Best Practices for Addressing Legal and Risk Management Issues in Education Abroad

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The Legal Landscape of Study Abroad

- In loco parentis – the pendulum swing
- Criminal law/civil law/common law/statutory law
- The law and policy distinction
- Torts: duty, negligence and the reasonable person
- Waivers, contracts, releases, and informed consent
- Transfer and assumption of risk
- Documentation
- Subpoenas, etc.

Nicaragua
In Loco Parentis

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

http://www.legal-dictionary.org

France

The pendulum swings in constant motion
Types of Programs

Prof. Jerry Urquhart, properly harnessed and helmeted in Nicaragua.

- Faculty-led
- Internships abroad
- Direct enrollment
- 3rd party provider
- Independent research
- U-operated study centers
- Alternative spring break
- Service learning abroad

- If it isn’t credit bearing, it may not be study abroad, but it still may be university-sponsored travel
- **Short-term faculty-led program pose the highest risk**
Why Higher Risk?

- Program leaders are often ill-prepared by their institution to prepare for or respond to emergencies.
- Faculty-led programs sometimes lack local institutional affiliations (unlike exchange or direct enrollment programs).
- Faculty leaders feel pressure to stay on schedule instead of choosing a less risky although slower option.
- Internships or service learning projects require students to be on their own in often less-than-safe locations and supervision may be inadequate or inefficient.
- In both cases, there may be a lack of medical (or security/natural disaster evacuation) insurance and/or a medical emergency response plan.
When an organization, institution, or staff:

- Facilitates dangerous activities or experiences
- Expresses indifference to, dismiss, or ignore known risks
- Performs an expected and reasonable responsibility in a negligent fashion
- Dictates rules they don’t actually enforce
- Fails to prepare for reasonably foreseeable emergencies

It could experience:

- Damage to reputation
- Negative publicity
- Loss of contracts or agreements
- Low morale
- Decreased enrollment
- Lawsuits

In the U.S., the most likely legal claim is negligence
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
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 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.

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.
Law vs. Policy

- **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.

- **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
DOS Travel Warnings

- Review program locations and http://travel.state.gov

- See if you have a policy that prohibits travel to countries with Travel Warnings (some underwriters won’t cover travel to these locations)
  - 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
**Duty/Reasonableness**

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.

South Korea

Legal/Risk Issues
Vancouver, BC 2011
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.

Example: Duty

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.”
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
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 of Duty

- 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.
- http://travel.state.gov
Limiting Neg. 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
Negligent Acts?

- Hiring a disreputable transportation provider, allowing them to stick to a schedule or route you know to be unsafe, traveling at night, or not inspecting vehicles
- Having rules, policies, or procedures that you do not follow
- **Failing to conform to standard safety practices for the activity, not just the country**
- Expecting experts in one field to be experts in another
- Dismissing safety alerts and warnings from reputable sources, without review and documentation
- **Assuming program leaders “know the right thing to do”**
- Not requiring int’l medical insurance
- **Not having (someone) available 24/7**
- Practicing medicine without a license

Kenya

- Not having a health review process, or failing to protect a student’s medical privacy
- Not having workable emergency and communication plans
- **Not having access to a lot of money – fast**
Contracts

A **contract** is a legally enforceable agreement between two or more parties with mutual obligations. The remedy for breach of contract is "damages" (\$.\$). In equity, the remedy can be specific performance or an injunction.

Examples: An apartment lease or a behavioral agreement, such as a statement of responsibility.

See: [https://osa.isp.msu.edu/statementofresponsibility](https://osa.isp.msu.edu/statementofresponsibility)

In exchange for money and effort, you will receive a grade/credit for the educational experience.
A **waiver** is the voluntary **relinquishment** or **surrender** of some known **right** or **privilege**. In this context, a **release** is a **legal instrument** that acts to terminate any legal **liability** between the student and the university signed by the student.

- These documents attempt to shift the liability for damages caused by negligence.
- In some jurisdictions, one may not prospectively waive liability for some or all intentional activities.
- Waivers generally must be made knowledgeably and voluntarily.
- The waiver should be unambiguous and clear to a reasonable person.
- Releases can be particularly effective for participation in inherently dangerous activities, such as scuba diving. Or, travel to a country with a State Department Warning.
In this context, **assumption of risk** is a **defense** in the **law of torts**, which bars a student from recovery against provider, program leader, or institution if we can demonstrate that the student voluntarily and knowingly assumed the risks at issue inherent to the dangerous activity in which he was participating at the time of his injury.
Managing Risk

Transfer

Waive

Limit

Deny

An MSU Police Cadet responds to a call

Kenya

India

Floor Evacuation Markers
USFQ, Quito, Ecuador
Incident Reports

An incident report is a brief, written summary of the emergency, crisis, or disaster to your various stakeholders (students, US-based campus, parents, other in-country colleagues, etc.)

It should include:

- Date, time, location of event and its proximity to (in miles), or effect on, your students
- Stick to the facts
- General status of students, staff and faculty on-site
- Local analysis of situation
- Next steps or contingencies
- Date of follow-up message

Nicaragua
The Subpoena

- [Latin, Under penalty.] A formal document that orders a named individual to appear before a duly authorized body at a fixed time to give testimony.
- A court, grand jury, legislative body, or administrative agency uses a subpoena to compel an individual to appear before it at a specified time to give testimony.

West's Encyclopedia of American Law, published by Thomson Gale

When the Subpoena Comes

1) Do not panic
2) Do not destroy evidence
3) Prepare requested documents
4) Notify general counsel
5) Appear if called to testify
6) Understand that e-mail is discoverable, even if it was deleted
Sources

Articles

- William P. Hoye, & Gary M. Rhodes, *An Ounce of Prevention is Worth...the Life of a Student: Reducing the Risk in International Programs*, 27 J.C.& U.L. 151 (Summer 2000).

Texts

- *The Rights and Responsibilities of a Modern University* by Bickel and Lake
- *Risk Communication* by Lundgren and McMakin
- *Managing Liability and Overseas Programs* by Weeks
- *A Legal Guide for Study Abroad Professionals* by Kaplan and Lee
- *Study Abroad in Higher Education: Program Administration and Risk Management* by Tribbensee (NACUA Pub.)
Thank You

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