NEGLIGENCE

WHAT IS NEGLIGENCE?

Negligence is unintentional harm to others as a result of an unsatisfactory degree of care. It occurs when a person NEGLECTS to do something that a reasonably prudent person would do. It also occurs when a person does something that a reasonably prudent person would NOT do. In other words, negligence is the failure to exercise reasonable care. Risk management is the action taken to prevent negligence and to prepare for the possibility of a negligent occurrence.

In a negligence lawsuit, the person who is injured (the Plaintiff) files a legal suit claiming the person being sued (the Defendant) acted negligently. The Courts must consider the following issues:

1. Has there been negligence?
2. Was the defendant negligent?
3. Who is liable for that negligence?
4. Can the defendant escape that liability?
5. What damages does the defendant have to pay the plaintiff?

HAS THERE BEEN NEGLIGENCE?

All four of the following must be demonstrated for a legal claim of negligence to be successful:

1. The defendant owed the plaintiff a **duty of care**.
2. The defendant breached a reasonable **standard of care** affecting the plaintiff.
3. The plaintiff suffered **actual harm** on which a value can be placed.
4. The defendant's carelessness was the direct **cause of harm** to the plaintiff.

Duty of Care applies only to people for whom harm can be reasonably foreseen. The key here is reasonability. Did the defendant foresee the incident that caused harm? This is often the clearest point of the above.

Standard of Care is a much more complicated issue. The courts are required to decide two things:

1. Establish a minimum standard of care. (The court decides how careful the defendant should have been)
2. Determine if the defendant breached that standard.

This issue decides most negligence cases. The general factors on which the court bases its decision are:

- The specific facts of the case.
- The "reasonable human being" test. What would the average person do in the same situation? Did the defendant do something that put the plaintiff into harm's way?
- What are the universally accepted practices in this same situation?

Actual Harm is the assessed value of your loss. Damages can be calculated from the following:

- Damage to or loss of property
- Present medical expenses
- Future medical expenses
- Past medical expenses
- Present loss of income
- Future loss of income
- Past loss of income
- Pain and Suffering
- Mental Health/Rehabilitation expenses
- Extended Care

IS THE DEFENDANT LIABLE FOR NEGLIGENCE?

After defining negligence, the courts must next decide who is liable for the negligence. In other words, finding who will actually take responsibility for the negligence.

In the sports and recreation field, there are four possibilities where liability for negligence can be assigned.

1. **Personal Liability**
If the defendant is the person whose negligent behavior caused the injury, Personal Liability can be assigned.

2. **Vicarious Liability**
If the defendant is an employee acting within the scope of his or her duties, Vicarious Liability can be assigned. In this situation, the employee should be covered by the employer's insurance and should not be held personally liable. If the employee is found negligent, then the employer or organization will be held vicariously liable for the employee's negligence.

3. **Product Liability**
If the plaintiff was injured through defective equipment, Product Liability can be assigned. Participants in sports and recreation expect to be provided with safe equipment. Those who manufacture, distribute or loan equipment are expected to do everything within reason to make sure the product is safe. The best way to ensure product safety is:

- Buy safety approved products
- Have manufacturer install products
- Implement inspection programs
- Implement maintenance programs
- Use the product according to instructions
- Do not modify product

4. **Occupiers/Premises Liability**
If the owner of the facility is aware of hazards or dangerous parts of the facility, Occupiers or Premises Liability could be assigned. It is the responsibility of the facility owner to take reasonable precautions to protect those he or she leases to. Leasing or renting space to outside groups is common with sports and recreation. The owner or occupier must protect against any foreseeable harm to avoid liability.

However, Recreation Land Use Statutes may protect the owner or occupier. What are Recreation Land Use Statutes?

1. Most states have enacted legislation, which excuses landowners (governmental or private) from a duty to warn or protect recreational users from dangerous conditions on their property.
2. Generally this immunity is lost if the landowner charges a fee or if the danger can be construed as constituting willful and wanton negligence (gross and outrageous disregard for the welfare of others).

This means that a landowner cannot be held responsible for an accident on his property if the conditions that lead to the accident were not foreseeable. This is not applicable if the landowner charged a fee for use of his property.

DEFENSES AGAINST NEGLIGENCE

Clearly, the best way to escape liability is not to be negligent. After an incident, the courts decide if there are any circumstances under which the defendant can escape being held liable. Defenses against negligence are:

1. Contributory Negligence.
   This means that the plaintiff contributed to the negligent act, which resulted in loss. This does not mean that the defendant is free from negligence; the defendant may still be more negligent than the plaintiff. The theory here is that the plaintiff should be punished for failing to protect his/her own safety. The theory behind contributory negligence defense is that were it not for the
   negligent acts of the plaintiff, no harm would have occurred. The action of the defendant may or may not be critical to the case. The court will determine who contributed most to the negligence, therefore, who is most responsible for the loss.

What are exceptions to the contributory negligence defense?

1. Contributory negligence must be proved and specifically pleaded by the defendant.
2. Some jurisdictions leave the contributory negligence question to the jury.
3. Most states require that the plaintiff's negligence meet the "but for" test or the "substantial factor test".
4. When the plaintiff could not foresee the harm that occurs.
5. Last clear chance doctrine: Here if the defendant has an opportunity to avert harm to the plaintiff, but fails to do so, then regardless of the plaintiff's negligence, the defendant is liable.

When is contributory negligence not a defense?

1. When the tort is intentional, willful, wanton, or reckless (unless the Plaintiff's contributory negligence was also willful, wanton, or reckless).
2. Generally, in negligence *per se* when the Plaintiff is a member of the class of individuals the statute was designed to protect.
3. Generally in strict liability cases.

2. Comparative Negligence.
In contributory negligence- the outcome is all or nothing, even if the defendant is more negligent than the Plaintiff. Consequently, a more equitable alternative was created. Comparative negligence allows for proportionate liability based on the extent to which each party contributed to the harm. There are different types of comparative negligence:

1. Pure comparative negligence: Under this system a Plaintiff recovers to whatever the extent it can be shown that the Defendant was negligent (Defendant's negligence minus Plaintiff's negligence).
2. 50% approaches:

   (1) Not as great as 50%
   (2) Not greater than 50%

In cases where the blame is balanced at 50-50, in states where the rule is stated as "not greater than" the plaintiff can still collect damages if his/her share of the blame is the same as the defendants. If the rule uses the phrase "not greater than 50%" then the plaintiff's share of the blame cannot exceed 49% in order to collect damages.

3. Assumption of Risk
   Assumption of risk is a defense based on the theory that a Plaintiff's assumption of risk of harm excuses the conduct of the defendant. This is a defense that can often apply to recreation and leisure situations. There are two types of assumption of risk:
   1. Express: Here the Plaintiff agrees with the Defendant, in advance of any harm, to not hold the Defendant liable should any harm befall the Plaintiff. However, there are several factors limiting the enforceability of this doctrine. One can document express assumption of risk in two forms:

(1) Waiver forms. A waiver is the intentional or voluntary relinquishment of a known right. Waiver forms provide some protection as many have stood up in a court of law. Although a waiver form does not waive negligence, it does waive the right of the plaintiff to sue if negligence occurs.

(2) Informed Consent Agreements. The use of an Informed Consent Agreement is becoming common in athletics and recreation. Informed Consent is "an agreement to allow something to happen that is based on full disclosure of facts needed to make the decision intelligently, with the knowledge of risks involved and alternatives. An Informed Consent Form does not have the same legal clout as a waiver form. However, those organizations that do not want to utilize waiver forms should require and Informed Consent Form as a way of informing participants of the risks involved.
Factors that limit the enforceability of the express assumption of risk doctrine:

1. Unusual bargaining power: If the Defendant is in a position (unique service provider) and uses that position as a means of inducing the Plaintiff to agree to waive liability, the courts will generally find such an agreement unenforceable.
2. Public service: If the Defendant is a common carrier, public utility, or some other regulated industry, the courts are not usually inclined to enforce an assumption of risk agreement.
3. Fine print: The Plaintiff must know of the risk. If a waiver clause is hidden in fine print, the courts will generally find it unenforceable.
4. Intentionally or willfully negligent conduct: A waiver of liability cannot defend against intentional or willful negligence.
5. Health care discounts: Generally courts refuse waivers induced by promises of lower fees. This is particularly true when a patient signs a waiver promising not to file a malpractice suit in exchange for bargain basement medical fees.

2. Implied: Here liability is inferred from the conduct of the Plaintiff in respect to the circumstances. Implied assumption of risk requires two elements be present:

A. The Plaintiff must have known the existence of a particular danger. It is not enough that he should have known.
B. The Plaintiff entered into the dangerous conduct voluntarily. Even if the Plaintiff protests about entering the activity, but still does so, he will be held to have assumed risk. (This, in spite of his protests to the contrary.)

Three criteria must be met to establish implied assumption of risk:

A. Manifest consent to risk
B. Voluntary acceptance
C. Full-knowledge and appreciation of risks and dangers

WHAT TO DO IN THE EVENT OF A POSSIBLE LAWSUIT

Certain steps should be taken in the event of a possible lawsuit. First, you need to contact your superiors, inform them of what has happened and discuss with them the steps that will be taken. Next document the details of the incident. This documentation may prove to be important information for your defense down the road. Lastly, you need to deal with the media. You need to decide how you want to handle the publicity the incident may generate and handle the media accordingly.

<u>Contact Your Supervisor</u>
You should immediately contact your organization's senior officials, who will then advise the insurers. By virtue of the terms of liability insurance policies, the insurer is entitled to conduct the defense of any lawsuit instigated against its insured. The insurer will also retain lawyers on behalf of the organization and its employees.

Depending upon the factual circumstances surrounding the incident, the organization's insurance may or may not apply. Coaches and administrators should always request confirmation as to whether or not the insurers will be protecting their interests. In the event that the organization's insurance coverage will not be provided, you will have to retain an attorney of your own.

<u>Documenting the Details</u>
It is VERY IMPORTANT to document all details of the incident. These notes should include the safeguards taken to avoid the accident, details of how the accident occurred, information on all witnesses, and the treatment and emergency procedures

taken after the incident. Any logbooks kept on a regular basis will also be important. The more information you collect, the more you will help your attorneys. A sample of an incident report form can be found in the Appendix.

Dealing with the Media

The media are a difficult group to deal with. If you are unsure how to handle the media, it is best to wait until you can speak with your attorney. Together you can decide what information will present to them and how you will present it. If you are making an oral statement, thoroughly prepare what you will say before speaking to the media. Remember, once you make a statement, you cannot take it back or revise your wording. If you prefer, you may issue a press release. This gives you the luxury of stating exactly what you want to state with the correct wording, while keeping the media informed.