

WORLD CARES CENTER®
August 2009 White Paper

“Spontaneous Volunteer Liability Management in 2009: Achievements and Challenges
for Volunteer Organizations”

Our government asks every citizen to be a proactive volunteer and self-sustaining individual for at least 72 hours in times of emergency and disaster. However, many volunteer organizations are hesitant to manage such spontaneous volunteers due to a confusing patchwork of volunteer and volunteer organization liability court decisions and statutes. This White Paper will analyze the current state of play and examine possible solutions to this dilemma.

EXECUTIVE SUMMARY

Can people who help in a disaster can be held liable for any malfeasance, negligence, and other possible wrongs which take place during the rescue? Under general common law, the answer in general is no they cannot be held liable unless they have created the peril or undertaken an act to assist someone and then acted negligently in rendering assistance to them. There is no general duty to come to the aid of another in peril unless there is a legal duty, such as one created by relationships between parties (i.e. mother-daughter), legislative enactment, administrative regulation, or judicial decision, except to the extent that if you do volunteer to undertake an activity, you must do so non-negligently. We must examine the general law of torts (wrongs), corrective statutes such as the state Good Samaritan laws and Volunteer Protection Act of 1997, as well as the court decisions interpreting these statutes and the exemptions in these laws.

GENERAL TORT LAW

As a background note, in order to be liable for negligence, all five elements of the tort must be proven:

1. Duty
2. Breach of duty
3. Cause in fact (causation- “but for” test)
4. Legal Causation (i.e.- foreseeability)
5. Damages

The analysis ends if there is no duty to act, which is heart of the question. Under § 283 of the Restatement of Torts 2D, a person has a duty to act as a reasonable man under like circumstances. Under § 284 of the same restatement, negligent conduct may be either:

- (a) An act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, (i.e. misfeasance or malfeasance) or

- (b) A failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do. (i.e. nonfeasance).

§ 228A, Excused Violations states that:

(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when: (d) he is confronted by an emergency not due to his own misconduct and (e) compliance would involve a greater risk of harm to the actor or to others.

Under § 296, Emergency:

- (1) In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action.
- (2) The fact that the actor is not negligent after the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency.

(Note: emergencies include disasters).

§ 314, Duty to Act for Protection of Others

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Comment C- The rule stated in this Section is applicable irrespective of the gravity of danger to which the other is subjected and insignificance of the trouble, effort, or expense of giving him aid or protection.

§ 322, Negligent Performance of Undertaking to Render Services

One who undertakes, gratuitously or for consideration (i.e. money), to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

(i.e., if acting negligently while rendering assistance to another, there is liability for negligent assistance).

In short, a citizen has no duty to help another absent certain circumstances, but if he or she decides to act, then he or she must do so in a non-negligent fashion to avoid liability (e.g., you are under no duty to wave on a pedestrian in front of your car into oncoming traffic, but if you do, you must make sure that it is safe to walk into the street or be held liable for the consequences). This liability also applies to organizations which actively work with the volunteers under the theory of contributory negligence.

GOOD SAMARITAN STATUTES

Since anyone trying to help another may be liable, but public policy dictates that it is desirable to do help others in need, legislators began to look to Good Samaritan statutes to solve the problem. In the Bible, Luke 10:25-37 tells the story of the Good Samaritan, a man who stops by to help a robbery victim, even though he was not obligated to do so. Two examples, from Connecticut and New Jersey, are set forth below:

Connecticut Good Samaritan Act

C.G.S.A. §52-557b.

"Good samaritan law". Immunity from liability for emergency medical assistance, first aid or medication by injection. School personnel not required to administer or render

A person licensed to practice medicine and surgery under the provisions of chapter 370 or dentistry under the provisions of section 20-106 or members of the same professions licensed to practice in any other state of the United States, a person licensed as a registered nurse under section 20-93 or 20-94 or certified as a licensed practical nurse under section 20-96 or 20-97, a medical technician or any person operating a cardiopulmonary resuscitator or a person trained in cardiopulmonary resuscitation in accordance with the standards set forth by the American Red Cross or American Heart Association, who, voluntarily and gratuitously and other than in the ordinary course of his employment or practice, renders emergency medical or professional assistance to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injuries which result from acts or omissions by such person in rendering the emergency care, which may constitute ordinary negligence. The immunity provided in this subsection does not apply to acts or omissions constituting gross, wilful or wanton negligence.

1. A paid or volunteer fireman or policeman, a teacher or other school personnel on the school grounds or in the school building or at a school function, a member of a ski patrol, a lifeguard, a conservation officer, patrolman or special policeman of the Department of Environmental Protection, or ambulance personnel, who has completed a course in first aid offered by the American Red Cross, the American Heart Association, the National Ski Patrol, the Department of Public Health or any director of health, as certified by the agency or director of health offering the course, and who renders emergency first aid to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injuries which result from acts or omissions by such person in rendering the emergency first aid, which may constitute ordinary negligence. No paid or volunteer fireman, policeman or ambulance personnel who forcibly enters the residence of any person in order to render emergency first aid to a person whom he reasonably believes to be in need thereof shall be liable to such person for civil damages incurred as a result of such entry. The immunity provided in this subsection does not apply to acts or omissions constituting gross, willful or wanton negligence.

2. An employee of a railroad company, including any company operating a commuter rail line, who has completed a course in first aid offered by the American Red Cross, who is trained in cardiopulmonary resuscitation in accordance with standards set forth by the American Red Cross and who renders emergency first aid or cardiopulmonary resuscitation to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injury or death which results from acts or omissions by such employee in rendering the emergency first aid or cardiopulmonary resuscitation, which may constitute ordinary negligence. The immunity provided in this subsection does not apply to acts or omissions constituting gross, willful or wanton negligence.
3. A railroad company, including any commuter rail line, which provides emergency medical training or equipment to any employee granted immunity pursuant to subsection (c) of this section shall not be liable for civil damages for any injury sustained by a person or for the death of a person which results from the company's acts or omissions in providing such training or equipment or which results from acts or omissions by such employee in rendering emergency first aid or cardiopulmonary resuscitation, which may constitute ordinary negligence. The immunity provided in this subsection does not apply to acts or omissions constituting gross, willful or wanton negligence.
4. A teacher or other school personnel, on the school grounds or in the school building or at a school function, who has completed both a course in first aid in accordance with subsection (b) of this section and a course given by the medical adviser of the school or by a licensed physician in the administration of medication by injection, who renders emergency care by administration of medication by injection to a person in need thereof, shall not be liable to the person assisted for civil damages for any injuries which result from acts or omissions by the person in rendering the emergency care of administration of medication by injection, which may constitute ordinary negligence. This immunity does not apply to acts or omissions constituting gross, willful or wanton negligence.
5. The provisions of this section shall not be construed to require any teacher or other school personnel to render emergency first aid or administer medication by injection.

New Jersey

Good Samaritan Act 2A:62A-1.

Any individual, including a person licensed to practice any method of treatment of human ailments, disease, pain, deformity, mental or physical condition, or licensed to render service ancillary thereto, who in good faith renders emergency care at the scene of an accident or emergency to the victim or victims thereof, shall not be liable for any civil damages as a result of any act or omissions by such person in rendering the emergency care. L. 1986

A careful reading of these statutes in these states, and in other states, indicates a very large loophole for spontaneous volunteers – they are not trained professionals. Moreover, if their actions are considered to be beyond “normal” negligence, such as gross, willful, or wanton, they will not be exempted. Let us look at this example: a spontaneous volunteer pulls a woman from a house quickly being flooded and in the

process dislocates her arm. Would a jury decide this is this “willful negligence”? Could at least a claim be made that it was? << **ADD CASES**>> Finally, these statutes only exempt the volunteers, not the volunteer organizations. Thus, Good Samaritan statutes only take us so far in protection of spontaneous volunteers and their supporting organizations.

VOLUNTEER PROTECTION ACT OF 1997

In 1997, President Bill Clinton signed into federal law the Volunteer Protection Act, which generally exempts volunteer workers, but not sponsoring organizations, from liability. << **NEED BULLET POINT REVIEW OF VPA**>> The pertinent Section 4 is set forth below:

SEC. 4. LIMITATION ON LIABILITY FOR VOLUNTEERS.

(a) **LIABILITY PROTECTION FOR VOLUNTEERS.**—Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—

(1) the volunteer was acting within the scope of the volunteer’s responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken
42 USC 14503.

42 USC 14502.

111 STAT. 220 PUBLIC LAW 105–19—JUNE 18, 1997

within the scope of the volunteer’s responsibilities in the nonprofit organization or governmental entity;

(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—

(A) possess an operator’s license; or

(B) maintain insurance.

(b) **CONCERNING RESPONSIBILITY OF VOLUNTEERS TO ORGANIZATIONS AND ENTITIES.**—Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.

(c) **NO EFFECT ON LIABILITY OF ORGANIZATION OR ENTITY.**—

Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.

(d) EXCEPTIONS TO VOLUNTEER LIABILITY PROTECTION.—If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:

(1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.

(2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.

(3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.

(4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.

It is interesting to note that although Section 4(c) exempts volunteer organizations from the provisions of this Act (i.e., such organizations can be sued), Section 4(d)(4) permits individual states to enact legislation which will exempt volunteers from liability only if the volunteer organization has obtained sufficient liability insurance. The reason for this exception is to protect harmed rescues from having no recourse for harm against a protected rescuer and his or her not for profit/non profit organization which may have no resources to pay such claims.

FEDERAL STAFFORD ACT (42 USC 5121)

<<ADD>>

OPEN ISSUES

(1) Should the VPA be expanded to include organizations? (2) Should organizations and the volunteers themselves be required to carry insurance if there are to engage in spontaneous volunteer activities or should there be a general governmental

insurance fund to protect injured rescuees? (3) Should the definition of what constitutes a "volunteer" be expanded to protect other types of volunteers in an emergency/disaster scenario?

CONCLUSION

The legal protection afforded to volunteers has evolved over the years from common law liability for all who undertake a rescue activity, to certain exemptions under the Good Samaritan laws, and further to protection by federal statutes such as the Volunteer Protection Act. Similar exemptions for volunteer organizations have not been forthcoming. If it is truly national policy to encourage citizens to assist in emergency/disaster situations, the Volunteer Protection Act should be expanded to include volunteer organizations, and a national insurance fund, similar to Social Security disability insurance, should be established to create a fair balance between protection for injured rescuees and for volunteers and their organizations who give their free time and sometimes their own lives to selflessly help others in need.