

A Camp's Duty of Care — In Good Times and Bad

Charles R. Gregg and Catherine Hansen-Stamp*



What Is Your Legal Duty of Care?

We have previously written in *The Campline* about a camp's legal duty of supervision ("Reasonable Supervision and the 'Safe' Environment — What are the Issues," September 2005). The focus of this article is the broader duty of care owed to campers, across the spectrum of the camp relationship. We will be discussing duty as it pertains to a potential claim of negligence.

As we have noted previously, the camp experience is unique in its challenges and rewards. A camp is expected to manage reasonably an environment where meaningful personal and physical development can occur. Growth does not occur without change, and change does not occur without risks. So, conscientious camp management faces the task of reasonably exposing young men and women to new experiences, successes and

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disappointments, hurt feelings, and skinned knees — so they can emerge from the camp experience wiser, more resilient, and with new recreation and social skills.

The subject of a camp's legal duty of care is important because, of course, it is good to take care of your campers and, more pertinent to this discussion, one's legal duty is the core of an analysis of negligence. If there is no duty, there is no negligence. Negligence is most likely to be the claim brought against your camp for lapses in judgment or competencies.

The law is interested in the duty *of* care — not a duty *to* care — though it's a rare camp manager who does not genuinely care for the campers in his or her charge.

The camp's legal duty of care weaves in and out of the camp experience, changing with the activities, relationships, and environments. The law does not impose a consistent level of duty throughout the camp experience — certainly not an unqualified duty to avoid harm.

In its simplest form, the legal duty *of* care is to protect the camper from unreasonable risks of harm. The law does not expect the camper to be protected from *all* harm and not in all circumstances. In fact, the law recognizes risks of harm which are reasonable. These include risks which are inherent to an activity, risks which are assumed, and risks the liability for which has been released, or waived, in advance.

The most common articulation of a camp's legal duty of care is to deal with the camper as a reasonable camp professional would under the same or similar circumstances. Importantly the law does not demand perfection (nor should a parent) — only reasonableness. And the test of reasonableness is objective. The test is how one acted — not what one intended, or felt. The "reasonable person" is a fiction, to be defined by a jury.

We might be satisfied with this description of legal duty — merely to act reasonably — but, thankfully, the courts have helped us in our understanding of what might be reasonable in certain (and changing) circumstances.

Factors Affecting the Duty of Care

Factors recognized by prevailing case law as affecting a duty of care include: a) a disparity in knowledge, experience, or mental and physical competencies; b) a relationship of trust, dependency, or control; c) case law, as well as Federal, State, and other statutes and regulations that may dictate or define certain conduct or standards;

d) a camp's own internal policies; e) camp representations to the public or staff words or conduct; and f) standards, policies, and practices, in a particular organization or in an industry. In this latter connection, the ACA Standards ask camps to consider, for example, "appropriate" levels of training of staff and "appropriate" staff/camper ratios.

Duty may be influenced by evidence that the child was coerced into participation and exposure to risk by peer pressure, by the authoritative role of the counselor, or by a desire to please. Duty may be created or altered by expectations — created or expanded by marketing or brochure representations, for example. ("We assure your child's safety," "Every effort will be made to protect your child from harm," "Your child will be under our constant supervision.") Expectations may be influenced, more subtly, by a camp's reputation and history.

We see from a consideration of the factors described above that the camp experience contains the potential for enlargement of the ordinary duty of care in many aspects. The camp-camper relationship is, in fact, uniquely intimate, dependent, and controlling, intensely marketed, and historical; correspondingly, the duty of care owed, generally speaking, is considerable. There are also some limited opportunities for shrinking or eliminating that duty.

As we discussed in our previous *Camping Magazine* and *The CampLine* articles¹, a parent can agree, in advance, for himself or herself, to release the camp from liability for the camp's, or staff's, or other representatives' negligent conduct. In some jurisdictions (a minority), a parent can also lawfully agree to release the camp from liability for negligence for and on behalf of their minor child

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Contributors:

Barry Garst, Amy Katzenberger, Harriet Lowe, Rhonda Mickelson, Teresa Prefontaine, and Susan Yoder

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(the camper). These documents will, of course, be subject to strict review by the courts.

In the body of case law dealing with children and outdoor recreation, there is solid support for the *Primary Assumption of Risk* principle that camps and other organizations have *no duty* to protect children and adults alike from injuries resulting from the inherent risks of recreation and adventure activities (the Inherent Risk Doctrine). Inherent risks are those, both good and bad, that are integral to the activity. Inherent risks can provide the challenge to participate, the opportunity to learn, or the catalyst for growth. Most jurisdictions define their “take” on the Inherent Risk Doctrine through either case law, statutes focused on the particular activity, or on all recreational activities (Wyoming, for example). The classic doctrine provides that, although a camp or other provider has no duty to protect campers from inherent risks, they still have a duty to exercise reasonable care in other circumstances. The result? There is often dispute over whether the injury resulted from an inherent risk of the activity, or, some negligence on the part of the camp, fueling litigation.

There is growing support for the notion that in an instructional or “sport” context, co-participants, coaches, teachers (including camp counselors), and even management are not responsible if they are merely negligent (as distinguished from reckless or intentionally harmful conduct.) Otherwise, the reasoning goes, there would be no “pushing of the envelope” in a teaching or sporting experience, and the thrill and excitement of the sport would be muted. This variation of the Inherent Risk Doctrine, is based on the notion that some carelessness may be unavoidable in a sport or recreational setting. Essentially, negligence is considered an inherent risk of the activity. The duty of care in these teaching and sporting activities then becomes one of no recklessness or intentionally harmful behavior. “Reasonable” has taken on a special meaning.

Courts do not uniformly embrace this variation of the Inherent Risk Doctrine when it comes to children. Many, predominantly on the East Coast, take the position that the duty of ordinary care must be observed and that negligence cannot be tolerated. Camp managers would do well to learn the viability of the Inherent Risk Doctrine in their states.

Courts generally support a child’s “secondary” assumption of risk. That is, if proven that the child knew and appreciated the risk that caused his or her injury, he or she can be held responsible for all or part of the loss (under a state’s “comparative fault” laws). In other words, even if a child (through his or her parent) is able to establish a camp’s negligence in a lawsuit, the child’s proven secondary assumption of risks can reduce or eliminate the camp’s ultimate responsibility.

In Loco Parentis

Whether analyzing case law or merely applying one’s personal “reasonableness” test, children are generally considered to be owed a higher degree of care than an adult in the same situation. And campers, it might be argued, are entitled to a higher duty of care than children in other circumstances. A “high” degree of

care may reflect what a *cautious* or prudent person might do in the circumstances. A “highest” degree of care may reflect what an *extremely cautious* person would do.

We addressed the doctrine of “in loco parentis” (“in the place of the parent”) in the 2005 article we previously cited. “In loco” has been described by some courts as “the highest duty of care” — to act with that level of care that would be exercised by a prudent (even extremely prudent) parent. “In loco parentis” is not recognized in all states, but it has a respectable circulation, and is often referred to by camp managers and camp families. As we have noted previously, it is often misunderstood.

Despite these legal labels, reliable case law recognizes that even in jurisdictions whose courts refer to “in loco” as the “highest” duty of care, those courts do not call for the camper to be placed in a cocoon, insulated from all chance of harm or disappointment. This recognition, in fact, is consistent with what parents want and expect for their children — the child is allowed to experience new challenges with a degree of supervision that allows risks to be taken, failure to occur, and lessons to be learned.²

How have courts articulated a camp’s duty of care? Because this duty to exercise reasonable care applies, generally, to a camp’s operations, for example, claims of negligence are often directed at hiring or training of staff or sub-contractors, instruction, supervision or screening of participants, warnings or other information (or lack of) provided to campers and their families, equipment or animal use, and facilities or premises issues.

Dealing With Duty of Care in a Tough Economy

In a tough economy, how do camps deal with cutting budgets and trimming costs, while still endeavoring to exercise reasonable care in their efforts to run a quality program? The bottom line is that camps and their staff must continue to use good judgment and exercise common sense. As tempting as it might be to cut corners, risk management cannot be compromised. Tough times or not, in running a camp operation, camps must continue their efforts to manage the risk of loss to the camper as well as to the camp. Let’s look at a few areas that deserve attention as you consider if and where to trim your budgets in the coming season:

1. Compliance with ACA standards. Standards compliance is an overarching issue in your budget considerations. Accredited camps must comply, appropriately, with ACA Standards in order to be or remain accredited.³ Camps that are not accredited need to pay attention to the Standards, understanding this may be one of the first places a plaintiff’s expert will look in an attempt to demonstrate the camp’s negligence. In addition, the Standards provide a good risk management tool in reviewing the entire camp operation. Most of the items discussed below are addressed in some fashion in the ACA standards.
2. Staff hiring, training, and oversight remains a constant, in good times and bad, and is not a place to cut costs. With

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trained and competent staff, and appropriate camper-to-counselor ratios, the camp can consider scaling back in other areas (see below). On the other hand, a camp can consider postponing new hires for its anticipated expansion into new activities. Putting valuable camp resources into new hires intended for new activities during tough economic times may be a dangerous proposition. If the camp budget is tight, this decision could force the camp to skimp on new hire training, compromising its ability to responsibly introduce these new activities.

3. Camp grounds and facilities maintenance and inspection, as well as compliance with applicable building codes and regulations, including ADA compliance, remain important items in your budget, even in the face of an economic downturn. If a camp is looking to trim costs, postponing construction of new facilities (to house, for example, hoped for increases in camper numbers) is an option in this area.
4. Equipment maintenance, replacement, and storage also remain a continuing and important priority, as do staff competencies associated with handling these issues, and instructing participants on the proper use and care of the equipment. This applies equally to animals. Attempting to save money by retaining and using poorly functioning equipment, refusing to take a problem horse off the line, or other skimping measures can translate into an increased chance of accidents and increased exposure in litigation.
5. Existing programming can continue to run as it has, with trained and competent staff. Sacrificing in other areas while introducing new activities or programs (and associated “new” equipment) can be a sensitive proposition if budgets are tight. For example, a camp shouldn’t rush into new programming for new activities if the camp isn’t ready to roll those out responsibly. The rationale (one we’ve heard) that a camp must spend money on new activities and associated equipment to draw in campers, at the expense of other critical areas (like needed facilities maintenance or legal review), can be a recipe for disaster. On the other hand, a thoughtful decision to eliminate expensive programming (for example, use of an off-premises, outside contractor), and opt instead for an on-premises activity that the camp is comfortable in presenting with existing staff may be a viable option.
6. Fair, informative, and accurate information exchange with campers (minors) and camp families continues to be

important in fluctuating economic times. Regular review by trained staff and legal counsel should remain a priority.

7. Your liability and other insurance is a continuing priority. You may consider re-thinking your current insurance to try to trim your budget. It may be a good time to re-evaluate your insurance needs. However, don’t be fooled by premium cost alone; that is, do not purchase insurance based solely on the best price! This is a complex topic, but camps should be looking for the right policy, with appropriate coverage, limits, insurance company experience, ratings, and other factors.
8. Don’t compromise your wise use of professionals, including lawyers, accountants, tax specialists, physicians, and others. Certainly, you can consider whether to postpone new projects or analyses that do not pertain to existing operations. However, avoid this argument/rationale (again, one we’ve heard), “I can’t afford to have you review my documentation this year because, with a tight budget, we’re putting that money into new programming.”
9. Understanding of, and compliance with, laws goes hand in hand with item number eight. You may need ongoing assistance from your attorney, accountant, or other specialist, to deal with understanding important state or Federal laws or regulations that apply to your existing camp operation. This expense shouldn’t be compromised.

Conclusion

If, in challenging economic times, a camp sticks with a positive and proactive approach to operations that is fair to campers, camp families, and camp staff, the camp increases the likelihood that its camp will continue to run in a responsible fashion. You may delay, for example, the introduction of new activities and additional staff, while avoiding drastic and potentially dangerous cuts that may compromise ACA standards, your own internal policies, or frankly, your “common sense” comfort level. Keeping on track in these areas can hopefully minimize the potential for injuries or accidents, keep your camp running smoothly, and provide protection to your organization in the event of an incident. ■

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Charles R. (Reb) Gregg is a practicing attorney in Houston, Texas, specializing in outdoor recreation matters and general litigation. He can be reached at 713-982-8415 or e-mail rgregg@gregglaw.net; www.rebgregg.com.

Catherine Hansen-Stamp is a practicing attorney in Golden, Colorado. She consults with and advises recreation and adventure program providers on legal liability and risk management issues. Hansen-Stamp can be reached at 303-232-7049, or e-mail reclaw@hansenstampattorney.com; www.hansenstampattorney.com.

¹The What and the Why of Camp Releases, *Camping Magazine*, Fall 2006 and Releases Revisited, *The Campline*, Spring 2007.

²An example of this reasoning can be found in recent cases from the trial and appellate courts in the State of New York, which often invoke the “in loco” standard. See the following: *Lesser v. Camp Wildwood*, 282 Fed. Supp. 2d 139 (2003) (evacuation of water front, and injury to camper); *Murowski v. Camp Negeela* 798 N.Y.S.2d 346 (2004) (camper to camper fight); *Gibbud v. Camp Shane* 2006 N.Y. App. Div. 8254 (camp horseplay).

³Not all ACA standards are mandatory. In addition, not all standards apply to all camps.

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