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LEGAL ASPECTS OF RECREATION IN A TECHNOLOGICAL SOCIETY

BY

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ABSTRACT

A changing technical society poses different kinds of legal issues. The recreation industry is changing the basic nature of its services and the number and nature of the law suits are increasing significantly. It is important that the recreation professional be aware of the legal changes affecting the profession and how to cope. The profession must also take an active role in helping to shape legislative and legal processes to insure the continued success of the profession.

LEGAL ASPECTS OF RECREATION IN A TECHNOLOGICAL SOCIETY

As society has shifted from a production and occupational emphasis on industry to an emphasis on technology and information, the recreational concerns of the populace are also changing. We, as a society, have become more diverse in our recreational pursuits and, as a result, recreation professionals are faced with many concerns regarding the future of recreation. One of these concerns should be to expand the legal awareness of recreation professionals.

To address the legal aspects of recreation in a technological society, one must not only address current legal ramifications, but one must also "predict" the future legal parameters of recreation. "In order to predict the future, one must choose a conceivable future." (1) Isaac Asimov predicts that computers, satellites and a litigious society will dominate the law for the next 70 years. (1) One can address recreational concerns regarding the law by adapting current concerns to future trends.

The law, at best, is a paradox. Based on the principle of "stare decisis" or precedent, the law is relatively stable and predictable. At the same time, the law allows for societal change and is constantly changing its parameters. The general principles of law can be applied specifically to recreation. Four major legal categories which apply to recreation are: Constitutional Law, Property, Contracts and Torts.

In the past, the major applications of Constitutional law to recreation has concerned freedom of speech and assembly (1st Amendment); due process (5th or 6th Amendments) and equal protection (14th Amendment). Constitutional law and statutory law also address the civil rights issues. Presently, the Reagan administration appears "determined to reshape the law." (9) "Across the nation, Reagan judges are fight efforts of the citizens to sue the government and are refusing to rule against public agencies at all levels." (9) This could have a profound effect on lawsuits concerning recreation.

A vast amount of recreational land is owned by various governmental agencies. Until 1946, when the Federal Tort Claims Act was enacted, citizens had little redress for injuries sustained on governmental lands or involving governmental functions. (5) The Federal and, subsequently, State Tort Claims Acts were (are) the most significant legislation limiting the defense of sovereign immunity. (5) With Reagan's judges fighting the efforts of citizens to sue the government, it is conceivable that a limited concept of sovereign immunity may again be enacted making it more difficult for any recreation participant who is injured on governmental lands to enter a cause of action for their injuries.

Another Constitutional consideration deals with the First Amendment rights: Freedom of speech, right to assemble, freedom of religion. Precedent, based on the First Amendment, has allowed freedom of speech in public places, specifically parks. (7) Since the 1950s, park administrators have been allowed to regulate with regards to time, place and manner, but they have not been allowed to deny access to the parks. (4) Recently, a judge "upheld the right of a school board in Pennsylvania to block a student group from staging a peaceful antinuclear rally at the school and declared "(that) the purpose of the school to educate the students and not become a forum for political debate." (9) Will the many extracurricular recreation activities which take place on school grounds also be deemed uneducational?

The current courts are also interpreting the Constitution more narrowly than in the past. In the past, most groups who had a history of mistreatment (blacks, women and some religious groups), had legal remedies through affirmative action and civil rights legislation. Recently, however, the conservative courts are "at odds with groups that want to use the courts to attach what they see as political and economic inequities." (9) The Supreme Court, in a recent case, has ruled that mentally disabled persons are not entitled to special Constitutional deference based on their history of mistreatment. (12) While the court agreed that zoning ordinances which bar group homes are basically discriminatory, they failed to give special populations the impetus needed to increase judicial scrutiny in all fundamental rights considerations.

Although the Federal courts appear determined to narrow Constitutional parameters, the California State Tort Claims Act has been expanded to include a recreational use immunity (RUI) Bill. Enacted in 1983, it follows the assumption that recreational activities are

inherently more dangerous and thus may cause more injuries than a person's occupational or personal pursuits. The California RUI statute specifically addresses the problem of "hazardous recreational activities" and seeks to balance the personal responsibility of the participant with reasonable protection owed the participant by the park or the recreation professional.(15)

Another concern of regulatory law deals with the relatively recent deregulation of the airlines. The deregulation of the airlines in 1978 produced a large economic impact on the travel industry.(6) Routes were changed, the less profitable routes were eliminated, a price war ensued and "no-frills" airlines became profitable. Deregulation has allowed more people to travel, yet, in the cases of the smaller cities once served, it has made it more difficult to reach the smaller cities.

It is unlikely that the airlines will again be regulated except with regards to safety. Current legislative bills in Congress address the government subsidies of the passenger rail industry and highways. If the government fails to subsidize these industries, it is likely the air travel will become the major industry of recreational travel.

In a highly technological democratic society, the Constitution only guarantees very broad rights to the people. Statutes and ordinances further define these rights. As the society becomes more complex, the statutes tend to become more specific. In a conservative administration it is conceivable that courts will lend themselves strictly to interpreting the law and avoid activist stands. Historically, recreation has not been viewed as an "essential right" by the courts. Usually relegated to the fringes of legislation, it is doubtful that within the next ten years, recreation will have a direct impact upon Federal or State legislation except in the areas of Property and Torts.

PROPERTY

"No area of the law is more arcane and encumbered with ritual, ancient forms, and legalistic phraseology than the law of property."(5) It is unlikely that this will change within the next ten years. Two major concerns will impact upon recreation and property: technology and the recent lessening of restrictions of business.

With modern advances in technology and information, industries such as timber and mining are able to produce their various commodities in greater number, more efficiently and more economically. Although James Watt, former Secretary of the Interior, met considerable opposition with his concepts of using federal park lands for timber, strip mining and other revenue producing products, it is conceivable that future administrations and courts will interpret the Multiple Use-Sustained Yield Act of 1960 in a more liberal business sense. With a more advanced technology, it is likely that recreation and business-industrial concerns will coexist in the future. The lack of open and natural space and the depletion of natural resources will force both the recreation community and business concerns to develop innovative technologies to meet increased population demands for recreation and commodities.

As the population grows and less recreational/open space is available, another legal concern is with the concept of nuisance. A nuisance is defined as "a substantial and unreasonable interference with the possessor's use and enjoyment of their property." (5) This common-law concept has been used to enjoin commercial recreation entrepreneurs from conducting a rock concert at a ski resort. (5) In the future, as space becomes more premium, will snowmobiles be banned from public parks due to noise pollution, will lights on a ballfield in a populated area still be viewed as not a nuisance? (5) Again, it appears that in a highly technological society which has limited space, innovative techniques must be found that will advance recreation without infringing upon the use of the space by other concerns.

The Public Trust Doctrine (PTD) also plays a part in the role of recreation in a technological society. The PTD involves public lands which are held in trust for the public. (5) In recreation this would include governmental control of parks, beaches, and other natural resources. In the future, depending upon parameters set by the courts, it may be more difficult for a governmental authority to hold lands in trust and to determine the uses (recreational or otherwise) of those lands. As business is deregulated it may affect the use of the various lands held by the government. Also, as the government limits social service spending and bills such as Proposition 13 limit property taxes, recreation agencies must find alternative funding methods. One of those methods may be to impose fees and charges on lands held in public trust. Beach fees and usage fees are examples of these methods. The one distinction the courts have made thus far regarding beach fees indicate that the fees must be consistent and equal with regards to residents and nonresidents. (13) As funds are diverted to technology, recreation agencies may become more territorial about their monies. Thus, in the future, different scales of fees may exist on lands held in the public trust.

Generally, the major effects technology will have on the legal concept of property with regards to recreation is that technology may divert funds from the social services; it may provide methods by which industry and recreation can coexist; and it may produce recreational products which may be deemed nuisances by the surrounding populace.

CONTRACTS

Recreational professionals must become legally aware of various contractual procedures which are becoming more and more a part of day-to-day recreational operations. Employment contracts and construction bidding are areas in which recreation professionals have had limited involvement. Other areas which will affect recreation in the future are waiver forms, travel contracts, and third party contracts.

Contrary to the belief of most recreation professionals, waivers or releases of liability are valid if they meet certain criteria. (9) These criteria include that the contract meet all contractual guidelines, that the waiver be conducted between competent parties and that the contract

is not against public policy. With more technological advances in recreational products, vehicles and activities, more professionals are availing themselves of the legal protection offered in the form of a waiver.

As society becomes more mobile, it is important that travelers and carriers become aware of their legal liabilities with regards to such things as overbooking, injuries while traveling and liability for payment of services rendered. Most travelers do not know their rights as passengers. In the future (recreation in space?), with travel to more exotic places, it is essential that travelers know their rights and that those supplying travel services know their liabilities.

Third party contracts involve payment or an execution of a service. Many therapeutic recreation professionals are aware of third party payments. In the future, insurance and social service agencies may pay for the majority of therapeutic care. Third party contracts also are evident in the travel industry. Between the traveler and the carrier there exists a contract. The third party may be the booking agent or the tour operator. These agents and operators also have a contractual responsibility to the traveler.

As recreation becomes more complex, more expensive and has more participants, it is likely that recreation professionals will feel a need to protect themselves from lawsuits through contracts.

TORT

Most recreation professionals are familiar with a form of tort law - liability. Most lawsuits involving recreational agencies are concerned with injuries to participants or visitors while engaged in the activity. In the past twenty years there has been a tremendous increase in liability suits. This is due to several factors.(5)

The demise of historic sovereign immunity (governmental immunity) has allowed the general population to seek redress through the Federal Tort Claims Act and the various State Tort Claims Acts. Secondly, several states no longer allow the defendant to claim that the participant assumed the risk of the activity when he/she participated in the activity. The voluntary assumption of risk (V.A.R.) defense had long exculpated recreation agencies from liability suits. The V.A.R. defense has been modified to the point that only the risks which are inherent to the activity are usually voluntarily assumed.

In addition, the contributory negligence defense in which one could not collect for his/her injuries if he/she in any way contributed to the injury has metamorphosized into comparative negligence defense in which the plaintiff and defendant are assigned various percentages of liability. Comparative negligence is widely used in recreation cases. With the technological advances expected in the next twenty years it is foreseeable that several parties may be held responsible for an injury, including the manufacturer, the distributor, the designer, the maintenance person, and the participant. As technology becomes more

complex, the law which governs technology also becomes complicated.

As recreation activities broaden and more participants become involved in the activities, more lawsuits will be brought. In the future, recreation professionals will also serve a broader constituency. With the advances in medical technology, special populations, including the elderly, will continue to be served by recreation professionals, (14) who will become more specialized. It will be no longer feasible to know all recreation activities as well as the special considerations needed for each population.

Also, rising medical costs have not only given rise to additional lawsuits, but they have also made the recreation professional wary about offering high risk activities which may cause serious injury. Risk management has become an important part of recreation planning. (14)

Finally, the modification and, in some cases, the elimination of the requirement of proof of fault in product liability may impact heavily on recreation in the future. Product liability will be one of the most significant areas of concern for the recreation professional in a technological society.

Generally, product liability deals with the manufacture, distribution and use of a specific product. Some of the product liability cases with which one is most familiar are the cases of the Ford Pinto and asbestos insulation. In recreation, most of the product liability cases are either football helmets or swimming pools. The majority of these recreation-related product liability cases deal with faulty design or failure to warn about a hazardous condition.

For example, in a case involving a Hobie Cat Catamaran, the designers of the boat were held negligent in their design of an aluminum mast which could contact low hanging electrical wires. (11) The plaintiffs showed that alternative designs existed. With technology aiding in the rapid advancement of design, it is often not possible to compare an allegedly faulty design with that of an existing design. In this case, a "state of the art" defense is usually maintained by the defendant. State of the art defenses claim that no liability should exist because the product is so new and innovative that not all of the flaws could have possibly been worked out at this time. Therefore, it is impossible to warn the participant of all conceivable dangerous situations.

The recreation professional must have a legal awareness to recognize not only a potentially dangerous situation, but also, a potentially dangerous product. In a technological society and a litigious society, the professional must alleviate but not necessarily eliminate all potentially dangerous conditions. In this type of society, the professional may assume that he/she may incur more lawsuits for injuries sustained in recreational activities. In order to legally protect themselves in these situations, it is conceivable that the professional will begin to purchase liability insurance (or malpractice insurance).

The rising costs of malpractice insurance have forced many industries to claim bankruptcy. (2) If in the future the recreation

professional must be covered by malpractice insurance, it is conceivable that he/she will offer activities which have a low injury rate.

OVERVIEW

Recreation in a technological society poses a variety of legal issues. Will the recreation industry alter its activities due to the increase in the number and amount of lawsuits? How will a conservative administration affect future legislation and court rulings involving recreation? Will the decrease in open space force business/industry and recreation concerns to peacefully and profitably coexist? Will the "state of the art" defense become a major concern in product liability suits involving recreation products? Will waiver forms and third party contracts become more widely used in recreation settings?

The questions are seemingly endless, yet the law is flexible enough to change with changing technology. A legal awareness must exist within the recreation profession in order for it to cope with the changing parameters of the law which are affected by a technological society.

NOTE: A list of references available from author upon request.