

Torts 101 (for ski guides)

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Disclaimer

- The purpose of this presentation is not to answer specific questions but is intended to be educational in order to stimulate better awareness of potential problems before they emerge. When a problem, question, or concern does arise, you should consult with counsel to obtain specific guidance with respect to the specific issue at hand. This presentation is intended only as a general overview and certainly does not purport to be a complete discussion of the applicable law (which would take a several volume treatise!) Also, because laws are subject to change, you should not rely on the information contained herein as being current without first checking with counsel. In addition, many of the observations contained herein are my own and not those of any law firm.

The Worst Case Scenario

- Great day of skiing so far – blower pow, bluebird skies, 6 runs taken, snowpack has been stable
- Half of the groups return – the other half decide to take one run
- First group enters a 2500 vertical feet run. It was relatively low angle (32 degrees)
- All guides agree earlier that they should attempt to ski that run if logistically appropriate
- Run is made up of three bowl shaped features, converging about midway into one large pathway to the bottom
- First group skis right side of the right bowl
- Second guide radios first group – ops normal, first guide said right side was excellent skiing
- There was a blind feature halfway down and there is a large island of trees toward the middle of the right bowl chute.
- Second guide told skiers to re-group 30-40 yards above the trees, right before the narrow exit chute.
- As the 10th member of the group enters the bowl, a large slab avalanche releases
- The guide and nine guests are caught and fully buried by the slide

- A textbook rescue is undertaken in minutes. All nine skiers' bodies were located in 45 minutes

- Only the guide survives

- All the heirs of the deceased skiers sue

Tort Claims

- Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.

- Very difficult area of law as it has developed from the common law tradition (developed through cases)

- In this scenario, the likely causes of action are negligence and wrongful death claims. Successful claims can carry large financial awards (i.e. economic value of decedents remainder of life and punitive damages)

Basic Elements of a Tort Claim

- Duty

- Breach

- Causation

- Damages

Negligence

- Negligence generally is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.

- The general standard is that of a “reasonable man.” This is occasionally described as that of a reasonable man of ordinary prudence, or a man of reasonable sense exercising ordinary care

- It is an objective standard and left largely to the determination of the jury or judge

- Unfortunately no clear standard has been established by case law for heli-ski guides in Alaska

Bay Street case

- Accident occurred, it was admitted, because a mistake was made in the assessment of the stability of a slope in relation to avalanche risk
- Liability in tort will only arise where a defendant has transgressed the standards to be expected of a reasonable man, not where he has acted with due care but nevertheless made what turned out to be a wrong decision

“Bay Street” case: Scurfield v. Cariboo Helicopter Skiing Ltd. (1993) was quoted:

“It is not contended that the defendants had a duty to ensure that their guest were kept away from all places where avalanches could occur in the context of helicopter skiing – that would be impossible... the duty of care ... was not to expose their guest to risks regarded in the business as unreasonably high, whether from avalanche or any other hazard to which participants in the sport are normally exposed. To enjoy the excitement of skiing in mountain wilderness areas participants are necessarily exposed both ... certain risk”

Determination of Reasonableness of Risk

- The determination of what constitutes an unreasonably high risk must be in the eyes of a reasonably competent heli-ski guide.
- This analysis must be made before the accident occurs

Court Determinations in Bay Street case

- Was the decision to ski the slope (made by all five guides) a decision made on the negligent application of the skill and knowledge of a reasonably competent heli-ski guide?
- Did the guides in charge, fail, in deciding to ski the slope when they did, to exercise the skill and care of a reasonably competent heli-ski guide?
- Was the company system for avalanche forecasting below the standard in the avalanche forecasting profession?
- Were the industry standards for avalanche forecasting negligent?

Results

- The court held that neither the Company nor the guides were negligent in any of the areas

Why this result?

- Meeting the industry standard
 - The company was not negligent because it met (and surpassed in the courts view) the industry standard in its general avalanche forecasting
 - The guides followed generally accepted procedures – using ski poles and ski cuts to help determine stability; had communicated consistently (3 meetings per day) about snow stability, had observed (and recorded) recent avalanche activity in the area; had noted weather and terrain observations. These assessments were consistent with the cumulative process of decision making for assessing potential avalanche danger
 - The court did not require that a snow pit be dug for each descent – (due largely to a reference of spatial variability)
 - Noted that test pits are a small piece of information in the ongoing data collection

Thoughts

- Stay abreast of new developments in the field - keep learning, keep trying to improve your skills
- Keep good notes of observations
- Communication is key – keep records of meetings, make brief notes of important conversations
- Stay mindful of what is an “unreasonable risk” that your clients should not be exposed to