You Be the Judge: Case Studies in Risk, Negligence and Risk Management

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Agenda

- Overview of Legal Terms and Definition of Negligence
- Full Group Review and Discussion (Cases 1 and 2)
- Individual Table Review and Discussion (Cases 3-5)
- Full Group Discussion: Lessons Learned
- Remaining Questions
Legal Problems Result

When leaders or institutions:

- Facilitate dangerous activities or experiences
- Express indifference to, dismiss, or ignore known risks
- Perform an expected and reasonable responsibility in a negligent fashion
- Dictate rules they don’t actually enforce

This may lead to claims of:

- Sexual harassment and/or sexual assault
- ADA violations
- Negligence

Switzerland
Types of Law

Common Law
- Case law, judge-made law, reliant on precedent
- Definitions are found in cases

Civil Law
- Statutes, regulations and ordinances enacted by legislative bodies such as Congress, state legislatures, county, and city officials
- Concerned with the relationship between individuals
- In Higher Education many such “wrongs” are identified as violations of contracts or a failure of professional duty
- Usually the claim will be for compensation

Criminal Law
- Governs crimes (felonies and misdemeanors)
- Crimes are offenses against the state
- Punishment is usually in the form of fines, probation, and/or incarceration
Not Guilty, but Liable

- In 1995, O.J. Simpson was found not guilty of murder by a jury in criminal court.
- In criminal court, guilt must be established “beyond a reasonable doubt”; that is, it must be a virtual certainty that the defendant is guilty.
- In civil court, liability is established by “a preponderance of the evidence”; that is, it is more likely than not that the plaintiff’s account is accurate.

In 1997, a civil jury found him liable for the death of Ronald Goldman and awarded $8.5 million in compensatory damages to Goldman’s family.
The Terms

- **Law**: The body of rules and principles governing the affairs of a community and enforced by a political authority; a legal system (American Heritage Dictionary)

- **Policy**: A plan or course of action, as of a government, political party, or business, intended to influence and determine decisions, actions, and other matters (American Heritage Dictionary)

- **Risk Management**: the identification, assessment, and prioritization of risks followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events (Wikipedia)
Law Verses Policy

- Review program locations: [http://travel.state.gov](http://travel.state.gov)
- See if you have a policy that prohibits travel to countries with DOS Travel Warnings
  - If so, you are in violation of University policy, but not the law
- If not, review Travel Warning in light of your program’s activities and locations
- Document reasons why you are going against government advice
  - To NOT do this is NOT a violation of law, but it could keep you out of court if a tragedy befell your program that was specifically mentioned in the Travel Warning

South Africa
In Loco Parentis

- Latin for "in place of a parent"
- A person or institution that assumes parental rights and duties for a minor

Source: http://www.legal-dictionary.org

The pendulum swings in constant motion

The Rights and Responsibilities of the Modern University by Robert D. Bickel and Peter F. Lake
In tort law, a **duty of care** is a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others.

A **reasonable person** is a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.

The test is the defendant’s actions compared to that of a reasonable person under similar circumstances.

In most cases, **specialists** (persons with greater than average skills, or with special duties to society), are held to a higher standard of care.
Fiduciary Duty

“Someone who has been entrusted with something by another – the beneficiary”

Institutions of higher education can be seen as fiduciaries; students rely on the faculty, staff and administration to provide knowledge and services in exchange for their effort (and tuition) to obtain (earn) a degree.
Example: Duty

- Americans abroad are subject to that country’s laws & regulations
- The most relevant laws pertaining to travel are often covered in the US DOS’s Country Information Sheets

Mexico: “The Mexican Constitution prohibits political activities by foreigners, and such actions may result in detention and/or deportation. Travelers should avoid political demonstrations and other activities that might be deemed political by the Mexican authorities.”
Negligence

Is defined as the careless performance of a legally required duty or the failure to perform a legally required act.

In order to recover on a theory of negligence a plaintiff must establish four elements: duty, breach, causation, and damages.
Example: Negligence

- If a program is operating in an area where the U.S. Department of State cautions against nighttime group travel in large buses due to poor road conditions, it might be considered your duty (1) to heed this advice.

- If the institution chooses to travel in that exact manner, this may be considered a breach of duty (2) because the institution failed to conform to recommended standards.

- If an accident occurs and students were injured (4) and the injuries were indeed a result of the accident (3), the third and fourth elements of the claim would be met.

Preparing for Emergencies Abroad

1. Read Emergency Procedures section of the Faculty Handbook.
2. Share faculty cell phone numbers with students.
3. Convey the local emergency number.
4. Obtain student cell phone numbers.
5. Create a communications tree for students.
6. Implement the “Buddy System.”
7. Advise students to never leave their residence without ID and money.
8. Designate a primary meeting place.
9. Designate a secondary meeting place.
10. Create an emergency plan.

To report an emergency call 1-517-353-3784
This will connect you with the 24/7 International Emergency Assistance Line operated by the MSU Department of Police and Public Safety (DPPS).
Group Work/Discussion

- Full Group Review and Discussion (Cases 1 and 6)
  - What was the theory or theories under which the plaintiff sued?
  - What risk management lessons could or should the defendant learn?
- Individual Table Review and Discussion (Cases 2-5)
  - Same questions as above
  - (Be prepared to report 1-2 responses to the full group)
Limiting Negligence Claims

- Be prepared to respond to an emergency (24/7)
- Train leaders how to respond to an emergency
- Require leaders/RDs to contact the home institution
- Make it easy for them to contact the home campus
- Have or require an international emergency treatment, evacuation, and repatriation insurance policy
- **Assign a student, family, or institutional advocate**
- Allow a student some control over an i-ship or service learning placement, or an opportunity to make a change if he/she feels unsafe
- Provide adequate, regular supervision, including escorts to/from transit points if placed in a high crime area
Limiting Breach of Duty Claims

- Accept and acknowledge the “special relationship.”
  - Don’t make assumptions about the knowledge base of your students, esp. when it comes to risk
  - Document your advice and/or warnings
  - Don’t make promises you can’t keep

- Act in good faith
  - Attempt to do the right thing
  - Don’t dismiss the things that give you pause
Reducing Risks

The identification, assessment, and prioritization of risks followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events (Wikipedia)

Steps to reduce risk:

- Review program locations regularly
- Review program activities to ensure they fit with your educational mission
- Create a program proposal process that include a comprehensive health and safety section
- Check insurance policies for exclusions (BAC, bungee jumping, etc.)
- Ask: “What would a reasonable person do?” and “Was the risk reasonably foreseeable?”
- In court you will be judged in hindsight
Reducing Risks, cont.

- Act now – don’t wait for a problem
- Consult industry “Best Practices” to minimize risk
- Develop program creation and review policies/procedures as well as emergency preparedness and response policies/procedure
  - Office-wide
    - Health/Safety Team
    - Crisis Manager/Risk Analyst
    - Crisis Management Team
  - University-wide
    - Risk & Security Assessment Committee
    - Incident Command Team
- Train all staff on your policies and procedures
- Protect student confidentiality, but document your actions internally and externally
Questions (and Thanks!)

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