

PROPOSED FEDERAL VOLUNTEER PROTECTION ACT: FORM OR SUBSTANCE?

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The month's column contains an analysis of proposed federal legislation to "protect" volunteers from negligence liability. This analysis was prepared at the request and with the support of the NRPA Director of Public Affairs, Barry S. Tindall. While it is unlikely that these bills will be considered in the present session of Congress, similar proposals to encourage limited tort immunity for volunteers will probably resurface when the United States Congress reconvenes in January. Given the importance of volunteers in the provision of leisure services, it would behoove interests within NRPA to become familiar with proposed and existing immunity legislation in this area.

FEDERAL POSTURING OR CATALYST FOR STATES?

The proposed "Volunteer Protection Act of 1987," H.R. 911/S. 929, would, in part, require each State to certify to the Secretary of Health and Human Services that it has enacted a statute which provides limited immunity to volunteers of nonprofit organizations and governmental entities. Specifically, states would have to provide that "any volunteer of a nonprofit organization or governmental entity shall be immune from civil liability in any action... resulting in damage or injury to any person" if the volunteer was acting in good faith within the scope of their authority. Such volunteer immunity, however, would not be available where the damage or injury was "caused by willful and wanton misconduct." Certification of compliance would be required each fiscal year beginning in 1989. Those states which fail to provide the required certification would lose 1 percent of their fiscal year allotment for the Social Services Block Grant Program under title XX of the Social Security Act.

Section 3 of the proposed legislation states: "Nothing in this Act shall be construed to preempt the laws of any State governing tort liability actions." As a result, the title of the proposed legislation, "Volunteer Protection Act of 1987," is a misnomer. The bills, in and of themselves, provide no tort immunity "protection" for volunteers. They simply encourage states to adopt tort reform legislation which "substantially complies" with the format prescribed in H.R. 911/S. 929 or face a loss of certain federal aid.

State legislation in compliance with the proposal would lower the applicable legal standard of care for volunteers from ordinary negligence to willful/wanton misconduct. Ordinary negligence can be mere carelessness or a momentary oversight which creates an unreasonable risk of harm and causes injury. Rather than mere carelessness, willful/wanton misconduct requires intentional or outrageous misconduct. As the term suggests, "willful" requires an intent or will to injure. While not intentional, "wanton" misconduct demonstrates an utter lack of care and complete disregard for the physical well being of others.

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H.R. 911/S. 929 state that potential volunteers are increasingly being deterred for offering their services "by a perception that they thereby put personal assets at risk in the event of liability actions against the organization they serve." While state legislation inspired by the bills may provide volunteers with a potent defense to tort liability, it does not necessarily preclude their being sued. With or without state legislation, volunteers can still be sued. The plaintiff's attorney will simply have to change the boilerplate language in the personal injury complaint to allege willful/wanton misconduct, rather than ordinary negligence.

Once sued, the volunteer must then defend the lawsuit to avoid a default judgment. If a volunteer has no available insurance coverage or the sponsoring agency will not provide for indemnification, defending a lawsuit can put "personal assets at risk" whether or not liability is ultimately imposed. The legislation, therefore, does not address the real concern of volunteers which is indemnification, not a lower standard of care.

On the other hand, if the sponsoring organization does not indemnify its volunteers, an individual's homeowner's insurance policy will oftentimes provide some level of protection. For example, as the named insured on a personal homeowner's insurance policy, this author is indemnified up to \$100,000 for personal liability arising out of a non-business pursuit. This coverage would presumably cover a lawsuit arising out of services provided as a volunteer. The perception of risk may, therefore, be much greater than the reality of personal liability associated with volunteer services.

H.R. 911/S. 929 would do nothing substantive to change the rather limited level of personal liability associated with most volunteer services. On the contrary, it may very well create the false impression that it somehow provides federal protection to volunteers against lawsuits. It does not.

On the other hand, this proposed legislation can act as a catalyst to examine existing state laws regarding limited immunity and indemnification for volunteers. In many instances, existing state law provides volunteers in public park and recreation agencies with the type of limited immunity envisioned by H.R. 911/S. 929. However, much of the recently enacted state "volunteer protection" legislation is not applicable to governmental entities. In the following paragraphs, volunteer protection is evaluated under various volunteer protection statutes as well as several state tort claim statutes governing liability for public entities.

DELAWARE

Title 10, section 8132 of the Delaware Code provides limitation "from civil liability for certain nonprofit organization volunteers." By definition, the applicability of this statute is limited to "any not for profit corporation exempt from federal tax under 501(c) of the Internal Revenue Code." It would provide no protection to public park and recreation agencies in Delaware or volunteers in an unincorporated

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association. With the exception of volunteer services involving the operation of motor vehicle, this statute imposes a willful/wanton or gross negligence standard for liability.

MARYLAND

Similarly, section 5-312 of the Courts and Judicial Proceedings Article in the Maryland Code provides limitations on the "personal liability of agents of charitable organizations." A "charitable organization" is defined as an organization "exempt from taxation under 501(c)(3) of the Internal Revenue Code of 1954." Further, the charitable organization must provide insurance for its agents. Under such circumstances, personal liability of the agent will be limited to injuries caused by malice or gross negligence.

NEW HAMPSHIRE

A recently passed piece of legislation (HB 237) provides limited immunity to volunteers of nonprofit organizations as well as governmental entities. Under the statute, volunteers of nonprofit organizations or governmental entities are immune from civil liability for ordinary negligence. However, the volunteer must have "prior written approval from the organization to act on behalf of the organization." In addition, this statutory immunity is contingent upon the volunteer acting "in good faith and within the scope of his official functions and duties with the organization." Further, the volunteer must not be guilty of "willful, wanton, or grossly negligent misconduct." Consequently, the volunteer would still be liable for willful, wanton, or grossly negligent misconduct.

Statutory immunity from liability for ordinary negligence is limited to the individual volunteer. As a result, the organization may still be liable for negligence on the part of an organization volunteer. However, the statute limits organization liability for volunteer negligence to \$250,000 per individual and \$1,000,000 per incident.

The statute does not include volunteer work "related to transportation or to the care of the organization's premises." Further, the statutory definition of "organization" is limited to 501(c)(3) nonprofit corporations. As a result, unincorporated associations would not be covered by the statute. The statute became effective July 1, 1988.

NEW JERSEY

A 1986 New Jersey statute (N.J.S.A. 2A:62A-6) provides limited immunity against ordinary negligence liability for "volunteer athletic coaches, managers or officials of non-profit sport teams." Liability will still be imposed for willful, wanton or gross negligence. The statute expressly excludes sports volunteers "who provide services or assistance as part of a public or private educational institution's athletic program." Further, the non-profit sport team must be "organized or performing

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pursuant to a non-profit or similar charter" for the statutory immunity to apply. Such limited immunity would, therefore, not be available to most volunteers controlled by public park or recreation agencies. Also, non-sport volunteers would not be protected by this statute.

This particular law was prompted by a "horror story" involving a youth sports coach. In this instance, the injured youth was a second baseman on an all-star team. The coach, however, moved the youth to the outfield where he was struck in the face by a fly ball. The coach was sued alleging that he was negligent in moving the youth to another position without proper instruction. The insurance company settled the suit for \$25,000 without trying the merits of what, to most observers, was a spurious claim. (Participants in sports generally assume the open and obvious risks associated with their sport, like being struck by fly balls. Further, a baseball player on a youth all-star team generally knows the inherent risks associated with a fly ball, whether playing second base or the outfield.)

The popular media distorted the situation, thus prompting a rush to tort "reform". Existing state tort law would probably have covered this situation had the insurance company defended the suit. This situation spawned the New Jersey statute and other state volunteer protection laws in other jurisdictions, most of which were enacted in 1986. While lowering the applicable standard of care to willful/wanton misconduct, most of these laws still fail to address the real concern of volunteers (i.e. when and if I am sued will the sponsoring organization indemnify me?)

PENNSYLVANIA

A Pennsylvania statute provides limited immunity to sports volunteers for both incorporated and unincorporated associations (42 Pa.C.S.A. 8332.1). Under this statute there is no liability unless the conduct involved "falls substantially below the standards generally practiced and accepted in like circumstances..." Such immunity, however, does not apply to the transportation of participants or real estate unrelated to the practice or playing areas. It is unclear whether this "substantially below" standard is tantamount to the willful/wanton misconduct standard used in other statutes. While the general willful/wanton standard has a clear definition within tort law, this "substantially below" standard requires an inquiry by the trial court into what are the "standards generally practiced and accepted in like circumstances." Consequently, cases brought in Pennsylvania are more likely to go to trial and less likely to be dismissed prior to trial on defendant's motion for summary judgment.

Since 8332.1 is limited to incorporated and unincorporated associations, it would not be applicable to public park and recreation agencies in Pennsylvania. On the other hand, volunteers for public agencies would appear to have both limited immunity and, more importantly, indemnification under the pertinent provisions of the state tort claims act (42 Pa.C.S.A. 8501 et seq.). In pertinent part, this legislation defines "employee" as follows:

Any person who is acting or who has acted on behalf of a government unit whether on a permanent or

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temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit, including... any elected or appointed officer, member of a governing body or other person designated to act for the government unit...

Under this definition, uncompensated volunteers of public entities would be considered employees for the purposes of tort liability.

This law mandates that the governmental entities provide employees, acting within the scope of their authority, with legal assistance and indemnification for the payment of any judgment resulting from lawsuits.

Further, the limitation on damages under the state tort claims act is \$250,000 per person, not to exceed \$1000,000 per incident. However, indemnification will not apply if the employee act constituted willful misconduct. Consequently, under existing state law, volunteers of public park and recreation agencies in Pennsylvania, including non-sport volunteers, are guaranteed legal assistance and indemnification for negligent acts which fall short of willful misconduct. The state tort claims act, therefore, provides volunteers of public entities in Pennsylvania with a greater degree of protection against personal liability than that available to sports volunteers of non-profit organizations under the recently enacted volunteer protection statute.

ILLINOIS

In Illinois, the "Local Governmental and Governmental Employees Tort Immunity Act" (Ill. Rev. Stat.1983, ch. 85, par. 1-101 et seq.) expressly includes volunteers in the statutory definition of employees. "Employee includes a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee, whether or not compensated, but does not include an independent contractor." Park districts and forest preserves are included within the statutory definition of "local public entity." As indicated in the recent case of *Young v. Chicago Housing Authority*, 515 N.E.2d 779 (Ill.App. 1 Dist. 1987), this law provides limited immunity from recreational injury liability for local governments. "[W]hen liability is based on a condition of any public park, playground, or recreational area, a local public entity is liable only when it is guilty of willful and wanton misconduct causing the injury. (Ill. Rev. Stat.1983, ch. 85, par. 3-106.)" The statute defines "willful and wanton misconduct" as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Further, the Act provides that "neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property." (Ill.Rev. Stat.1981, ch. 85, par. 3-108(a)). See *Ramos by Ramos v. City of Countryside*, 485 N.E.2d 418 (Ill.App. 1 Dist. 1985). As in Pennsylvania, the existing provisions within the Illinois state tort claims act would appear to provide volunteers of public park and recreation agencies with limited tort immunity greater or equal to that found in most of the recently enacted volunteer protection laws.

KANSAS

In the case of *Bonewell v. City of Derby*, 693 P.2d 1179 (Kan. 1985), the Supreme Court of Kansas considered whether the Derby Jaycees were employees within the definition of the state tort claims act. The state tort claims act provided that governmental entities or employees acting within the scope of their authority were not liable "for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence..." In pertinent part, the state tort claims act defined "employee" as "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." In the opinion of the state supreme court, the Jaycees were, therefore, employees of the city for the purposes of tort liability when they assisted the city in the operation of a public ballfield where plaintiff was injured. As a result, the court found that both the city and the Jaycees were immune from liability for alleged negligence in the maintenance of the ballfield.

Thus, in Kansas volunteers of public park and recreation agencies already enjoy limited immunity from premises liability under the state tort claims act. It is unclear whether this limited immunity for volunteers would extend to negligent instruction or supervision in public recreation activities. However, it is clear that the existing state tort claims act provides a more appropriate statutory vehicle for immunizing volunteers of public park and recreation agencies than the many of the proposed volunteer protection statutes inspired by H.R. 911 or S. 929.

CONCLUSIONS

Assuming that NRPA interests are primarily public park and recreation agencies, the Association should encourage the states to analyze the availability of limited immunity and indemnification for volunteers (and even employees) under existing tort claim legislation. In advocating volunteer protection legislation, states must distinguish between statutes which apply to non-profit entities from oftentimes unrelated legislation which governs the scope of liability for agents (i.e. employees as well as volunteers) of the State and its political subdivisions. Further, liability for agents of the State is oftentimes separate and apart from tort claims laws applicable to local governmental entities.

Any proposed volunteer protection legislation should provide immunity "notwithstanding" any immunity available under other laws. Otherwise, state courts may very well interpret immunity legislation for volunteers of non-profit organizations to necessarily preclude such immunity for other types of volunteers, including those sponsored by public park and recreation agencies. State courts will reason that the Legislature's failure to expressly include other types of volunteers in the legislation indicates an intent to deny limited immunity for volunteers not sponsored by a non-profit corporation.