from the Government when the child was bitten, may demonstrate the foolishness of visitors and courts—but it never happened.

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The Validity of Inspection Reports

From an interview with Frank E. Bird, Jr., President and Executive Director of the International Loss Control Institute.

International Loss Control Institute

Frank E. Bird, Jr.

Q. **How important are planned inspections in the overall park safety program?**

A. A recent opinion poll of 150 select safety professionals put this activity in a third-place ranking of importance in a listing of some 20 program elements. By way of interest, only "leadership and administration" and "management training" were deemed more important by this group of experts. While hazards are symptoms of real deficiencies in the management system, they nonetheless must be dealt with promptly and effectively if we are to minimize loss from the many types of exposures in a park environment. The first objective of any park safety management system must be to identify all loss exposures in order to establish the worst possible things that could happen. No other program activity serves a more important purpose in this regard.

Q. **What types of inspections should be made?**

A. There are basically three types of inspections that should be conducted on an ongoing basis in every park to minimize loss and maintain legal compliance. First, everyone on the staff, whether part-time or full-time employee, vendor, and/or service person must be led to develop an awareness of the importance to observe and report substandard conditions or practices promptly during their routine work activities. This technique has been referred to as an informal inspection approach. We know from past experience and numerous logical reasons that this method alone is grossly inadequate. It must be supplemented by two other planned inspection activities; the general inspection and the critical parts inspection.

There are hundreds, if not thousands, of items in any park environment that must wear out at some point, whether it is a stair tread in a museum, a cable supporting a trail bridge, a hose, or a chain or pulley in a repair shop or garage. This normal wear and tear brought about by gradual deterioration may be detected before any personal harm, property damage or service interruption occurs.

On the other hand, failure of these items can take place suddenly, and involve circumstances that present harmful exposures to employees, service personnel, the public, as well as violate local or federal safety and health legislation. We also know that in addition to undesired exposures created by these items as they wear out, there is, unfortunately, the ever-present loss potential from those park items that have been damaged or rendered inefficient by vandalism or other abuse and misuse. A planned, general inspection and critical parts inspection program augment any formal inspections to assure that these conditions have been identified and corrected on a timely basis.

Q. **How often should the planned general and critical parts item inspections be made?**

A. Two inventories provide the guidelines for the inspection frequency in both of these. An inventory that includes all park areas and structures provides a knowledgeable team with a comprehensive listing for consideration of planned general inspections frequency. Obviously, a risk evaluation of each area and/or structure form the basis of consideration for general inspection frequency. Each area or structure could have a different inspection frequency. The second inventory, to establish critical parts/items inspections, should include every machine, piece of equipment, every structure, area, and material or substance in the park. Initially this sounds like an awesome task, but once conducted, it needs only to be updated regularly with addition or change.

A team of knowledgeable persons establishes the parts of an item that, with wear-out or failure, could cause major loss when compared to the same condition or other parts of the

item. Individual items such as chemical substances, fuel and items in storage, could be considered critical items unto themselves. The dimension of work involved in making this inventory and establishing critical parts/items must be accomplished systematically and with an established time schedule.

Again, a knowledgeable team establishes the inspection program for every critical part/item. A critical parts inspection of a piece of equipment could be prior to every use by the operator, weekly, monthly, or annually on other parts or items.

This most certainly does not discourage the use of highly specialized, external inspection services for certain specific exposures or for an infrequent and unbiased outside opinion as to quality of the internal program.

Q. **Who should make these planned inspections?**

A. Obviously critical parts/items must be inspected by the most knowledgeable and/or qualified people. This could be the operator of a machine or piece of equipment before use. It could be a park maintenance worker, ranger or other responsible and knowledgeable person. On the other hand, it is strongly urged that the planned general inspection program be shared with all supervisory and staff personnel. This would certainly include sharing this activity with responsible vendor or concession personnel. All personnel would inspect to identify conditions that are substandard and legal safety requirements.

If all loss exposures are to be identified on an adequate scheduled basis, it is not usually economically feasible or practical to have an outside contractor do this. Even more important, to develop the safety awareness desired by all personnel regularly involved in park operation, it is absolutely essential that we do not isolate them from one of the greatest motivational and learning experiences in this regard.

Q. **What inspection documentation should be made, recognizing that such information may be subpoenaed and used to a park's disadvantage?**

A. This question is not only relevant to a park system, but to such organizations as insurance companies and consulting groups in particular that offer or provide services to others. Inspection activities could, by record, invite the possibility of litigation by a sin of omission for not identifying an exposure that was obvious to the public or others, or by committing an identified exposure/hazard to written form and then failing to remedy it.

Generally speaking, it is widely accepted that not to record the necessary information to properly manage an effective safety management system is to open the door to a much greater potential for loss. Saying it another way, there is no better way to control loss from all actual or alleged exposures to accident than a well-managed park safety management system. Of course, that means recording what is necessary to properly manage the system.

Q. **What qualifications do most supervisory or staff personnel have to recognize the wide variety of hazards or substandard conditions that could result in loss as well as violate state or federal legislation?**

A. The best in the world. They are much more familiar with the overall general park environment than a typical external inspector would be. Most major exposures including legislative violations are easily identified with a reasonable degree of training. Every year of their past experience has given them insight to the kinds of accident exposures that could occur in the environment they are familiar with. Of course, the better the training in hazard recognition, the more effective the results in hazard identification as well as legislative compliance. A great advantage of a variety of training and experience can be obtained by rotating inspection assignments from time to time.

Q. **What is the role of the safety professional, the collateral duty safety officer, or the person coordinating the inspection program?**

A. The most valuable utilization of this one person would unquestionably be to measure compliance to the park program standards including legal compliance by all responsible persons and to channel the resulting evaluation to key management people for commendation or constructive correction on a timely basis. In effect, the program coordinator, whatever the title, is an auditor of the safety management system. By this application of professional management skills and techniques, he or she multiplies the available human resources to manage park risks many times over.

As related specifically to the inspection program, he or she can provide training, guide upper management in the assignment of inspection responsibilities, measure the effectiveness of inspectors' efforts and communicate results to responsible managers.

Unfortunately, many park safety program coordinators believe their efforts are best spent by trying to do the work that all members of management should be doing—in this specific context—the inspections. The result is a very busy person who needs the help of additional safety inspectors to do an adequate job of inspecting with no time for the many other aspects of a modern park safety program.

Q. **How can park management personnel improve their methods of establishing priorities of items for correction to meet their own and legal standards? Please keep in mind the constraints of time and budget versus the legal implications of potential neglect once these substandards have become a matter of record.**

A. There is a variety of risk evaluation systems that can definitely assist management in setting priorities of corrective action. The best system is usually the one that can be most easily understood, retained, and continually utilized by members of management and particularly those involved with inspections. Every substandard condition should be classified as to its hazard classification:

Class "A" Hazard—A condition or practice likely to cause permanent disability, loss of life or body part, and or extensive loss of structure, equipment or material.

Class "B" Hazard—A condition or practice likely to cause serious injury or illness (resulting in temporary disability) or property damage that is disruptive, but less severe than Class "A."

Class "C" Hazard—A condition or practice likely to cause minor (nondisabling) injury or illness or nondisruptive property damage.

Through the use of a risk evaluation system, substandard items that have a high potential for major loss such as resulting from litigation can be grouped into three major categories such as super critical, highly critical and critical for correction priority.

A MANAGEMENT GUIDE TO RISK DECISION

KEY QUESTIONS

CLASSIFICATION OF HAZARD

1. What is the potential severity of a loss if an incident occurs?
   - ☐ A—Major
   - ☐ B—Serious
   - ☐ C—Minor

PROBABILITY OF OCCURRENCE

2. What is the probability that an incident will occur from this problem or hazard?
   - ☐ A—High
   - ☐ B—Moderate
   - ☐ C—Low

COST OF CONTROL

(Establish dollar amounts for each category)

3. What is the cost of the recommended control?
   - ☐ A—High
   - ☐ B—Medium
   - ☐ C—Low

DEGREE OF CONTROL

4. What degree of control will be achieved by this expenditure?
   - ☐ A—Substantial (67-100%)
   - ☐ B—Moderate (34-66%)
   - ☐ C—Low (1-33%)

ALTERNATIVES

5. What are the alternative controls?

JUSTIFICATION OF CHOICE

6. Why did you choose this control?

National Park Service

All staff should be alert to spot conditions that may lead to accidents.

Richard L. Wilburn, NPS

A thorough inspection would have identified and prevented rock from damaging bench.

bility in the program.

It isn't enough to give verbal support to the program coordinator. The vitality of the program is almost wholly dependent on whether or not people feel the top officials want it. Periodic inspection tours should be announced and made by the upper level of management including the park manager. On these occasions, there should be a clear connection of this action with the safety p A brief report on the safety program should be scheduled on all regular management meetings to clearly identify its association with important matters. Attitudes are like waterfalls—they invariably flow downward. Professional management experts refer to this aspect of leadership as modeling.

Q. **How can park management improve the quality of inspection in order to fulfill the safety program's mission, as well as to assume moral and legal responsibilities?**

A. There are simple, but proven techniques that motivate improved inspections. Some of these would include: adequate training of all personnel involved in inspection techniques that would include legislative requirements, the development and use of inspection guides for each park area and structure, a system to recognize good inspections and a pre-inspection motivational contact with inspection personnel by a member of upper management.

Q. **Are there any other factors important to managing an inspection program that minimize risk and optimize legislative compliance?**

A. There are many things that have not been said, but surely the most important aspect of all should be highlighted, and that is upper management visi-

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Discretionary Acts of Managers' Policy Decision-Making

by Betty van der Smissen, J.D.

Discretionary acts of policy decision-making in the federal jurisdiction and in most state jurisdictions, which statutorily make governmental agencies liable and then set forth exceptions, are an exception to liability. However, the distinction of discretionary acts as a basis for determining liability is not new. Though the concept of discretionary acts existed when the Federal Tort Claims Act was enacted in 1946, the impetus came in the decade of the '60s. While the government-proprietary dichotomy was applied in nearly every state in the '60s, a few states, notably California, turned toward a different standard for government tort liability, the distinction between discretionary and ministerial acts

By around 1970 there were cases in five additional states and by 1975 more than a dozen states referred by statute or case decision to the distinction of discretionary-ministerial duties, with immunity for the first and liability for the second. And, ten years later, the majority of states embraced the concept of discretionary acts.

The rationale for immunity for discretionary acts rests upon the principle that the public decision-maker should be shielded from personal liability or other factors extraneous to a judgment based on best perception of public need, and that choices or decisions should be made without fear of personal liability. Government officials should be permitted the freedom to perform their duties without fear of individual liability. Also, limited liability is essential if competent individuals are to be attracted to positions of public trust.

Whereas the government-proprietary dichotomy is directed toward the nature of the function of the *services* provided by the governmental *agency*, the discretionary-ministerial distinction focuses on the *acts* of the *official* or *employee*. What is a discretionary act and what is a ministerial act is not clearly defined, and has been left to the courts to determine.

A leading case stated that a discretionary duty includes more than the initiation of programs and activities. It also includes determinations made by administrators in establishing plans, specifications or schedules of operation. There is discretion where there is policy judgment and decision. Discretionary acts are often characterized as those involved in the planning and policy functions.

Ministerial acts usually are considered actions involved in operational elements, such as acts concerning routine, everyday matters not requiring evaluation of broad policy factors. The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as financial, political, economic, and social effects of a given plan or policy. A person performs in a given state of facts in a prescribed manner, without regard to exercise of his/her own judgment upon proprietary of act being done.

Determination Tests

A number of states have made efforts to set up "tests" for determining what constitutes a discretionary and a ministerial act, rather than just defining the words. Four questions were formulated by the Washington court as guidelines:

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

2. Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program or objective?

3. Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Under the "planning-operational" test, decision-making and consideration of basic policy factors evidence discretionary acts, while a ministerial act implements the decision or policy. Some reference this as the "undertaking test." There is no duty to initially perform a function, but once it is "undertaken," then there is liability for doing the function with due care. You choose to do the function at your "discretion" for which you have no liability for choosing or not choosing to do so; but, once you have chosen to perform the function, you are liable for the conduct of the function and your acts are considered ministerial.

For example, deciding to build a pool was deemed a discretionary act, but the operation of the pool

would be ministerial in nature. And, in *Connelly v. State*, the California court held that there was no duty on the part of the State Department of Water Resources to issue flood forecasts, but when it undertook to do so, it was held to a standard of reasonable care.

The discretionary immunity exception to liability not only protects affirmative discretionary acts, it also protects the discretionary decision not to act, such as a decision not to provide police protection. However, failure to act in the face of a known dangerous situation (e.g., vicious dogs) is decision-making at the operational level and is not protected as a discretionary act (*Hansen v. City of St. Paul*). In a seemingly contrary decision, the court held that the government was not liable for failing to exercise its discretion and provide safety features, such as boardwalks and rails on an undeveloped trail, inasmuch as courts have traditionally held that the government's decision to develop or not to develop certain areas within the national parks to be a discretionary activity within 28 *USC* 2680. However, this case should be distinguished from the preceding *Hansen* case in that it involved a natural area with the conditions perfectly obvious to the user and there was no eminent danger.

With the focus on the acts of the persons, there is a tendency to consider the distinction in terms of the level of the person, whether at the policy-making or the operational level. While it is true that discretionary acts are most often found in the upper echelon of the administrative hierarchy and the public officials level, the determining factor should not be the position held, but rather the nature of the act. An administrator can perform both discretionary and ministerial acts; which type of act depends on the type of judgment or discretion is exercised in a given situation. Further, an agent (administrator) acting beyond statutory authority cannot then be protected under discretionary act immunity. In one federal case an agent destroyed horses grazing on lands, although he knew to whom they belonged. Also, there is no protection from liability while performing a discretionary act, if such act involves willful and wanton negligence.

Richard L. Wilburn, NPS

Swimmers in remote river along a major trail. Failure to post as a hazardous or prohibited swimming area could lead to liability.

Case Illustrations

Keeping the foregoing principles in mind, what are some of the case illustrations of what the courts determine to be discretionary and ministerial? Most of the recreation and parks cases deal with recreation programming, rather than park development or management.

In a 1982 Florida case it was held that traffic control was a discretionary act. The plaintiff alleged that she was sunbathing on the beach within the limits of the City and that while so engaged, she was run over by an automobile driven by the co-defendant, suffering injuries. The plaintiff contended that by virtue of a charter provision making the portion of the beach within the city limits a public highway and authorizing the City to regulate traffic thereon, the City had a duty to make the beach reasonably safe for sunbathers invited thereon in the same manner as would private persons owning a place of recreation and amusement. The court held that the City was immune from suit, since whether to allow, restrict or otherwise regulate vehicular traffic on the beach required a decision which involved basic governmental policy, program or objective.

In an early (1965) case (and the state still invoked governmental function, as well as applied the concept of discretionary act), the court held that the placing of barriers around the river, supervising the river area, posting warnings, and erecting railings or safety devices along the banks of the river were discretionary decisions. A 7-year-old had drowned in a river in the city park.

A case about 15 years later reached a similar result, holding

Richard L. Wilburn, NPS

Sign at Point Reyes National Seashore (CA) provides precise information about the hazards of going in the water at the point of visitor access.

that the act of determining whether to place a warning near the boulder from which the swimmer dove, to guard the area, and to prohibit persons from diving in the area related to a discretionary act for which the Director enjoyed official immunity. The boulder from which the plaintiff dove was near, but not in, an area that was maintained for swimming on the park grounds.

Warnings

Regarding warnings, several cases reached a contrary decision. A 14-year-old visitor to Yellowstone National Park was viewing a superheated thermal pool in an area near Clear Water Springs, when he fell through the thin crust and was severely burned. The court held that to leave the area in an undeveloped state was a discretionary function, but the decision not to post warning signs in the area was not.

The government, as landowner, has a duty under state law to warn about conditions which have been left undisturbed as a policy matter, so the court held. It was stated, further, that the 14-year-old owed a reciprocal duty to exercise ordinary care to avoid injuring himself.

The condition of the terrain also was a factor in a Wisconsin case about the same time. The court held that where the manager knew of the condition of the terrain of a recreation area to which the public was invited, and especially when he was in a position to take action, there was a ministerial duty to either place warning signs or advise his superiors of the dangerous situation which existed.

A Minnesota case, too, held that while it was a discretionary act to put in a boat launching site, it was a ministerial act to operate the site. A duty was owed to maintain the facilities in a safe condition or to warn of hazards. A water skier cut the bottom of his foot severely when he stepped on an object in the lakebed near the city's public boat-launching sites. The defendant sought to have the decision to search or not to search this area as discretionary; however, this was an operational decision for which there is no immunity. The duty to protect the user gave rise to liability for unsafe conditions in the operation of the boat-launching site.

The duty to provide a reasonably safe premise also was held to be a ministerial act in a park playground case. The court stated that the city's decision to establish a park and equip it was a discretionary function of local government, but that it was a ministerial duty to use reasonable care in carrying out that decision. (A 14-year-old fell from a slide.)

The distinction between a discretionary act and a ministerial act also was made in an Oregon case. A child was permanently injured while attending an "Indian Powwow" within the fairgrounds arena. Immediately adjacent was an area used for boarding of horses. The child saw a horse tied by a rope to a fence adjacent to the arena and went over to it. He took hold of the rope and his fingers were pulled against the fence by the horse, causing the middle three fingers to be severed. The court stated that the selection of the arena as the site for the Powwow was a discretionary function, but once the selection had been made there was a duty to maintain it in a safe condition, a duty of a ministerial nature. (This injury did not occur due to the lack of area or building maintenance.)

However, the selection of site was held not to come under the protection of discretionary act in a New Jersey case. A tenth-grade student was struck in the right eye by a flying hockey puck causing eventual removal of the eye. Plaintiff alleged that there was an excess number of players in a playing area that was too small. The defendant endeavored to bring the selection of the site under discretionary act. The court stated that such decision to play the game with that many participants in that

National Park Service

Insure properly placed and manned lifeguards in designated pools.

size space was not the type of decision the court contemplated as "high policy" discretionary acts.

The decision to provide no supervision in the park at night was held to be a discretionary function in a 1980 Florida case. The plaintiff, a young girl, was injured late at night in a city-owned park. It was alleged that the city knew that minors frequented the area and therefore owed a duty to supervise. However, where there is a special relationship which gives rise to a duty to protect (supervise), then to supervise is considered a ministerial act.

The Florida court, though, has attempted to distinguish inadequacy of supervision and insufficient personnel based upon budgetary and other judgmental criteria; inadequacy being ministerial in nature and insufficiency due to other controlling factors discretionary in nature.

In another Florida case the budgetary considerations, also, were pointed out when it said that whether to provide security guards, parking attendants, security gates, and the numbers thereof are clearly discretionary decisions, partially based upon budgetary limitations controlled by the Legislature. While the foregoing four cases are all from Florida, they do give some idea of the definition of discretionary and ministerial acts facing all states who have, in the late '70s and early '80s, put in place this dichotomy, replacing the governmental-proprietary function approach to governmental immunity.

Conclusion

In summary, a discretionary act to come under the umbrella of governmental immunity must be an act of broad policy determined by political, economic, and social factors. Therefore, most acts of a policy board would be discretionary acts given immunity, while most acts of employees in their operational tasks would not be, but would be ministerial in nature.

Whether the decisions made by managers are discretionary acts under the immunity provision depends upon the nature of the policy—if it is an operational policy carrying out a function already established, then it is ministerial in nature and is not protected from liability. If it is a broad policy setting the direction of the agency and its activities, then it is discretionary as contemplated by the legislatures or courts and immunity is given. Although few local government managers would be setting such policies, more state and federal officials would be (but not state and federal managers of areas or facilities).

However, a decision made in respect to development of a natural or undeveloped area, which is basically a planning decision, usually is considered a discretionary act.

This article is based upon material in Chapter 4 of the forthcoming book Legal Liability and Risk Management *by van der Smissen, published by Anderson Publishing Company, Cincinnati, 1985.*

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Landowner Liability

by Jeanne L. Langdon

Delaware Dept of Natural Resources/ Environmental Control

Even though there is always some risk involved in a common item such as a swing set, that risk is not unreasonable.

With large numbers of people enjoying a variety of activities in park and recreation areas, it is inevitable that some accidents will occur. It is equally inevitable that in our litigious society, some of these accidents will result in lawsuits against the park or recreation area's owner. While it is always disturbing to park and recreation managers to discover that they have been named as defendants in this type of suit, a knowledge of the basic principles of law which will determine liability will make lawsuits less intimidating and may help to prevent future suits.

Not every injury will result in liability for the park owner. Before the park owner can be held liable, it must be determined that he or she was negligent in some way, and that the injured person did not contribute to the injuries through his or her own negligence. Some injuries are caused by unavoidable accidents; they are caused by no one's negligence, and could not have been prevented because they could not have been foreseen.

Many injuries, however, are caused by someone's negligence. It could be the negligence of the injured person, as by not watching where he or she is going, or the negligence of a third person. Or the injury could have been caused by the negligence of the park owner.

In many cases, the governmental entity that owns the park will be found to be immune from suit due to sovereign immunity. If not, it must next be determined whether the park owners can be held liable. (It is worth noting that only in the most extraordinary circumstances will park personnel be held personally liable. Unless the employee acted outside the scope of his or her employment, the governmental entity will be held liable for the conduct.)

In every lawsuit based on the negligence of a landowner, the plaintiff must establish four elements: 1) the defendant must have been under a duty to conform to a specific standard of conduct for the protection of the plaintiff against an unreasonable risk of injury, 2) the defendant must have breached that duty of care, 3) the breach of

duty must have been the direct cause of the plaintiff's injury, and 4) the plaintiff must have suffered some injury or other damages.

Duty of Care

Generally, the most difficult element for a court to determine is whether or not the defendant breached his or her duty of care. The existence and nature of the duty is fairly clear: owners of park land are required to use reasonable care to keep the property reasonably safe for park visitors. The owner has a duty to make reasonable inspections to discover any concealed, dangerous conditions and make them safe. The difficulty lies in determining when a park owner has failed to act reasonably to protect park visitors and so has breached his or her duty of care.

Taking for example a swing set in a recreation area, it is clear that if the parents of a child who was hit by the swing bring a lawsuit, they will probably not be able to establish that the park owners were negligent. The park operators had a duty to protect the child from unreasonable risks, but few people would argue that the risks of a swing set are not more than outweighed by its utility to children. Even though there is always some risk involved in even such a common item as a swing set, that risk is not unreasonable.

The result might be different, however, if the swing set had not been properly maintained, and had collapsed and injured the child who was playing there. If the parents of the injured child can prove that the deteriorated condition of the swing would have been discovered by a reasonable inspection, they will have proved that the park owners breached their duty of care.

A person entering a public recreation area or other land owned by the government and maintained for public use has, in effect, been invited into the area by the governmental entity. The landowner's duty to persons invited onto his property to use reasonable care to prevent known or foreseeable dangers is the same regardless of whether a fee is charged for entrance into the recreation area. Visitors to parks have a right to expect that reasonable care has been taken to make the premises safe by undertaking inspections to learn of any hidden dangers, and then by either repairing the defect, taking steps to prevent harm, or warning visitors of the danger.

While this duty usually refers to hidden dangerous conditions of the land or buildings, such as slippery walks and loose guardrails, it can also include the actions of third persons if the landowner could have anticipated and prevented the harm. This would include the situation, for example, where hikers are not warned that hunting is allowed in the area of a marked hiking trail, or where lifeguards are aware of children running and playing boisterously, but do nothing to prevent them from injuring other swimmers.

Warnings

In many cases, a warning will be sufficient to fulfill the duty of reasonable care. Warnings may be particularly appropriate in recreation areas and parks, where part of the enjoyment of the experience is from the natural, if dangerous, condition of the area. The duty to warn extends only to those dangers which the landowner knows about but which are not open and obvious, so the visitor would not be likely to discover the danger.

The dangers of a wilderness area are generally well known: uneven, unstable or slippery terrain, the possibility of becoming lost in the woods, and wild animals are all risks of which reasonable people are aware when they enter a park or wilderness area. A smoothly paved trail may be safer than a trail covered with rocks concealed by leaves and twigs, but pavement certainly detracts from the wilderness experience.

However, in addition to the usual dangers, there may be dangers present which the reasonable park visitor would have no reason to anticipate. Without a warning, a hiker might not realize that hunting is permitted and there may be traps or hunters in the area, or that a blight the previous year had killed many trees in the area, and the dead trees were becoming rotten and likely to fall on unsuspecting hikers. While it might be prudent to remove the dead trees around a picnic area where the potential danger of injury from falling trees is greater, it is not feasible to remove them throughout a forest, and so a notice to that effect should be posted to warn of the danger.

It should be noted that this duty to correct a dangerous condition arises only with respect to dangerous conditions which the park management knows exist, or which could have been discovered through reasonable inspection. This means that park personnel should take a periodic tour of the area, walking the trails to check that guardrails and signs have not deteriorated or been vandalized, or that new dangers have not developed. The inspection need only be reasonable. There is no duty to inspect every inch of the park, or to imagine every possible type of accident.

Proper Use

The liability of the park owner will also depend on the use for which the land is offered as opposed to the actual use made of it. In order to find the park owner liable, the injured person must show that he or she was using the premises for a purpose contemplated by the invitation. If, for example, a dock is provided in a lake for the purpose of boat access, there would be no liability to someone who injured himself or herself while diving off of the dock for a swim, unless park personnel knew that the dock was being used for swimming and did nothing to stop it or make the area safe for swimming. The person swimming from the dock has exceeded the scope of the invitation.

Similarly, if an area has been roped off and marked for swimming, there has been an invitation to the public to use only the area within the ropes for swimming. By providing a safe swimming area, the park owner has implied that swimming outside that area is at one's own risk. There may be liability to a person injured by a steep drop-off inside the swimming area, but no liability for the same dangerous condition outside the roped-off area. In this case, the injured person has exceeded the physical scope of the invitation.

The duty to make safe or warn of concealed, dangerous conditions applies to all of the areas of the park which are open to visitors or which visitors could assume are open. Although there are no limits to the ways that people can be injured, a discussion of some of the major trouble spots may be helpful.

Roads and Walkways

Roads and walkways should be kept in a reasonably safe condition and free from defects. The park owner may be liable if dangerous instrumentalities or obstacles are left in the way and cause someone to trip and fall. This becomes especially important after dark, because although a park may officially close at dusk, there may be people still in the park. If park owners are aware that there are regularly people in the park after dark, the walkways they use should be lighted or made safe.

Grassy Areas

Grassy areas should also be kept in a reasonably good condition. While there is no liability for someone who trips in a small depression in a lawn, there may be liability if, for example, a playing field is established in an area known to be disturbed by burrowing animals.

Ramps and Stairs

Ramps and stairs are a frequent cause of lawsuits. Stairs should be kept in good repair, free of obstructions, and should be designed to withstand the type of use anticipated. Wooden steps which have become rotten should be replaced as soon as reasonable diligence would disclose the defect. If stairs have been designed to accommodate a usual flow of a few people at a time up and down the stairs, they should not be permitted to be used by many people at one time, for example, as a type of bleachers to view some activity below.

Recreation Equipment

Recreation equipment should be kept free of defects attributable to the landowner's negligence. For example, a failure to maintain the equipment could lead to liability if someone is cut by rusted or jagged edges, or if the equipment falls apart during use. If the equipment is in good working condition, there will ordinarily be no liability, unless park personnel have undertaken to supervise children using the equipment, as by running a camp, and have failed to supervise the activity adequately.

Delaware Div of Parks/Recreation

In many cases, a warning will be sufficient to fulfill the duty of reasonable care.

Swimming

Drownings and other swimming injuries are an unfortunate but inevitable factor in park management. Some of these incidents must be considered unavoidable accidents, for which the park owner will not be liable, because a landowner is under no obligation to determine the swimming ability of those who wish to use a swimming area. A court in Tennessee has pointed out that if the owner of a swimming pool were held to be negligent in permitting a boy who could not swim to enter the pool, an ordinary city boy could never learn to swim.

A swimming area, however, like any other part of the park, should be free from concealed dangerous defects. A swimming area in a lake or pond should not have unmarked steep drop-offs, or an accumulation of underwater vegetation. Stairs and ladders should not be permitted to become slippery with algae. Diving areas should be deep enough to allow safe diving, and areas that are too shallow for diving should be marked. If a mark on the side of a pool indicates a depth of three feet, adults are expected to know that it is too shallow for diving.

The decision of how many, if any, lifeguards to provide for an area would generally be considered a discretionary function, for which the government is immune from suit. However, if no lifeguard is provided at a swimming area, there should be a sign which either prohibits swimming in the area or warns that swimming is at one's own risk. Because the danger of drowning is obvious and known to all adults, this sign is sufficient to parents that they should closely supervise their children's swimming.

If a lifeguard is provided, parents often think that their duty to supervise their children has been assumed by the lifeguard. Whether or not this is true depends on the circumstances. Although it is the lifeguard's duty to rescue swimmers in trouble, it is the parents' duty to see that their children are not in a position to get into trouble, as by making them stay out of deep water.

Many of the precautions that should be taken by park and recreation managers are good common sense. In addition, they are good legal sense, because as long as park and recreation managers have exercised reasonable care in protecting park visitors, there can be no finding of liability. In addition to preventing lawsuits, the exercise of reasonable care will also help to prevent future injuries.

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New NRPA Law Reporter to Focus on Recreation Injury Cases

by James C. Kozlowski, J.D.

In 1984, the National Recreation and Park Association (NRPA) began publication of the *Recreation and Parks Law Reporter (RPLR)*. *RPLR* is a quarterly subscription service providing a description of recent court decisions (1977-present) on recreation and park issues. The primary focus of *RPLR* is personal injury suits against recreation and park agencies. Suits involving federal, state, county, municipal, and commercial recreation and park agencies are featured. *RPLR* will also describe recent cases involving other law-related aspects of recreation and park administration such as land use, revenue management, civil rights, etc.

RPLR was developed to complement rather than supplant the information now available in "NRPA Law Review," a monthly legal topics column in NRPA's *Parks & Recreation* magazine. The increased volume of litigation against recreation and park providers made it impossible to adequately report recent court decisions within the limitations of a single monthly magazine column. *RPLR* will, therefore, provide a more comprehensive overview of court decisions impacting the field. Indexed by jurisdiction and topic, *RPLR* should prove to be a valuable resource for administrators, educators, and attorneys in keeping abreast of the law-related developments in recreation and parks.

The expressed purpose of the *Recreation & Parks Law Reporter* is to provide informative background information for administrators, educators, and attorneys. Judicial decisions presented in *RPLR*, however, cannot possibly predict the outcome of recreation-related litigation in other jurisdictions. On the other hand, these case descriptions do provide valuable insights into the issues, rules of law, and legal analysis which have been applied by courts to resolve recent controversies.

In so doing, material in *RPLR* may raise more questions about the law than it answers. These law-related questions, however, are the first significant step in understanding the law of recreation and parks. Discussion among administrators, attorneys, and educators on the legal issues raised in *RPLR* cases will hopefully remove some of the mystery and misunderstanding which oftentimes surrounds the law. Such law-related education will certainly contribute to the professional development of the individual and the field.

Like the members of a jury, subscribers to *RPLR* benefit from the perfect vision of 20/20 hindsight. In both instances, it is easier to pass judgment after the fact, identifying those precautions which could have avoided legal liability in a given situation. Consequently, recreation and park professionals can certainly learn from the apparent shortcomings of the defendants in *RPLR* cases.

The issues raised in *RPLR* should also prompt constructive self-examination among recreation and park administrators regarding potential legal liability in their programs. In this way, *RPLR* can provide valuable lessons in recreation administration at far less cost than that borne by the defendants in the reported cases.

To introduce the readership to this new law related publication, this article will excerpt a report from Volume I, Number 1, of the *Recreation and Parks Law Reporter*.

Liability for Injury on Railroad Adjacent to City Park

In the case of *Leone v. City of Utica*, 414 N.Y.S.2d 412, aff'd. 49 N.Y.2d 811, 426 N.Y.S.2d 980, 403 N.E.2d 964 (1979), the eight-year-old plaintiff was injured on railroad tracks adjacent to a municipal park. Although the park contained playground development, the area close to the railway was heavily

Bill Clark, NPS

Specific warnings about the hazards of crossing dangerous areas should be provided by park management.

wooded and rugged. A ravine traversed the park separating the developed section from the wooded area. A few rope swings and a tree fort were located in the woods along with several footpaths leading to the railroad tracks. As described by the court: "Neither the playground nor the larger park area was enclosed by fencing and thus there were no formidable obstacles or barriers between the playground and the remainder of the park, or between the park and the railroad property."

City personnel were assigned to the playground until August 15. The accident occurred on August 24. Plaintiff and several friends were playing in the ravine when they heard a train whistle. They ran to the tracks to wave to the trainmen. Plaintiff climbed a five foot incline to reach the railway and began running alongside the slowly moving train. Near the end of the train, plaintiff slipped and fell beneath the train. Plaintiff's right leg was amputated as a result of the accident.

According to the court, the issue to be considered concerned "the liability which may befall a municipality for injuries sustained by a child on railroad property located adjacent to a city-owned playground." In determining such liability, the court said, "the degree of care to be imposed upon a municipality in a particular instance is necessarily dependant upon the attendant circumstances and is thus ordinarily a jury question." The city contended that plaintiff "arrived on the railroad property from privately-owned land and not directly from its park land." The city, therefore, argued that it "owed no duty" to plaintiff.

Citing other New York decisions the court stated that the "city owes to those who use its parks a duty of ordinary care against foreseeable danger." Further, "the degree of care to be exercised must take into account the known propensity of children to roam and climb and play." Under the circumstances, the court, therefore, concluded that a jury could reasonably find a lack of ordinary care based upon: the foreseeable danger of serious injury presented by the location of the railroad tracks, the failure of the city to fence its playground or park, and the failure to supervise the use of the park or take some other reasonable precaution to prevent or discourage children from going onto railroad property.

> *The record sufficiently establishes that young children often played in the wooded area of the park west of the creek and it may be fairly inferred that the city was aware of that activity and made no effort to prevent it. Additionally, the city had knowledge of the location of the railroad tracks and that pathways in the park lead to those tracks.*

In establishing the duty of care owed in a given situation, courts will balance the foreseeable risk of serious injury against the burden of precaution. In this instance, the city failed to offer any evidence that fencing, supervision, or other precautions would have been unreasonable. "While the city might have introduced proof showing that it would have been unduly burdensome to take measures to avoid the risk of harm presented here . . . it did not do so."

The city also argued that "its conduct was not the proximate cause of Anthony's injury." In considering this point on appeal, the court said that it "is bound to assume . . . that the jury adopted that view of the evidence most favorable to the prevailing parties." Based upon this assumption, the court concluded: "The jury properly may have found that the city's breach of duty was a substantial factor in bringing about this foreseeable occurrence."

> *Since there were no barriers or apparent line of demarcation between the park land and the contiguous property, it could reasonably have been anticipated that an infant, attracted by a train whistle, might take a path leading from the park and across that property to the tracks. The jury permissibly could have found that a fence along the boundary between the park and the private property would have prevented this accident.*

This appellate court, therefore, affirmed the judgment in favor of plaintiff. A subsequent appeal to the New York Court of Appeals similarly affirmed the decision of the lower court.

Two of the five judges dissented in this case. The dissenting opinion relied upon testimony which indicated that plaintiff was 250 feet south of the park and approximately 600 feet from the playground when he was injured.

While acknowledging that "a landowner may be liable for injuries that occur on his property or, in some circumstances on nearby property," the dissent stated such liability is "not endless." In other words, a landowner is not "an insurer of all who come upon his property." As described by the dissent, such liability is "limited by basic principles underpinning the fault theory of tort law—reasonable care and proximate cause." In the opinion of the dissent, the majority view in this case ignored these principles and holds "a landowner liable for an accident that occurred on the property of another, a substantial distance from the landowner's property and having only the most tenuous connection with it "

> *In our view it was not reasonably foreseeable that this eight-year-old child would leave the playground, traverse this much territory and eventually be injured by a train traveling so slowly, i.e., eight miles per hour, that this youngster could successfully chase and catch up with it. Since this accident was not reasonably foreseeable, the City owed no duty to protect him from it. To create such a duty, as the majority does, is to require that barriers be built and maintained surrounding every parcel of the land upon which children may come regardless of the remoteness of the risk. To cast a landowner in liability for its failure to undertake these measures is unfairly and unduly burdensome.*

According to the dissent, other factors, rather than sufficient legal proof of negligence, prompted the jury's verdict against the city. "In short, one must conclude that this verdict was a product of understandable sympathy from a jury swayed by the exhibition of the plaintiff's very serious injury and the passion-evoking testimony of a doctor who described the terrible and intense pain that this youthful plaintiff suffered."

National Park Service

Regularly inspect all equipment to insure there are no loose joints, sharp protrusions, or pinch points.

James C. Kozlowski, J.D., is a private consultant specializing in the legal aspects of recreation and parks. He is a member of the bar in the District of Columbia and the United States District Court for the District of Columbia. He is also the author of the Recreation and Parks Law Reporter.

Take Your Lawyer To Lunch

by David A. Watts, Esq.

Park managers administer for the use and enjoyment of the public irreplaceable and unique resources, representing great diversity and purpose. The visiting public enjoys the facilities, interpretive programs, wilderness solitude, recreational opportunities, and historical representations that are provided with determination, creativity, and pride. On the basis of various public opinion surveys these programs are considered to be among the most popular, and your agencies are held in high respect by the taxpayers of this country. The visiting public also considers the resources placed under your administration as in public ownership, to be managed under notions of a "trust" responsibility, for the use and enjoyment of future generations.

The public is invited to your facilities to consume the full menu of programs and experiences. They are also encouraged to participate in the planning process, and to offer comments and suggestions. One of the fundamental tenets of well-accepted park programs is public visitation, participation, and involvement. This is the cornerstone of your mission and respect.

Yet, try as you will, there will at one time or another be an accident resulting in a tort claim, a disagreement over a development plan, or public controversy over wildlife management strategies involving the resource or visitor use.

The old adage of President Lincoln is still true: you cannot please all of the people all of the time. Thus, it is ordained that for each park manager there will exist in his or her lifetime at least one citizen who utters, "sue the _____," and who has an attorney with the ancestry to undertake the task.

National Park Service

Understanding of the problems existing around unique recreation areas may require special research by attorneys and managers.

The propensity of this culture to resolve problems through litigation not only keeps at least the private bar in three-piece suits, but also places additional burdens and considerations on the park manager. Although it has been suggested that the judicial system is not well suited for the resolution of disputes involving park resources, the fact remains that in today's world the courthouse is the stage upon which many of these problems are decided.

Shakespeare may have articulated through the words of a butcher, the answer to any suggestion on the need for park managers to appear on stage in defense of their decisions, let alone entertain attorneys at lunch:

Dick (the butcher): The first thing we do, let's kill all the lawyers.

Cade: Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment being scribbled o'er, should undo a man? Some say the bee stings; but I say, 'tis the bee's wax, . . .

Shakespeare, Henry VI, Part II, *Act IV, Scene II.*

Certainly, the words of the butcher have been quoted often to illustrate the frustration with attorneys and the legal process. The issue for the park manager is how to deal effectively with the legal community. Being an effective player in the courtroom is difficult at best, and requires a thorough understanding of the process.

National Park Service

The use of firearms and explosives in public demonstrations may pose serious legal questions that your attorney must address.

Failure results in judicial precedent detrimental to your programs and embarrassing to your agency's mission. Success instills confidence, innovation, and a constructive belief in the system.

This drama has been played before throughout the country. But, the experience is still a mixed blessing. The players are few. Two lawyers, known as YOUR COUNSEL and COUNSEL FOR THE OTHER SIDE (often known in pejorative terms as "HIRED GUNS"); the PLAINTIFF, who has taken exception to one of your decisions or actions; the DEFENDANT, who is the park manager; and the JUDGE.

Enter, stage right, the sheriff.

As you sit quietly in your office planning the budget for the next fiscal year, the Sheriff appears, specifically looking for you. With a smile he presents the parchment called the "summons and complaint." The lawsuit has begun, and your destiny may no longer be in your hands. According to custom, if not necessity, you must now call your attorney, advising him or her of this latest turn of events. The usual response is, "send me the paper, I'll get back in touch later."

Having been stung by the bee, the park manager is at a crossroads. He either knows his legal counsel as a professional, and is full of confidence and hope that his management decision will be vindicated in the courthouse or, if his confidence is low, the noise at the other end of the phone speaks a foreign version of old Latin, and the park manager reacts in a state of fear. Your reaction to the Sheriff, the parchment, the lawyer, and initiation of litigation is a function of previous experiences with the legal profession. "Anyone for lunch"?

The Worst Case Scenario

The worst case scenario is all too often the real world. You do not know the attorney responsible for the case, let alone his or her ability. The attorney has never seen you, seen the park area, or been educated in the agency's mission. There is an information void, often a reaction of mass misinformation, or a black hole of silence.

The lawyer requests your administrative record, an explanation of why you did "this" rather than "that," and tells you that your deposition will be taken in three days. Your response is usually, "My deposition, why me?" You are also instructed to pull together all your files, meet with your staff, and try to reconstruct all the facts which led to the litigation. "That's right, all the facts." A formidable task with impossible deadlines.

You curse the system, and quote Shakespeare. A few epitaphs are spoken:

"Old lawyers never die, they just lose their appeal."

"When the lawyers are laughing, the Republic is endangered."

If the script is followed, you will then have the opportunity to meet counsel for the "OTHER SIDE." You will quickly recognize that his or her role is to embarrass you, to challenge your rationality, or at least the rationale for the controverted decisions, and to find logi-

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Attorney from a field solicitor's office examines field conditions for familiarization with local managers.

cal inconsistencies in your administrative record or practices. In effect, he or she views the litigation as a 100-meter high hurdles event, forcing you to run the distance full speed without stumbling over any of the hurdles. The task can be arduous, time-consuming, and in your mind, impossible.

Your attorney is also under pressure. He or she needs to pull together, in a short period of time, a credible defense to the litigation—a rationale, some criteria, established agency practice, or application of policy. If that cannot be accomplished, he or she will confess error (i.e., cancel your appearance on stage) or start settlement discussions (i.e., often a significant revision of the script). To have a good defense means your lawyer should understand the park resources, the agency mission, and the balancing act you do on a daily basis.

Difficult decisions are often the result of a careful weighing of competing interests and concerns which require thoughtful professional assessment. Lawyers need to know in detail the process you undertook in reaching a decision. This is essential because lawsuits are won or lost on the facts, as a general rule, not exotic theories of law or clever performances.

Without a park management and resource background your lawyer is at a disadvantage, and most of the time, following the initiation of the lawsuit, is devoted to getting him or her "up to speed." This leaves little time to get ready for the depositions and trial, or prepare for the final act—that classic defense.

If you have cultivated the legal department for your agency, the litigation process may be enjoyable, as well as intellectually challenging. When the seasoned park manager, the truly experienced actor, has taken the time to get to know the legal actors, a great deal of time and energy is saved, the agency puts on a better case, and you have more winners than losers. Restated, your decisions as a professional are upheld in the courthouse.

Administrative Record

Most cases are decided on the basis of the administrative record. Judges do not like long, involved trials. There is a judicial instinct to decide cases on the basis of the script you have written. If a rationale exists for your decision, judges are reluctant to second guess the resource expert. As the controversy brews over a proposed decision, make a good paper record, written in the King's English rather than scientific jargon. Only by this process can you be assured that the court, when it reviews your decision, will understand why you did "this" rather than "that."

The administrative record must also be kept in a chronological fashion. A disoriented record is an invitation for an extended trial on the merits, a very time-consuming process. By planning ahead and developing your record of decision you control or isolate the issues in controversy and encourage speedy judicial resolution.

Also, you must be comfortable

in placing in the record all sides of an issue: the pros and the cons. By this process you demonstrate to the court that the record was not "adjusted" to make the facts look more favorable. You will demonstrate that all issues, facts, and arguments were fully considered. You are an objective resource professional. When the antagonist in the drama is able to demonstrate that key issues were not considered, or they were adjusted in the record, credibility becomes an issue, not the professional basis of the decision. Disputes that are thoroughly and thoughtfully considered from all perspectives will lead to more victories for you in the courthouse.

National Park Service

What do you do when the campgrounds are full? Are there potential liabilities from allowing visitors to sleep in unauthorized locations?

Legal Authorities

Understand the legal authorities under which you operate. Do you understand what an authority is based upon and its statutory and constitutional basis? Urge the attorneys to come to your training programs to explain the law and recent court decisions. This process will encourage a dialogue on legal issues and provide the opportunity to understand the nuances of the legislation for your program.

Park programs at both the federal and state level are usually a function of legislative direction. Constitutions for governments seldom recite "parks" as a right of the citizens or purpose of the government. It follows that programs have a legislative basis. This legislative process of itself encourages, to some degree, litigation, since the legislation can never address all issues or concerns which may arise. This leads to some ambiguity and room for interpretation. Enter the Lawyer.

Joint Training Programs

Joint training programs, while not a substitute for taking your lawyer to lunch, provide an excellent tool to breach the gap between attorneys and park professionals. For example, both the legal and scientific community have vocabularies which are foreign to one another. (How many managers know about orders nunc pro tunc, writs of certiorari, and a fortiori?) In joint training this problem is easily solved, and the participants learn to speak in similar tongues.

The resource manager will also learn to be comfortable in discussing legal authorities and cases decided by the courts. The National Park Service has been running these programs for several years, with a great deal of success.

The training programs could include a mock court proceedings, which may dispel the fear that comes from the lack of understanding of the judicial process and the theatre of the courtroom. With a little experience at cross examination, deposition taking, and talking to juries, the park manager very quickly becomes a professional actor.

Informal Consultations

Rather than seeking "on the record" legal opinions, written with skill and caution, seek informal advice and guidance. Alternatively, pick up the telephone and have those informal discussions on the

various legal approaches to a difficult problem in your office. Having lawyers go "on the record" with a legal opinion has limited benefits. Joint training fosters informal relationships and permits lawyers to practice preventative law that minimizes courtroom appearances.

Self-Help

Self-help can also improve the dramatic skills of a park manager. Collect copies of the relevant statutes and laws for your park area or program. To be a participant in any play requires a script, otherwise stage fright is inevitable.

Develop a notebook that contains a history of the area and the reasons for its establishment, a summary of past controversies and their resolution, copies of legislation and appropriations, copies of prior litigation affecting the area, and a running diary of potential litigation. Consideration should be given to keeping a deed book for property disputes, and summaries of activities external to the area which may be viewed as a threat to the resources.

If you have the instincts of a historian you can develop a legal history of a park area that will be invaluable to you and your successors in interest. This process will increase your awareness of the legal issues and assist the attorneys dealing with litigation.

Program Control

Truly experienced park managers also know that litigation may foster loss of program control and decision-making. The folk lore of lawyers running an agency program, under the guise of "winning" a lawsuit, is not uncommon. Lawyers provide counsel, advice, and options. They are not accountable for the success or failure of a park program. A loss in the courthouse is not a license to change a program or decision-making responsibility.

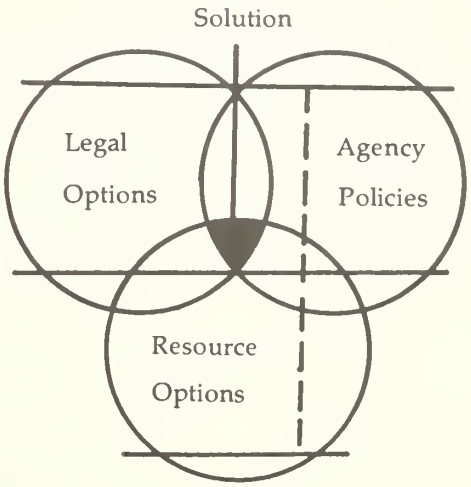
In tort claim litigation involving death or serious injury, there is strong pressure to dramatically change agency policy or practices to avoid future liability. There is a fine balance between public safety, winning tort claims, visitor enjoyment, and adhering to the purposes for which an area was established. The issue is editorial control over the script.

Gray Zone

During the decision-making process or while in the courthouse, try to get a risk analysis or assessment from your counsel. Some decisions are winners, others losers. Yet, in most situations there is a gray zone. It is important to understand the scope of discretion and its shades of gray. This process also keeps the manager in control of his or her program's destiny, rather than the attorney. Lawyers strongly support program decisions that are winners in the courthouse, but this instinct should not preclude the park manager from selecting an option in the "gray area" of the law.

In resolving a problem or making a decision, think in terms of three subsets: the scope of your legal authorities, agency policies, and resource protection strategies. Where these three subsets overlap is where the solution to the problem lies.

Approach litigation in a philosophical context. Ask yourself are you doing your job well if you have never been sued? Obviously, you are not. Litigation may be in-



evitable in areas of controversy. Yet, well considered agency decisions, with a keen eye for legal precedent, and based on sound, professional resource judgment, will in the long run further your agency's mission. Precedent setting litigation may dramatically increase or decrease the scope of agency discretion. A well-planned lawsuit may provide answers to many difficult problems facing an agency.

Conclusion

Whether or not you choose to be a participant on stage, you will nonetheless make a debut. If you have not rehearsed your lines, you may have a dramatic impact on the direction of the programs and activities of the agency. If you do not have the lead role in this drama, who will speak for the protection and preservation of these unique and diverse resources under your stewardship?

The complexity of the issues facing a park manager requires him to be, in effect, a Renaissance Man. Only the eclectic person survives. Lawyers, if "directed" properly, can be a component to your decision-making, broadening your perspective and perception.

Used improperly, a park manager will speak as the butcher spoke in *Henry VI, Part II*. Become familiar with your legal staff, by taking your lawyer to lunch (or fishing!).

David A. Watts is Assistant Solicitor, Parks and Recreation for the U.S. Department of the Interior.

Waivers and Releases

by Betty van der Smissen

National Park Service

These rafters on the Colorado River signed specially worded waivers covering activities for this trip.

The term "waivers and releases" is a catch-all term which is imprecise and misleading. There is only one true waiver or release and that is based in contract, not tort. The usual "waiver or release" signed by a participant is not a contract, but is an acknowledgement that there is some inherent "risk" involved in participation and is based in tort as related to assumption of risk. It behooves the recreation and parks profession to use appropriate terminology and distinguish the intent/purpose of the form being signed. There are four types of agreements, and these are set forth in subsequent sections.

The "True" Release, an Exculpatory Agreement

An exculpatory agreement is a contract between two parties, the provider of the service, activity or facility and the consumer (participant). The contract is signed prior to participation and states that the participant, if injured, will "excuse" or not hold liable the provider regardless of the negligence of the provider; that is, the provider will not be held liable for damages caused by the provider's negligence. Because an exculpatory agreement endeavors to insulate a party from liability for its own negligence, the courts have held that such contracts must be closely scrutinized and strictly construed, as well as meet certain criteria.

In a 1982 Washington case which involved an injury related to mountain climbing, the court held that contracts against liability for negligence are generally valid except (1) where public interest is involved, (2) the negligent act falls greatly below standard established

by law for protection of others against unreasonable risk of harm, (3) the hazard was within contemplation of the release and the release clause was clear, unambiguous, and conspicuous, and (4) the individual (participant) knowingly agreed to terms of the release.

In a skydiving case the court set forth four similar factors: (1) existence of duty to the public, (2) nature of service performed, (3) whether contract was fairly entered into, and (4) whether the intention of the parties is expressed in clear and unambiguous language.

And, in a rental agreement case the court said that for an agreement to be valid and enforceable (1) the exculpatory clause must not contravene policy of law, must relate to individuals in their private dealings, and each party must be a free bargaining agent; and (2) the agreement must be strictly construed against the party asserting it and it must spell out the intent of the parties with particularity.

Expressed in Clear and Unequivocal Terms

Unless the intention of the release is very clear and unequivocal, a negligent party will not be relieved of liability. In a whitewater rafting situation, the plaintiff, as well as all participants, was required to sign the release in order to go on the trip. The release set forth the dangerous nature of the trip and representations as to the undersigned's age, condition and state of mind, and included this clause:

> *The undersigned understands and expressly assumes all the dangers of the trip. The undersigned waives all claims arising out of the trip, whether caused by negligence, breach of contract or otherwise, and whether for bodily injury, property damage or loss or otherwise, which he may ever have against Niagara Gorge River Trips, Inc., its successor and assigns, and its officers, directors, shareholders, employees and agents, and their heirs, executors and administrators.*

The court held this statement to be clear and unequivocal, and thus a valid agreement. While the use of the term "negligence of the owner . . ." is not mandatory for the clause to be valid, it is highly desirable that it be used for clarity. Such exculpatory clauses are used primarily with activities generally considered of "higher risk" such as rafting, parachuting, scuba diving. If an intended exculpatory clause is not sufficiently explicit in its language, it may be held to be ineffectual, as a court so held in a camp case when the clause stated:

> *It is further agreed that reasonable precautions will be taken by Camp to assure the safety and good health of said boy/girl but that Camp is not to be held liable in the event of injury, illness or death of said boy/girl, and the undersigned, does fully release Camp, and all persons concerned therewith, for any such liability.*

The enumeration of risks is not sufficient. The court held in a horseback riding case that the only risks referred to in the agreement were those "inherent in horseback riding," and not specifically the negligence of the defendant. Thus, the document was an agreement to participate based on assumption of risk, not a contract waiving rights against defendant for negligence. A similar decision was reached in a 1983 water skiing incident in Florida. The release executed gave evidence of actual consent to assumption of risk, not a release from liability based in negligence.

Understanding What is Being Signed

The signer of an instrument (contract) is conclusively bound by it and it is immaterial whether it was read or subjectively assented to in the absence of fraud or misrepresentation or that a special relationship existed between the parties which would render the agreement invalid. However, the clause must be conspicuous. The statement of release may be incorporated into the participation process, such as an admission ticket, season pass, entry form, or membership application.

There must, however, be opportunity for a person of average intelligence to observe what is on the ticket. In *Kushner v. McGinnis* the admission ticket was taken 4-5 steps after purchase and torn up, which made the release defective. Further, the plaintiff was unable to read the release. And, on a skiing season pass, the court held that the statement on the pass did not contain express consent on the part of the holder to exonerate the ski area

for negligent conditions. A college student ski jumper alleged that he had not read on the entry form he signed the waiver clause before signing, signing it unwittingly, and thus he should be relieved from the consequences of his act. The court held that the plaintiff was under a duty to inform himself on what he was signing, and the release was conspicuous and valid in the language in which it used.

The exculpatory clause may appear on a membership application form and be held valid, as was the situation in a 1983 New York case, which involved use of a private mountain club's skiing facilities. Similarly, an exculpatory clause may be placed in a rental agreement, such as for use of snow ski equipment or water jet skis. Any disclaimers, of course, must be conspicuous and in writing. Damages may be limited or excluded unless the limitation or exclusion is "unconscionable." Clauses, too, may be placed in leases. However, such clause must meet criteria such as not against policy, retention of control, et. al.

Void as to Minors

Another criterion for a contract to be valid is that the person signing must be of majority age. It is usually for this reason that it is said that the "waiver or release" agreement for participation is not valid since many participants are minors. Exculpatory agreements can be made only with persons of legal majority age.

However, a person below such age who has signed may ratify the agreement upon reaching majority. This ratification can come either by expressly doing so or by implied ratification. For example, the plaintiff, when 17 years of age, signed a contract with the defendant for use of skydiving facilities. After reaching majority, the plaintiff used the facilities and the court held that by his acts he in fact ratified the contract upon reaching majority. The disaffirming of an agreement related to a mountain climb could be done even by the administrator of a child's estate (the 15-year-old was fatally injured in a fall) by commencing an action.

Public Policy

Another reason why exculpatory agreements are frequently considered not valid as related to recreation and parks is because of the public service nature of recreation and parks when provided by governmental agencies and charitable organizations. Seldom is this issue raised in private enterprise recreational activity, although a business which has a public service character would be found not to have an enforceable exculpatory agreement. In a private riding academy case the court commentary, in saying that in this instance there was not a service of public character, likened such public character to outdoor recreation, sports, and recreational events.

In *Hewitt v. Miller* it was held that instruction in scuba was not a public service, but a private contract between the parties. Exculpatory agreements related to auto racing, as a general rule, are held by the courts not to be contrary to public policy.

In respect to being against public policy, one of the concerns is that if an individual has contracted not to be held liable, then such individual may use less care for the protection of the participant. The courts have held that an exculpatory agreement is valid only if the act does not fall greatly below the standard established by law for the protection of others against unreasonable risk of harm. The standard of care can be set by statute or by precedence.

Also, a special relationship may exist which requires one party to have greater responsibility than that of the ordinary person, particularly as related to children. The court so held regarding protection of children in camp. However, no special relationship was found between student and instructor in parachute jumping.

It also is considered against public policy if one party clearly dominates or there is an "adhesion contract," that is, one drafted unilaterally by business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere. It may be imposed on the public for a necessary service on a "take-it-or-leave-it" basis. In an early camp case, the agreement was held to have two parties of unequal bargaining power, where the plaintiff was a family of low-income. But, in a skydiving agreement, it was held not to be an adhesion contract in that it was not established that the services provided could not have been obtained elsewhere.

National Park Service

Prior to conducting ski class the instructor asks for signed waivers which include the need to follow instructions and to stay within specified activity limits.

An exculpatory contract is against public policy if it provides a shield against claims for willful and wanton negligence or a malicious act. It is against public policy to permit a defendant to exonerate himself from liability for an intentional tort. Also, where there is a fundamental breach of an implied covenant to transport safely, this breach would nullify an exculpatory clause.

Agreements to Participate

An agreement to participate should be distinguished from a waiver which is an exculpatory contract. An agreement to participate is not a contract at all, but is related to unintentional tort based in negligence through the concept of assumption of risk—a valid defense in most jurisdictions. In an exculpatory agreement, the negligence of the defendant is "waived or released"; whereas, in an agreement to participate under the concept of assumption of risk, there is no negligence involved on the part of either the defendant or the plaintiff. The plaintiff does not assume any risks of activity occasioned by the negligence of the defendant, and the plaintiff is not contributorily negligent. The plaintiff is assuming those risks which are inherent in the activity and from which injury occurs but due to no negligence on the part of either party.

Agreements to participate are for both minors and persons of majority age. The signature of the parent on such agreement by a minor carries no legal force. An agreement to participate can be a useful document in that it provides one written evidence of an effort to gain understanding and appreciation by the participant regarding the inherent risks of the activity.

In order to do so, it is recommended that an agreement to participate have two primary elements embodied within it. First should be a section on the nature of the activity. This description should be fairly detailed, so that indeed the participant is aware of expectations. If it is, for example, a rafting trip, then the type of group, degree of difficulty of the river, supervision being given, etc., should be set forth. *ALSO*, the fact that the individual will get wet in cold water, perhaps be sleeping overnight on the river bank, may need to exert considerable physical energy and be tired, etc. The unpleasurable aspects must be identified, so the participant cannot later say "If I had known . . . I would not have gone."

Second, there should be a pointed and unglossed-over section as to possible consequences of going on the trip in terms of injury, including possible death, in the case of a rafting trip. After having a $6+ million judgment against them in a football case, the Seattle Public Schools drafted this paragraph for students to sign:

I am aware that playing or practicing to play/participate in any sport can be a dangerous activity involving MANY RISKS OF INJURY. I understand that the dangers and risks of playing or practicing to play/participate in the above sport include, but are not limited to, death, serious neck and spinal injuries which may result in complete or partial paralysis, brain damage, serious injury to virtually all internal organs, serious injury to virtually all bones, joints, ligaments, muscles, tendons, and other aspects of the muscular skeletal system, and serious injury or impairment to other aspects of my body, general health and well-being. I understand that the dangers and risks of playing or practicing to play/participate in the above sport may result not only in serious injury, but in a serious impairment of my future abilities to earn a living, to engage in other business, social and recreational activities, and generally to enjoy life.

While this may seem a bit extreme, such a statement does not seem to restrict persons from participating. However, the statement

National Park Service

Businesses renting equipment for use in potentially hazardous activities may require users to sign waivers.

should be appropriate to the activity in which the participant will be engaged. The last sentence was included because in computing compensatory damages for an injury, such are calculated—future earnings, inability to participate in certain activities, and general life disability and enjoyment.

It is recommended that in addition to the foregoing two sections that a third be included in which the participant agrees to follow the rules and regulations and obey the leader or supervisor of the trip or activity. If there are some special safety rules and regulations, it might be well to have them printed right on the reverse side of the agreement form or have some indication that the participant has received and read them. This section finds its rationale for inclusion in the legal concept of contributory negligence. While in a majority of the states contributory negligence is no longer a bar to recover, it does impact greatly upon the size of the award in those states which embrace the doctrine of comparative negligence. An award under comparative negligence is reduced in accord with the plaintiff's contributing negligence; failure to follow rules and regulations or the leadership could be construed as an act contributing toward ore's own injury.

Depending upon the activity, a fourth section may be highly desirable in the agreement to participate. It has to do with the condition of the participant. If certain physical condition or skill competency is prerequisite to a safe experience, then there should be some affirmation by the participant that these conditions or competencies have been met. Or, if there are certain conditions which are very desirable to be known by the leadership in order to more adequately protect the participant, then such should be asked about, such as epilepsy, allergies (such as bee stings for outdoor activities), temporary physical illness, or disability. To withhold pertinent information can be considered misrepresentation and fraudulent on the part of the participant. To not know and therefore not be able to be aware of possible needs would be taken into consideration when determining foreseeability of the injury and the reasonableness of the care given to the participant on the part of the leaders.

Parental Permissions

Often the parental permission and the agreement to participate are embodied in the same form. If such is the case, both the participant, although a minor, and parents must sign. It is desirable to have a special statement above the parents' signature indicating that permission is given for the child to participate in the aforedescribed activity. The agreement to participate, in the detail described in the foregoing section, provides an excellent information document, and also is good public relations.

In addition to the permission statement, it may be desirable to have an exculpatory clause for the parents, since parents can sue for damages occasioned by injury to the child in their own behalf.

Parents cannot, however, sign away the rights of the child. A child normally has the right to sue in his own behalf until the statute of limitations has run after reaching the age of majority for that state, whether it be age 18 or 21. Normally the statute of limitations for negligence (injury caused by) is two or three years.

A permission statement also can be helpful in identifying conditions about which a leader/supervisor should be aware. For example, in a Louisiana case a 17-year-old drowned in a hotel pool while on a band trip. Even though the young man was afraid of the water and could not swim, so the plaintiff alleged, the parent had signed a written permission form that the son could use the pool. If the permission was intended to be conditional, then such should have been indicated by the parent. The school was found not to be negligent.

Richard L. Wilburn, NPS

Allowing activities not appropriate for the location or the conditions would not be excused by a waiver.

Indemnification Clauses or "Hold Harmless" Agreements

While indemnification or "hold harmless" clauses are becoming quite commonplace in agreements to use facilities or areas, or to conduct certain activities, this section discusses only an indemnification clause as related to an individual participant, the focus of the preceding three approaches to limiting liability. An indemnification clause shifts the responsibility for the payment of damages to someone other than the negligent party (defendant), and in this context the shift is back to the injured or plaintiff.

An indemnification clause and an exculpatory clause are technically distinguished in that the exculpatory clause denies the injured party the right to recover. However, they both have the same result in regard to the injured—the injured cannot recover against the negligent defendant. Because there is similar purpose, both are generally construed by the same principles of law. However, indemnification clauses usually are not held contrary to public policy and are construed a bit more liberally, essentially because insurance is usually employed to cover such indemnification clauses. Nevertheless, the clause must clearly provide for indemnitee's own negligence; it cannot be inferred since some courts have held that one who is actively negligent has no right to indemnification.

A procedure that is questioned as not being either sound fiscally or public relations-wise is that of including an indemnification clause in either a membership application or a rental agreement. However, if the indemnification clause is sufficiently clear, it will be held valid. As a participant one must very carefully read an indemnification clause. Frequently such clauses are extended not only to the individual signing but also to damages sustained by other individuals and actions brought against the sponsor of the activity or owner of the facility. In essence these clauses endeavor to have the parents of the participants or the adult members become the "insuring entity," rather than the organization taking out insurance from a company. It should be noted that an indemnification clause becomes operable only after the person being indemnified has suffered loss, that is, a judgment has been made against such person or organization. That is why an indemnification clause sometimes is referenced as a "hold harmless" clause.

State Statutes

It is deemed not appropriate to discuss specific state legislation. However, it is noted that some states have general legislation directed toward exculpatory agreements, while others may have legislation specific to a particular activity or service. Legislation, also, may focus on assumption of risk, comparative negligence, and consumer protection. Check your state's laws.

This article is based upon material in Chapter 16 of the forthcoming book by van der Smissen, Legal Liability and Risk Management, *Anderson Publishing Company, Cincinnati, 1985. See chapter for further discussion.*

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Federal Tort Liability: Reform in the Wind

by John Lodge Euler and John J. Farley, III

Historical Background

In 1959, a suit against a federal official in his individual (as opposed to official) capacity failed in the case of *Barr v. Matteo, et al.* In *Barr*, the Acting Director of the Office of Rent Stabilization was sued for libel by two of his subordinates for issuing a press release in which he announced their suspension and criticized their conduct. The Supreme Court, in a four-four-one decision, held that the defendant was absolutely immune from a personal suit for a tort committee within the "outer perimeter" of his line of duty. The rationale of the plurality was that the greater public good was better served by federal officials being free to exercise their judgment and carry out their duties without the threat of harassment, intimidation, or personal financial ruin inherent in the litigation of tort suits brought by those who disagreed with the federal action. Thus, it appeared established that federal officials could not be personally or individually sued for actions taken within the scope of employment and that the only tort remedy, if any, available for those aggrieved by some federal action was a suit under the Federal Tort Claims Act (FTCA) against the United States.

From the perspective of the federal official, this was a fairly salutary state of the law. However, it was all to change in 1971 when the Supreme Court decided a case filed by Webster Bivens. Alleging that his rights guaranteed by the Fourth Amendments had been violated by six agents of the Federal Bureau of Narcotics, Bivens sought money damages from the federal officers individually. The district court dismissed the action for want of jurisdiction, noting both the absence of a precedent for an action for damages directly and solely premised upon the Constitution and the immunity of the federal agents. The Second Circuit affirmed the dismissal, holding that the Fourth Amendment did not create a private right of action for damages. The Supreme Court disagreed. Reasoning that damages historically have been regarded as the ordinary remedy for an invasion of personal interests in liberty, the Court held that the suit stated a cause of action. In concurring, Mr. Justice Harlan noted that sovereign immunity would have barred such a suit against the United States, *i.e.*, no such cause of action is recognized under the Federal Tort Claims Act. Accordingly, "for people in Bivens' shoes, it is damages or nothing." Since the Second Circuit had not addressed the question of immunity, the case was remanded for consideration of that issue.

On remand, the Second Circuit held that the individual federal defendants were not entitled to the absolute immunity set forth in *Barr v. Matteo*, but could only claim the "qualified immunity" that was available to state law enforcement agents sued under the authority of the federal civil rights statutes. This was not really an "immunity" but an affirmative defense which enabled the defendant to demonstrate that he or she was acting in good faith and upon the reasonable belief that the subject actions were lawful.

Richard L. Wilburn, NPS

Youth diving into a shallow stream in area clearly posted which identifies submerged rocks. Management's duty seems to be fulfilled in properly posting the area.

Richard L. Wilburn, NPS

Controlling and adequately posting recognized dangerous areas are obligations of management.

In 1978, the Supreme Court confirmed that ruling in the case of *Butz, et al. v. Economou, et al.* There, a commodity futures dealer sued the Secretary of Agriculture and other officials for allegedly violating his Fourth and Fifth Amendment rights in the course of a proceeding to revoke or suspend the registration of his company. The Supreme Court held that a *Bivens* cause of action could be stated under the Fifth Amendment due process clause and that, as a general rule, absolute immunity was not available to federal officials in suits alleging constitutional violations. The high level official exercising discretionary or policy judgment was only entitled to the qualified immunity defense in cases alleging constitutional violations.

This general rule had exceptions, however. Absolute immunity would be available, the Court ruled, to judges, prosecutors, and their "agency equivalents." In addition, the Court left open the possibility of a grant of absolute immunity for other officials if it could be demonstrated that immunity in their case was "essential for the conduct of the public business." The Court reaffirmed the continued availability of *Barr v. Matteo* absolute immunity for all federal defendants in *common law*, as opposed to *constitutional*, tort cases. Finally, the Court counselled the lower federal courts that summary judgment should be readily utilized in *Bivens* cases to prevent harassment of federal officials by frivolous law suits.

In tandem, the *Bivens* and *Butz* cases established the framework of federal tort liability for individual federal defendants that pertains, with some modifications, to this day. It can be summarized as follows: The United States can be sued in tort only under the Federal Tort Claims Act, which does not embrace *Bivens* or constitutional torts. Most federal officials are absolutely immune for common law (or non-*Bivens* type) torts committed within the outer perimeter of their authority. Most federal officials are, however, individually amenable to suit for alleged constitutional torts and are only entitled to the defense of qualified immunity. Some federal officials are absolutely immune for both common law and constitutional torts if they were carrying out the functional duties of their office. These include judges, prosecutors, and their agency equivalents.

Recent Supreme Court Decisions

Subsequent Supreme Court cases have served to adjust or expand this basic scheme in a positive or negative way depending upon one's point of view. From the perspective of the federal employee, the situation continued to deteriorate after *Butz* as defensive theories were generally limited and causes of action were expanded in the *Bivens* area. In 1979, in *Davis v. Passman*, the Supreme Court confirmed that a *Bivens* cause of action could be stated under the Fifth Amendment by permitting a suit against a Congressman by his former employee whom he had terminated for alleged sexually discriminatory reasons.

In 1980, the Court ruled in *Carlson v. Green* that a cause of

action for violation of Fifth Amendment due process and equal protection rights and for the Eighth Amendment's proscription of cruel and unusual punishment could be stated in a case involving the death of a federal prisoner from medical malpractice so allegedly serious that it rose to the level of "deliberate indifference." In that case, the Court also held that the existence of another tort remedy under the Federal Tort Claims Act did not preclude the implication of a *Bivens* action. The Court construed Congress' intent to be that the FTCA and a *Bivens* cause of action were parallel and complementary.

The Court stated that Congress could explicitly declare another remedy to be exclusive and thereby preclude a *Bivens* action but it had not done so with the Federal Tort Claims Act except in the case of a few types of employees, primarily federal drivers of motor vehicles. Absent an explicit declaration from the Congress, the Court would only preclude implication of a *Bivens* suit if there were "special factors counselling hesitation" in doing so. The Court found none in *Carlson*.

Thus, within a decade following the original *Bivens* decision, federal officials were exposed to potential personal liability on a multitude of theories arising out of almost every one of the first thirteen amendments to the Constitution, even when an existing alternative remedy such as the FTCA was available in the particular case.

The only positive development from the perspective of the federal official over this period was the fact that the Attorney General of the United States authorized and implemented a program to provide Department of Justice legal representation to employees who were personally sued. So long as the conduct giving rise to the suit occurred within the scope of employment and representation was determined to be in the interest of the United States, federal defendants could secure representation by a Department of Justice attorney even though sued in an individual capacity.

Current Trends in the Court

In 1981, the Supreme Court seemed to turn a corner. First, the Court decided, in the case of *Nixon v. Fitzgerald*, that the President of the United States was absolutely immune from suit premised upon allegations of either constitutional or common law torts committed within the outer perimeter of his office. Of greater significance for federal employees as a whole, however, was the companion decision of *Harlow v. Fitzgerald*, where the Court modified the tests for qualified immunity, admonished the lower federal courts to dispose of *Bivens* cases on motions for summary judgment (even prior to allowing discovery) and, for the first time, seemed to demonstrate serious concern over the effect that such suits may be having on effective government:

> *. . . it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to the society as a whole. [Footnote omitted.] These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."* Gregoire v. Biddle, *177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).*

With respect to the qualified immunity defense, the Court removed one of the major impediments to summary judgment by eliminating the subjective or "good faith" prong of the test. The new description of the defense was stated to be solely objective: that the conduct of the government official did not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. The discerning reader will note that the new, objective "reasonableness" standard was articulated by the Court in terms of clearly established rights; that is, in terms of a reasonable legal analysis.

The question comes to mind as to how to treat a case involving a strictly factual decision or one in which there is a dispute as to the facts which led to the decision. Clearly the language and the intent of the Court seems to embrace factual as well as legal reasonableness as worthy of protection under the

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Traffic on poorly designed and/or maintained roads must be properly controlled to prevent accidents.

doctrine of qualified immunity. Time and the litigative process will tell.

In the two subsequent cases of recent decision, the Court continued to infer a new direction with respect to personal liability of federal officials. In *Wallace v. Chappell,* the Court held that principles of intramilitary immunity, otherwise known as the *Feres* doctrine, and the "special relationships that define military life" precluded suit by Navy enlisted men against their superior officers for alleged racial discrimination even when couched in Constitutional terms. Similarly, in *Bush v. Lucas,* the Court found "special factors counseling hestitation" in the federal personnel context and refused to permit a *Bivens* suit by one federal employee against another for alleged wrongful, retaliatory personnel action because of the existence of an exhaustive system of administrative remedies under the civil service regulations.

Thus it can be argued that the Court is becoming concerned about the price being paid for exposing federal public servants to personal liability and may be looking for ways to cut back upon or, even, rethink the liability imposed with the *Bivens* case some twelve years ago.

Legislative Reform

While the courts have been struggling to fashion a fair and workable liability scheme founded upon tort law principles, the legislative branch has also turned its attention to the problem. In the last several Congresses, serious legislative efforts have been made at reform and have been progressed through the subcommittee level. However, opposition has traditionally been strong from civil liberties organizations, primarily the American Civil Liberties Union, and this has had the effect of dragging out consideration of the various proposals until time expired in each Congress.

In the 98th Congress, however, interest in legislative reform may have finally reached critical mass. Several bills have been introduced and all parties seem now to agree that reform is necessary. In the House, Congressman Sam Hall of Texas introduced H.R. 595 which has proceeded through subcommittee mark-up and now awaits full Judiciary Committee action. In the Senate, Senator Charles Grassley of Iowa has championed the cause with S. 633 and S. 775 whose provisions also appear in Title 13 of S. 829, the President's Comprehensive Crime Control Act of 1983.

As in the past, the legislative proposals have in common two fundamental changes in federal tort law. First, sovereign immunity would be waived and the United States would consent to be sued for *Bivens* or constitutional torts. Under current law, it is clear that the United States cannot now be sued for such a tort. The result would be that an aggrieved plaintiff would, for the first time, have a viable, financially responsible defendant against whom to press his grievances. Second, the United States would become the exclusive defendant for all torts committed by employees within the scope of their employment. In other words, the "social costs" referred to by the Supreme Court in *Harlow* would be eliminated because individual federal employees could no longer be sued for either constitutional or common law torts. All tort actions would be placed under the mantle of the Federal Tort Claims Act and litigated pursuant to its provisions.

Beyond those two fundamental similarities, the House and Senate bills diverge. In the House, the bill as reported out of subcommittee (H.R. 3142) contains provisions for attorneys fees, jury trials when constitutional violations are alleged, an award of additional damages in cases of malicious conduct and, most importantly, precludes the United States from asserting the qualified immunity defense to which its employees would have been entitled. In the Senate, that defense is preserved. Moreover, although there is a provision for liquidated damages in the absence of proof of real injury, there are no provisions for attorneys fees, additional damages or jury trials.

The issue over which the legislation will rise or fall is that of the qualified immunity defense. While now supporting the concept of the legislation, civil liberties groups are adamant that the defense should be precluded. The administration is just as firm that elimination of the defense would be inimical both to the public interest and the interest of federal employees and that legislation which forces its elimination should not go forward.

Proponents of elimination of the defense argue that it was designed by the courts to protect individual defendants from unfair findings of liability when they acted reason-

ably and in good faith. Since the United States would become the defendant under the proposed legislation, there is no reason for it to have the same protection that was designed for individual defendants. If it is retained, they argue, some persons injured by government action will have no recovery.

Those who would keep the defense respond that it reflects the fundamental element of tort law that unreasonable action resulting in harm is the trigger of liability. If government officers act as reasonable persons in a given situation, either factually or legally, it makes little sense for the citizens of the United States to be held liable for damages. Moreover, the argument goes, there is a public interest and an interest of the individual employee in retaining the defense so that the reasonableness or validity of the conduct is relevant and at issue in court. Otherwise, the employee will not be able to defend his or her conduct in the public forum and the United States will be found liable without a similar opportunity to defend its action and without all the facts implicit in determining reasonableness coming to light.

Finally, there is the argument that the legislative proposals represent a bold, new concession to suit by the sovereign (United States) involving a venture into uncharted waters of liability and damages. Should the defense be waived, the government could well be placed in a situation of virtual strict liability in the constitutional tort area and subjected to unreasonable, and even intolerable, losses in readily foreseeable situations.

As of this writing (November 14, 1983) efforts are being made to find a means of compromising the two points of view. In the Senate, the full Judiciary Committee favorably passed upon Senator Grassley's proposal subject to a resolution of the outstanding issues satisfactory to Senator Grassley, Senator Joseph Biden of Delaware and the Department of Justice. Since all sides agree on the need for legislation, there is some hope that a way can be found.

Upon reviewing the testimony submitted in both houses of Congress during committee consideration, it becomes apparent that the case for reform is strong indeed. There are approximately 2400 pending cases filed against individual federal employees, 75% of which involve multiple defendants. Therefore, several thousand federal public servants are currently threatened with personal financial catastrophe for attempting to carry out the duties assigned to them by the Congress and the President.

Currently, there is no provision for federal indemnification or insurance for these employees. No other identifiable group of persons or professionals in the country is left in such a naked, unprotected position. Many of the suits filed are of a vindictive or hectoring nature, or filed for such questionable purposes as attempting to intimidate otherwise legitimate federal action or obtain discovery with respect to a related criminal or enforcement proceeding.

Evidence was presented in Congress of the personal trauma visited upon conscientious employees by these suits, the prodigal diversion of resources required for their defense and the overall chilling effect on legitimate government action. Truly, the "social costs" documented by the Supreme Court in *Harlow* are high and continuing to rise. From the other perspective, out of approximately 10,000 cases which have been filed since 1971, only 17 have proceeded to judgment against individual defendants and only 5 are known to have resulted in ultimate satisfaction or payment of the judgment. Clearly then a plaintiff who proceeds with a *Bivens* lawsuit has almost no chance of recovering money.

It is thus apparent that no one—defendant, government, citizenry or plaintiff—receives benefit from the current system of tort liability against individual federal officers. It now appears that this is being widely recognized and that both the Supreme Court and the Congress are troubled by the extent of the problem. There is ground for hope that meaningful reform is in the wind.

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